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March 19, 1992

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

Dear Chairman Wilkins:

As subchair of the Criminal History Working Group of the Practitioners Advisory Group, I have been asked to report to the Sentencing Commission in response to the proposed Amendments to guidelines, policy statements, and commentaries published in the Federal Register for the 1992 Amendment cycle pertaining to criminal history. The matters addressed below represent the views of the entire Practitioners Advisory Group. As always, we thank the Sentencing Commission for the opportunity which it affords us to present our views on these matters.

AMENDMENT #24

This amendment adds one point for non-counted crimes of violence (because they were consolidated for sentencing but occurred on different dates) if the defendant actually served 5 years or more for each offense up to three points.

The Practitioners Advisory Group recommends that the Sentencing Commission reject this proposal. There is a continuing problem with basing guideline action on events which occur outside of the guidelines setting. The guidelines sentencing system was instituted partially because of a recognition that other systems tended to foster disparate treatment, some of which was based on constitutionally impermissible criteria such as race, sex or religion. Most criminal history events occur in such systems. Although criminal history is a critical factor in sentencing, an over-reliance on criminal history factors in determining guidelines sentences has the dangerous possibility of building into the guidelines system factors which the guidelines were designed to eliminate in reaching a just sentence.

Also this amendment fails to consider the common practices of "case clearance" and "plea bargaining". Many police departments will "clear" unsolved crimes by charging a defendant with such crimes when his modus operandi fits them, even when the evidence

establishing guilt is weak. A prosecutor will then offer a plea bargain limiting defendant's sentence to only those offenses which are readily provable but requiring a plea to all offenses charged.

For example, a defendanat who is charged with six robberies but who actually committed only one is offered a plea bargain to plead as charged which limits the actual sentence to the statutory minimum for only one robbery. Most defendants would accept such an arrangement since the consequences of a trial on the readily provable offense would probably result in a harsher sentence and, absent an acquittal, must at a minimum, result in a sentence equal to the one offered in the plea agreement.

Under the proposed guideline amendment the defendant in the above example receives three criminal history points for offenses which he did not commit.

The Practitioners Advisory Group also recommends rejection because no empirical evidence has been furnished to justify this change and no study has been done to determine the impact of the proposal.

We strongly believe that although the guidelines must not remain stagnant, changes should only be instituted when a demonstrated need is shown for the change proposed, and the full impact of the proposed change is explored. Here, neither of the above criteria has been met.

For all of the foregoing reasons the Practitioners Advisory Group recommends that the Commission reject this amendment.

AMENDMENT #25A
OPTION 1

4A1.2(f) is amended so that the last clause is changed from:

"except that diversion from juvenile court is not counted."

to:

"provided for an offense committed prior to the defendant's 18th birthday is not counted."

The Practitioners Advisory Group endorses this amendment. Jurisdictions vary on how they define juveniles, and this amendment treats all defendants under age 18 the same, which promotes uniformity.

AMENDMENT #25A
EXPUNGED CONVICTIONS

Expunged convictions currently are not counted. Annulled, set aside, vacated, pardoned and reversed convictions are not counted only if based on errors of law or new evidence which establishes innocence.

The amendment counts expunged convictions:

Option 1: The same as other "set aside" convictions.

Option 2: The same as other set aside convictions if the conviction resulted in a term of imprisonment of 60 or more days or greater than one year and one month.

The Practitioners Advisory Group strongly recommends that both these proposals be rejected. At some point the laws of the jurisdiction of conviction must control.

Most jurisdictions dictate that an expungee need not disclose the matter expunged. See N.C.G.S. 90-96(b). "No person as to when such an order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such . . . information."

Discovery by probation of expunged material for a presentence investigation might violate the local court order prohibiting disclosure of expunged materials.

These problems outweigh the uniformity arguments which support the proposed changes. Again no empirical evidence has been furnished to the Practitioners Advisory Group and the Commission to indicate whether there is a justification for this change.

Based on the foregoing, we believe these changes should be rejected.

AMENDMENT #25
4A1.2f

4A1.2(f) is amended so that a diversionary disposition resulting from a finding or admission of guilt or a plea of nolo contendere in a judicial proceeding is counted as a sentence under §4A1.1(c) only if the defendant committed the instant offense prior to satisfaction of the express conditions, if any, of such diversionary disposition.

The current section requires an inquiry into whether the diversionary disposition resulted in a finding of guilt. This new section removes that inquiry but counts the diversion if the instant offense occurs during the diversionary probation.

This amendment promotes uniformity. Jurisdictions use a variety of procedures to defer or divert a prosecution, and there is no sound reason why some should count while others should not.

The Practitioners Advisory Group endorses this amendment.

AMENDMENT #25B

These amendments each would modify the decay factor -- by excluding the period that the defendant was actually incarcerated during the 10 and 15-year limitation period under Option 1. Option 2 creates a single 12-year limitation period but also would exclude periods of incarceration.

The Practitioners Advisory Group believes that each of these proposals should be rejected.

No empirical need has been demonstrated for any of the proposed changes.

The decay factor recognizes that convictions obtained more than 15 years before the instant offense are simply not reliable enough to cause inclusion. Such convictions may have been obtained in state systems before the full breadth of due process was applicable to those systems. After the passage of time litigating the constitutional validity of such convictions may prove impossible.

We believe that, based on the foregoing, the amendment should not be adopted.

AMENDMENT #26A

These amendment options provide structure to the adequacy departure permitted under §4A1.3.

Option 1 requires an extrapolation but recognizes that greater departure may be warranted for serious conduct.

Option 2 recognizes that point totals alone are not the sole criteria for departure in that such totals may under or over represent serious prior conduct. This option does attempt to safeguard against wanton departures by suggesting that a 3-level increment should be enough to address all but egregious cases.

The Practitioners Advisory Group believes that the interests recognized in Option 2 are appropriate and therefore we endorse this option.

AMENDMENT #26B

These provisions amend the adequacy policy statement to clarify that likelihood of future criminal behavior and type of risk should be considered in the calculus of departure by the court.

These factors are appropriate to consider so long as wanton upward departures are restricted under previous amendments, and therefore the Practitioners Advisory Group endorses this proposal.

AMENDMENT #26C

This amendment prohibits downward departure for career offenders on adequacy grounds.

As there are instances where a defendant qualifies for career status because of relatively minor offenses, the court should be permitted to take such a factor in consideration and should be able to depart downward if appropriate.

Congress was so vague in creating career status that the argument that somehow this departure conflicts with 28 USC 994(h) is not persuasive.

Literal interpretation of enabling legislation should not and has not restricted the Commission from providing the flexibility necessary to establish a coherent and uniform guidelines system.

The Practitioners Advisory Group strongly recommends that this amendment be rejected. The normal departure review process provides the necessary check on any unwarranted use of a departure under this circumstance.

AMENDMENT #27A

Under career offender provisions the guidelines are currently vague as to whether to use the statutory maximum to determine the base offense level before or after that maximum is enhanced by a prior conviction.

Option 1 uses the unenhanced maximum.

Option 2 uses the enhanced maximum.

The Practitioners Advisory Group recommends that Option 1 be implemented. This option prevents double counting. A defendant who qualifies as a career offender should not have his base offense level increased by the same offenses which qualified him.

AMENDMENT #27B

For career offender status a predicate crime of violence is now defined as such a crime whose maximum statutory punishment exceeds one year. This amendment would limit predicate crimes to those which have statutory maximums of greater than two years.

Obviously Congress failed in not providing a clear definition of crime of violence in its enabling statute. This lack of definition should not now be used nor should it have ever been used to create breadth in determining the scope of career status.

It is clear that bar fights and arguments which do not lead to injury are now absurdly included in the career categories if a jurisdiction happens to provide for more than one year's punishment.

The Practitioners Advisory Group favors total exclusion of such trivial offenses as career qualifiers.

We believe that exclusion by raising the qualifying maximum punishment level to a maximum of greater than two years is an essential narrowing amendment.

The two-year requirement will eliminate some trivial offenses and should be adopted even though some serious conduct may escape career treatment. Again, career status cannot be tolerated for minor offenders and breadth of coverage must not be the Commission's goal. Rather, lenity should especially limit the harshest punishments to only those who clearly deserve such treatment.

The Practitioners Advisory Group also originally proposed the additional narrowing amendment that predicate offenses be limited to those classified as felonies by the jurisdiction of conviction. Modifying this predicate would insure that a state conviction was obtained under conditions approaching due process. Many misdemeanants are processed in "meat market", "justice of the peace" type court systems which have spawned the very criticisms which fostered the creation of guidelines sentencing systems. A conviction obtained in such systems should not subject the offender to career treatment. Only felony convictions obtained in record proceedings after indictment under circumstances comporting with traditional notions of fair play and justice should count as

predicate offenses when the end result is the harshest of punishments.

However, the more we debated the merits of these two proposals, the more we realized that this entire subject had not been examined with sufficient scrutiny. A thorough study of the fifty states' statutes should be conducted so as to determine what effect these or other changes would have on inclusion or exclusion of violent offenders in career status.

The Practitioners Advisory Group believes and strongly urges that the Commission take no action on narrowing career predicate offenses in this cycle, but make this issue a priority item for 1993. The Practitioners Advisory Group requests that it be included in the preliminary inquiry into this area because of our interest in this issue.

AMENDMENT #27C

This amendment slightly broadens those who would be subject to career treatment by making the date a defendant sustained a conviction the date of adjudication of guilt. This amendment conforms this section to other sections.

The Practitioners Advisory Group endorses this amendment.

AMENDMENTS #D, #E, #F

The Practitioners Advisory Group believes that insufficient study has been conducted concerning these amendments and therefore asks that they be tabled for future study.

AMENDMENT #28
CATEGORY VII

The report provides no empirical justification for creating a Category VII. The Practitioners Advisory Group has endorsed a structured departure commentary to guide but not mandate courts departing for inadequacy as the only change. Allowing a court the continued and supervised authority to depart upward for an "of a kind and to a degree" departure is an adequate avenue to sentence the offender whose crime or crime past demands a greater sentence than called for in Category VI. We oppose any Category VII creation.

Again, on behalf of the Practitioners Advisory Group I want to thank the Sentencing Commission for allowing us to play such an important role in the amendment process. Our representatives look

forward to appearing before the Commission in person for further dialogue on the proposed 1992 amendments.

Sincerely yours,

Lyle J. Yurko

LJY:mep

#23

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
PROBATION OFFICE

ST. LOUIS, MISSOURI

February 28, 1992

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Ms. Phyllis J. Newton, Staff Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

RE: PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

Dear Ms. Newton:

The following comments are offered by the U.S. Probation Office, Eastern District of Missouri, in response to the Proposed Amendments to the Sentencing Guidelines.

SECTION I: AMENDMENTS RESPONSIVE TO JUDICIAL CONFERENCE RECOMMENDATIONS

Comments to questions by the Commission (Page 4):

1. It does not appear that the proposals "compromise the structure of the guidelines as originally drafted.

2. It is felt that the Commission should not adopt an "offense-by-offense" approach under which certain types of offenders within the alternative-eligible guideline cells would be excluded from eligibility.

3. There is no need to expand the available sentencing options to include additional alternative programs, such as intensive supervision, public service, shock incarceration, day reporting centers, or other programs, since this would unduly complicate the sentencing process, and most of said programs are already available options to the Bureau of Prisons.

Departures Based On Offender Characteristics (Page 4):

This is an important area warranting careful consideration by the Sentencing Commission.

Departures Based On Inadequacy Of Criminal History Score (Page 5):

Increased guidance to Courts as to how to depart based on inadequacy of criminal history is desirable; however, expansion of the criminal history categories to VII and beyond would lessen the need for further guidance.

Acceptance of Responsibility (Page 5):

Of the four proposed options, Option No. 4 appears most preferable since it would reward those defendant's who do more than merely plead guilty.

Relevant Conduct (Page 6):

Any amendments which clarify or help define relevant conduct are duly welcomed.

SECTION II: ADDITIONAL AMENDMENTS OF SPECIAL INTEREST

Comments to questions by the Commission (Page 9):

1. It is felt that the mitigating role adjustment should apply in cases in which the defendant is less culpable than other participants in the same case.

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

3. Factors including function and activity when compared to others involved should be considered by a mitigating role reduction.

4. The mitigating role reduction should not apply to defendants who have already benefitted from not being held for the full amount of controlled substances.

5. Defendants should not be considered for a mitigating role even if they are held responsible for a greater amount of controlled substance than actually trafficked. In general, role descriptions are too subjective and frequently result in objections from the defendant and/or government.

REDEFINITION OF CAREER CRIMINAL, GUIDELINE SECTION 4B1.1 (Page 10):

Part (D) It is recommended that the Commission should not identify certain categories of crimes of violence that would be considered "lesser" crimes of violence and therefore not counted.

Parts (E and F) Unrelated cases that are counted as two convictions should be counted as separate convictions for the purposes of the career criminal guideline. It is felt that a modification is not needed to insure that the two prior convictions in the instant offense shall have been committed in a strictly consecutive sequence. A "short-lived crime spree" involving unrelated offenses required serious consequences.

PLEA BARGAINING POLICY; USE OF ACQUITTALS (Page 11):

Parts (B and C) A departure based on conduct dismissed pursuant to a plea agreement is unnecessary in the Eighth Circuit because of case law associated with the relevant conduct guidelines. However, it is felt that conduct of which a defendant is acquitted should be ignore and not considered under the standards of relevant conduct.

SECTION IV: LIST OF ADDITIONAL PROPOSED AMENDMENTS

Chapter 2 Guidelines and Commentary (Page 14):

Amendment No. 5 - It is recommended that the Commission retain the "more than minimal planning" adjustment.

Amendment No. 7 - An increase of offense levels on the drug tables for distribution of large amounts of Schedule III, IV, and V controlled substances, anabolic steroids, and Schedule I and II depressants is recommended.

Amendment No. 8 - It is felt that an additional enhancement for death or bodily injury as well as possession of a firearm during the unlawful smuggling of aliens should be implemented. The defendant's state of mind does not appear relevant.

Amendments Nos. 10 and 11 regarding toxic substances, pesticides, and protected fish and wildlife appear appropriate.

Chapter 3 Guidelines and Commentary (Page 15):

Amendment No. 21 - It is felt that the present guideline 3C1.2 adequately covers the range of behavior which is applicable when reckless endangerment during flight occurs.

Amendment No. 22 - It is felt that the present guideline 3D1.4, multiple count rules, is already clear and effective, but further guidance and clarification are duly welcomed.

Chapter 4 Guidelines and Commentary (Page 16):

Amendment No. 28 - It is recommended that the Commission establish a new Category zero (0) criminal history to distinguish between a first offender and a category I offender. It is further recommended that a new category VII abe established as well as additional criminal history categories to address the more serious offenders. Option three, which establishes a category of VII (16 to 18 points), appears preferable.

Sincerely,

William R. Thorne

William R. Thorne
Senior U.S. Probation Officer

Approved by: W. A. Lazier
Wellington A. Lazier
Deputy Chief U.S. Probation Officer

cc: The Honorable Vincent L. Broderick
% Research Division
Federal Judicial Center
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Washington, D.C. 20005

WRT:tlm
[LT-Sente]

U.S. District Court
Eastern District of Missouri

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TO: U.S. SENTENCING COMMISSION

FROM: WM. THORNE
U.S. Probation Officer

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RE: PROPOSED GUIDELINES AMENDMENTS

Pages Sent (including cover sheet): 5

SPECIAL INSTRUCTIONS

Letter to follow!

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#3

February 6, 1992

Reply to: Kansas City

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

Re: Proposed Amendments:
New Criminal History Category
Split Sentencing

Dear Chairman Wilkins:

This letter is to comment on a couple of the proposed amendments that appeared in the January 2, 1992, Federal Register, 57 Fed. Reg. 1, 90 (1992).

A new Criminal History Category of 0 would separate offenders with no known criminal history from other offenders that have at least one criminal history point. I suggest this new category be defined as an offender that does not have any convictions under guidelines 4A1.1(a), (b), or (c) or 4A1.2(c)(1) regardless of the applicable time period (except in the case of juvenile adjudications). A person in this category may then receive a reduction in the offense level by as much as two points, for example. This will allow the current Sentencing Table to remain intact while giving defendants who have no criminal history a reduction in their offense level and sentencing range.

At the other end of the grid, a number of defendants have criminal history points beyond the thirteen points needed to establish a criminal history category of VI. This table appears to be sufficient to handle those cases by sentencing at the top of the range or departing upward. To establish a new Criminal History Category of VII would unnecessarily upset the Sentencing Table that is already in place.

The split sentencing alternatives is a third point to consider. The cutoff for offenders eligible for split sentencing should have an offense level high enough that would catch a wide spectrum of offenses. A rule of thumb for eligibility may be for those offenders who have a minimum guideline range of up to 24 months and no criminal history as defined above.

All three of these proposed changes would allow a possible "benefit" to those defendants who have no criminal history and have no substantial assistance to offer.

I hope these comments are of help to the Commission in considering the proposed amendments to the sentencing guidelines.

Respectfully submitted:

Christopher R. Buckman
U. S. Probation Officer

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

#19

To: U. S. Sentencing Commission
1331 Pennsylvania Ave., NW
Suite 1400
Washington D. C. 20004

Attention: Guideline Comment

From: C. U. R. E. (On behalf of over 72,000 federal prisoners)

C. U. R. E. (Citizens United for the Rehabilitation of Errants) would like to offer the following comments and proposals relevant to the published recommendations of the Commission:

§ 1B1.3, Relevant Conduct: C. U. R. E. objects to the further expansion of "relevant conduct," which is what the Court considers in setting base offense levels and making other important determinations. The Commission does not appear to view its recommended changes as an expansion of the existing guideline. However, particularly in the situation of uncharged conspiracies, it is not fair to the defendant to have a finding made that an act or omission by others was reasonably forseeable by him, when he, in fact, did not foresee any such act or omission taking place. Holding a person responsible for such behavior of others goes far beyond aiding and abetting and expands the conduct for which the defendant may be responsible by inserting the Commisssion's proposed amendment into Section 1B1.3(a)(1). When uncharged conduct is considered at all, the defendant's intent should be the governing guide.

§ 2F1.1, Fraud and Deceit: C. U. R. E. objects to the treatment of individuals sentenced for fraud involving financial institutions being differently situated (in this case significantly more stringently) than those frauds that involve other type victims. The Commission is proposing creation of a disparity.

§ 2D1.1, Unlawful Manufacturing, Importing, Exporting, or Trafficking: C. U. R. E. requests modification of the current offense levels for Schedule I or II depressants and Schedule III substances, so as to reflect the same existing level as now for a larger amount of drugs and a corresponding lowering of levels for the amount now listed as the threshhold Level 20. There should be a difference in sentence for those selling 100 kilograms of a substance as opposed to 20 kilograms, but the level for 20 kilograms should be lower, as opposed to making a higher level for 100 kilos. The present sentence levels for all drug offenses is too high! These lengthy sentences are accomplishing nothing, except creation of an enormous bill for the American taxpayer and perpetuation of a bureaucracy of prison guards, despite the noble goal envisioned.

§ 2T1.1(b), Offenses Involving Taxation: C. U. R. E. strenuously objects to the treatment of tax evaders differently, depending upon their source of income. Drug defendants have to deal with substantial sentences as it is. To treat one tax evader with a minimum level of 12, but treat another tax evader with a minimum level of 17, just because his criminal activity relates to controlled substances is the equivalent of overkill. Once again, the Commission proposes creating a disparity - exactly what the Guidelines is supposed to eliminate.

§ 3B1.1, Role in the Offense: A. C. U. R. E. strenuously objects to including law enforcement agents as participants to aggravate the defendant's role. Potential abuse of this proposed change should be obvious. The Commentary does not control this abusive potential. Undercover agents would not have to "recruit" other

agents for them to count as participants. By contending that an operation needed more than one agent, each would be counted, as the proposed section now reads. This is particularly deplorable when considering the fact that government informers (who are not government employees, but perform as if they are) are now included and the further fact that law enforcement officers cannot be considered members of a charged conspiracy.

B. C. U. R. E. feels mitigating role adjustments should apply in all cases in which the defendant is substantially less culpable than other defendants in the same case. Certain functions that are minor roles in drug activity should be automatically eligible for mitigating adjustments. The Judge should have discretion to make findings based upon the preponderance of the evidence standard and treat the defendant discretionarily. No defendant should be disqualified from mitigating role adjustment. New Application Note #4 for the Commentary to § 3B1.2 is laudatory, as is proposed amendments to § 2D1.1(b), involving minimal participation, because it is desireable to have different offense level caps for minor role offenders. Each drug should have a different offense level cap, which would limit the sentence imposed. Mandatory minimum penalties should be dropped entirely and criminal history should not affect offense caps.

§ 3C1.2, Reckless Endangerment During Flight: C. U. R. E. objects to the possibility of enhancement based on the wording "substantial risk of death or serious bodily injury," unless intent of the wrongdoer is fully considered. If the escapee had absolutely no intention of hurting anyone, and, in fact, did not injure anyone, he should not have his conduct aggravated for something that never happened.

§ 3D1.2, Multiple Counts: C. U. R. E recommends no change in the present structure relating to multiple counts.

§ 3E1.1, Acceptance of Responsibility: C. U. R. E. believes that acceptance of responsibility should not be affected by the exercise of the constitutional right to proceed to trial, and that a two level decrease should be available at any time prior to sentencing. Acceptance of responsibility should be limited solely to the offense of conviction and not to related conduct, for which the defendant may not have been charged. Three level reductions should be available for all offense levels over 30 and four level reductions should be available for all offense levels over 40. There should be no penalty for going to trial under any circumstances.

§ 4A1.2, Definitions and Instructions for Computing Criminal History: C. U. R. E. strongly urges not counting convictions that have been reversed, vacated, annulled, set aside, expunged or pardoned. The sentencing authority that made the prior decision to do any of the above, obviously meant that such prior conviction should not have a future detrimental effect on the defendant. By allowing such effect to take place anyway is to mandate invalid convictions affecting future sentences.

§ 4A1.3, Adequacy of Criminal History Category: C. U. R. E. opposes the proposed amendment for this section, simply because complete and total discretion to charge defendants under the Career Criminal sections remains with the prosecution - not the judiciary. To allow one offender with the same criminal history as a second offender the benefits of a departure, because he was not charged under a Career Criminal section is discriminatory. Disparity is what the New Guidelines is supposed to be about and departures should not be magnified by discretionary government charging authority.

§ 4B1.2, Definitions of Terms Used in § 4B1.1: A. "Offense Statutory Maximum" should refer to what the statute says before any enhancement caused by another statute. A prior criminal record should not be used in determining the offense

level under this guideline.

B. C. U. R. E. strongly urges that two prior offenses which are not related be counted as one conviction, if they could have been consolidated for trial as joinable offenses under FRCrP 8(a), for Career Offender purposes. Furthermore, this option should be expanded to include offenses that could have been joined under FRCrP 20(a) and (b) in one jurisdiction. The alternative is potential abuse by prosecutorial manipulation.

C. In order to count, the instant offense should have been committed subsequent to the prior conviction. There should be three separate encounters with the criminal justice system for career criminal status. As it is now, manipulation by an AUSA of his charging authority under either Rule 8 or Rule 20 FRCrP can make a recidivist for career criminal purposes out of a person who really has only one short crime spree in more than one jurisdiction.

Chapter Five, Part A - Sentencing Table: C. U. R. E. favors no change in the present table, which begins with Category I and ends with Category VI for criminal history purposes.

Chapter Five, Part C - Imprisonment: C. U. R. E. favors any enlargement of the number of defendants eligible for alternatives to imprisonment. These alternatives should apply to all defendant's. C. U. R. E. suggests the minimum term for eligibilty should be one year and that §5B1.1(a)(2) should be amended accordingly. Probation with confinement conditions should be available to those previously eligible for "split sentences." Split sentences should be available to guideline ranges up to 24 months. The judge at sentencing should have all intermediate options available as alternatives to incarceration.

Chapter Five, Part A - Departures: C. U. R. E. objects to a change in departure that would make it necessary to combine age with another factor to justify departure. Citizens over 60 have no business being in prison. The additional costs to the American taxpayer are enormous. Furthermore, the use of the nebulous term "major drug trafficker" should be avoided entirely, in determining whether an elderly defendant merits a downward departure, if the defendant's risk of recidivism has been reduced and he is to serve a substantial portion of his sentence. Elderly drug traffickers should not be singled out and treated differently than any other elderly defendants.

§ 5K1.1, Substantial Assistance: Under no circumstances, should a government motion be necessary for a court to reward a defendant for "substantial assistance to authorities." The Court should be able to make this finding by itself.

Chapter Six - Sentencing Procedures and Plea Agreements: A. The Commission should not "encourage," it should require the Government in plea discussions prior to Rule 11 colloquoy to disclose any and all information that is relevant to the application of sentencing guidelines.

B. If a count is dismissed, C. U. R. E. urges that the conduct underlying that count should not be considered as grounds for an upward departure. Furthermore, if a defendant is acquitted of conduct, under no circumstances should any evidence related to such conduct be used 1) to determine offense level; 2) for selecting a sentence within the guideline range, or; 3) as a basis for an upward departure. The alternative is incarceration, even though the defendant has not been found guilty.

Proposed Amendment to §1B1.10 (Retroactivity of Amended Guideline Range). C. U. R. E believes that all proposed amendments to the Guidelines which may lower a defendant's sentence should be retroactive and be considered under Title 18 U.S.C. §3582(c)(2). The amended guideline range should not be limited to amendments listed in subsection (d) of §1B1 10. Regardless of the purpose of the amendment or the magnitude of the change in the guideline range or the "difficulty" of applying the amendment retroactively, it should be remembered that the guidelines themselves were conceived to eliminate disparity. It does not behoove the Commission to have two inmates with the same conduct serving different lengths of incarceration, merely because one was sentenced at a different time than the other. The ISM (Inmate Systems Manager) at each BOP facility recomputes release dates on a daily basis. It is in the public interest to have each defendant with similar conduct - similarly sentenced - regardless of sentencing date. By appropriately amending the retroactivity section, this goal can be accomplished.

Commentary to § 2D1.1 - Proposed Additional Paragraphs. C U. R. E. strenuously objects to the "aggregating" of quantities involved in a substantive drug offense together with an attempt or conspiracy involving the same substantive offense. C. U. R. E. also objects to the weight under negotiation in an uncompleted distribution being used to calculate the applicable amount, unless there is a specific finding by the Court that the defendant had the ability to produce the negotiated amount. Agents and informers puff up the amounts negotiated so as to exceed certain minimum mandatory levels (levels that are unknown to the defendant). To say that the defendant is reasonably capable of producing an amount is not the same as saying that the defendant intended to produce that amount. There should always be "intent" to conduct a crime. Presently, there are many incarcerated individuals, who never had any intention of going through with the details of a government induced reverse sting operation. Yet, they are incarcerated based on these fictitious puffed-up amounts for inappropriate sentence lengths.

§ 5K2.17, Extraordinary Physical Impairment. C. U. R. E. applauds the creation of this new section.

There are additional proposals C. U. R. E. wishes the Commission to consider this year. They include the following.

I. Reinstitute Parole: Neither of the two prime objectives of the New Sentencing Guidelines would be diminished by allowing parole to all first-time non-violent offenders after service of one-third of their sentences.

A. Disparity of prior parole release dates would be avoided by an across-the-board policy.
B. Establishment of the certainty of jail time for even minor offenders would be unaffected.

C. U. R. E. envisions the absence of an arbitrary disenfranchisement of parole or departure for so-called "aggravating factors." Reinstituting parole mandates the repeal of mandatory minimum sentencing laws for all crimes and a further expansion of alternatives to incarceration for all offenders. Experts in the field of corrections realize it does not take a lengthy prison sentence to deter future criminal conduct. The lesser recidivism rate for non-violent first-time offenders indicates these people deserve a second chance.

II Institute Superior Programming Achievement As a Release Incentive: Under

the new guidelines, there is no incentive to reward superior deeds to those who are incarcerated. Studies prove that society benefits from an inmate who is able to help himself upon release. If an inmate can earn a degree or learn a vocation, he should be rewarded with a meaningful sentence cut. C. U. R. E. suggests a one year sentence cut for each degree and/or apprenticeship earned by an inmate.

III. Increase Good Time Benefits for Those Under the New Law: Meaningful good time credits must be instituted for all inmates who are non-parolable before prison riots become a certainty and innocent people are hurt.

Presently, those incarcerated under the New Sentencing Guidelines are faced with doing 85% of their time. There is no incentive for good behavior or self-improvement. -For the long-termers that make up a disturbingly large amount of the people entering the system, the handwriting is on the wall - they will spend the majority of their time in prison. It is only a matter of time before this situation deteriorates into chaos. When the higher security level institutions consists of a large majority of inmates with no hope, violence and anarchy will escalate. Try telling a 25 year old non American citizen that he must spend the next 30 or 40 years in prison and that you expect him to spend his time at non-meaningful labor at slave wages and what do you think will be his retort?

IV. Increase Availability of Halfway House, Curfew Parole and House Arrest: Both halfway house and house arrest (also known as curfew parole) should be available for longer periods of time (current maximums: halfway house - six months; house arrest - two months). These options should be available to all federal prisoners according to need because they are proven concepts that work. These programs should be a requirement for long term offenders who need them for an orderly transition to society. C. U. R. E. suggests a combination of these programs be made available for up to two years to those who will be incarcerated for more than five years. The Commission needs to establish set criteria and take the abuse of discretion relating to placement away from the BOP. If implemented, the costs to taxpayers will be reduced from the $40,000 per year, per inmate range to the $10,000 per year per inmate range.

C. U. R. E. thanks the Commission for allowing us the opportunity to offer this input.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
760 FEDERAL COURTS BUILDING
ST. PAUL, MINNESOTA 55101

[redacted]ALD D. ALSOP
CHIEF JUDGE

February 14, 1992

Honorable Jon O. Newman
Circuit Judge
450 Main Street
Hartford, CT 06103

Re: Sentencing Institute - Lexington, Kentucky
March 12, 1992 - 8:15 a.m. Panel

Dear Judge Newman:

This is in response to your letter requesting that the four non-commission members of the panel jot down some preliminary thoughts about guideline changes that they might cover as a part of the panel presentation. Although I have not had an opportunity to study this in-depth or come to any final conclusion, I do write to give you my preliminary thinking.

My present thought is to address Guideline 5H1.1 on the issue of whether or not age should be a relevant factor in determining if a sentence should be outside the applicable guideline range. My experience with the guidelines has been that they are extremely harsh on young offenders, especially so with the absence of release on parole.

I may also refer to Guideline 4B1.4, both as it relates to its application to youthful offenders and its interrelation with 18 U.S.C. § 1924(e). My concern relates to sentencing based on a guideline range in excess of the statutory mandatory minimum. I also would express my concern about being unable to take the age of the offender into account in cases under 4B1.4.

I am sending a copy of this letter to other panel members as suggested in your letter.

Yours very truly,

Donald D. Alsop

cc: Panel Members

UNITED STATES PROBATION SERVICE

MEMORANDUM

#22

DATE: February 27, 1992

REPLY TO ATTN OF: Presentence Unit/Western District of New York

SUBJECT: Proposed Amendments to Sentencing Guidelines

TO: Sentencing Commission

The members of the presentence unit in the Western District of New York individually reviewed the proposed amendments to the Sentencing Guidelines. Individual responses were formulated. The unit then met and are now submitting this collective response to the proposed amendments to the Sentencing Guidelines.

Amendment 29 - Expanded Availability of Non-prison Sentencing Options

There was a general concurrence that Option 6 is the most favorable. One officer expressed concerned about Option 6 because it combines options 1, 4, and 5. The concern specifically revolves around Option 4. This officer's concern is that defendants with increased criminal history categories should not receive the same benefit as defendants in criminal history categories I or II.

However, in general, Option 6 was viewed favorably because it allows expanded use of numerous alternatives to incarceration which will result in less overall prison time for low-level defendants. It also provides judges with greater discretion.

Amendment 33 - Departures Based on Offender Characteristics

There was a general concern that this amendment creates a Pandora's Box. It is too subjective. There is grave concern that an amendment such as this lends itself to abuse by defense attorneys. This type of amendment invites disparity between offenders. The only amendment in this section that warrants consideration is Part D, where a downward departure for advanced age is allowed as long as the required details are met.

Amendment 26

In general, there is overall support for Option 2 which adds advice the court should consider in determining

whether to depart from category VI, the nature of prior offenses rather than simply the number of prior offenses.

Amendment 23 - Acceptance of Responsibility

Our office concurs that a graduated approach to acceptance of responsibility is the most appropriate approach. The tendency is to concur with Option 3. One officer expressed concern regarding defendants who go to trial getting a two level reduction for acceptance of responsibility.

Additional Amendments of Special Interest

Amendment 17 - Part A - Role in the Offense, Especially Offenses Involving Drugs

There was general support for both Part A and Part B of Amendment 17. It is our experience that this can be one of the most misused adjustments in the guideline applications, especially from the standpoint of the government. One of the most important factors that should be considered for applying a mitigating role reduction is the time of the individual's involvement in the offense, the amount of renumeration the defendant was expected to receive, and at what level he knew other participants in the offense.

Amendment 18

The group generally liked this amendment in that it provided a clearer definition of when reductions can be applied. There is support for the court being able to depart below four levels for a defendant's more than minimal participation.

Amendment 19

Again, we direct the Sentencing Commission back to Part B of Amendment 18 and emphasize that the court should be able to depart below the applicable guideline range when it determines that a defendant's minimal participation exists to a kind or degree not taken into consideration by the Commission. While Option 1 under Amendment 19 had some reception, the main concern was how to decide which cap you choose. Based on the abuse of discretion that could occur under this option, there is some concern.

Amendment 27 - Redefinition of Career Criminal

Most of the changes under this guideline were concurred with. Part C makes it easier to calculate conviction dates, using the date of plea rather than the date of sentence. Part E, two cases consolidated for trial as

joinable issues under 8(a) should be counted as one conviction.

Amendment 35 - Plea Bargaining Policies

There was strong support for Part A of Amendment 35, it would be helpful and pressure the U. S. Attorney's Office to disclose the true guideline relevant facts, and circumstances, rather than what sometimes amounts to a fantasy version in plea agreements.

Amendment 36

This amendment also received strong support by the unit. It makes clear that dismissal of a charge does not mean that the conduct cannot be considered under relevant conduct.

List of Additional Proposed Amendments

Amendment 5

In general, there is great concern in a move to remove the more than minimal planning adjustment. The unit felt that there are some offenses which are unsophisticated and others that are well planned out and executed. These types of offenses should be differentiated and receive different consideration. The more sophisticated offender would receive no additional sanctions for the sophistication other than possibly an increase in the offense level based on the amount of loss. Sophistication and loss do not always go hand in hand.

Amendment 8

This section discusses the idea of increasing the offense level depending on the number of unlawful alien smuggled. Each alien represents money. Therefore, the current two level increase for previous convictions should not be deleted.

Amendment 13

General support with this amendment; currently you end up with a lower guideline score for willfully failing to file than you do for an evasion. This difference makes little sense.

Amendment 15

The three level upward departure would usually be insufficient to capture promoting terrorism and if it is adopted, should not certainly include both international and

domestic terrorism. The full wording states that it would apply to international terrorism. This might eliminate from consideration domestic terrorists or white supremacy groups.

Amendment 21

Should be adopted. There should be some adjustment for a range of behavior for reckless endangerment during flight.

Amendment 22

The current multiple count rules are very workable, however, they do not really result in much of an increase for multiple counts.

Amendment 24

This amendment should not be adopted. Different states impose different periods of incarceration for the same basic offense. Therefore, like offenders would not be treated similarly.

Amendment 25

This amendment under Chapter 4 of the Guidelines should definitely be implemented. This is a very clear statement was to what should and should not count.

Amendment 28

In general, the group did not believe a criminal history category VII is necessary. We find that the criminal history categories as they presently exist are functional. It seems to complicate the sentencing guidelines more than is necessary. Criminal history category I is usually a good measurement of the first time criminal who is not likely to be a recidivist.

Amendment 30

The general consensus for this amendment was a "NO".

Amendment 34

Amendment 34 under Chapter 5 guidelines is very important. This gives the court more discretion and allows the Probation Service to provide information to the judge concerning substantial assistance if, in fact, it truly exists.

Amendment 36

Amendment 36, Part H, is strongly urged not to be adopted. It will make it more difficult to determine loss and will essentially give a break to a defendant who preys on wholesaler victims rather than retailer victims.

In general, the group strongly urges the Sentencing Commission not to further complicate the sentencing guidelines. There seems to be a general consensus that more judicial discretion with direction or parameters is preferable.

FAX TRANSMITTAL

from the U.S. PROBATION SERVICE
WESTERN DISTRICT OF NEW YORK
Buffalo Office

Telephone: (716) 846-4241 FTS: 437-4241
Fax: (716) 846-4988 FTS: 437-4988

To: UNITED STATES SENTENCING COMMISSION

From: JOHN T. BABI, SUPERVISING U.S. PROBATION OFFICER

Date: 02/28/92

Number of Pages in Addition to This Cover Sheet: 5

Comments:

February 27, 1992

The Honorable Vincent L. Broderick
Chairman of the Committee on Criminal Law of
the Judicial Conference of the United States
101 East Post Road
White Plains, New York 10601

The Honorable William W. Wilkins, Jr.
Chairman of the United States
Sentencing Commission
P. O. Box 10857
Greenville, South Carolina 29603

Re: Sentencing Commission's Proposed 1992 Amendments to Guidelines

Dear Judge Broderick and Judge Wilkins:

On behalf of Chief Judge Richard S. Arnold and Eighth Circuit Judges Theodore McMillian, John R. Gibson, Donald P. Lay, Myron H. Bright, and myself, I submit the following response to the Sentencing Commission's proposed amendments to the sentencing guidelines, policy statements, and commentary.

I: Amendments Responsive to the Recommendations of the Judicial Conference

1. We support Amendment 29, which gives the district courts greater flexibility to impose sentences which call for alternatives to imprisonment. We prefer Option 6, which expands the availability of probation and provides for split sentences. We do not believe that these changes will compromise the guidelines, but will rather more carefully carry out the intent of the Sentencing Reform Act of 1984.

2. We support Amendment 33, which broadens the discretion of the sentencing judge to depart upward or downward when certain offender characteristics are present. We are confident that the district court judges will exercise this discretion wisely.

3. We support Amendment 26, Part (A), Option 2, and Part (B), which gives the sentencing court more authority to consider the nature rather than the number of prior offenses when considering whether to depart from the guidelines.

4. We support Amendment 23. Rather than adopting any of the options suggested by the Commission, we would prefer an option which would permit a sentencing judge to give a one- to three-level reduction for acceptance of responsibility, depending on the circumstances of the case.

5. We do not take a position on Amendment 1 dealing with relevant conduct, other than to recommend that the guidelines be amended to state that conduct for which a defendant has been acquitted or conduct included in a dismissed count not be considered in fixing the offense level. See Amendment 35, Part (C). Such conduct could, however, be considered in determining where within a guideline range a person should be sentenced.

II: Additional Amendments of Special Interest

1. There are twelve amendments in this category: four are changes in the commentary, and eight are changes in the guidelines. Most of the amendments tend to define and direct the discretion of the district judges in the sentencing process rather than broadening that discretion. They also follow the philosophy that the Commission should attempt to anticipate every factual circumstance and develop a guideline to meet that circumstance. In our view, it would generally be better, as Chief Judge Tjoflat suggests, to define the "heartland" and leave to the courts the task of adjusting for particular circumstances.

2. We support Amendment 27, Parts (A) and (B). Part (A), option (1) provides that a prior conviction that is used to enhance a statutory maximum sentence could not also be used in determining the offense level for a career offender. Part (B) changes the definition of a "prior felony conviction" so that only crimes having a statutory penalty of two years, rather than one, be counted.

3. Amendment 35, Part A is a very important and needed amendment. It would encourage the government to disclose all guideline relevant facts and circumstances to the defendant before the defendant enters his plea. Not only will this introduce more fairness into the process, but it will significantly reduce the number of appeals.

Part III: List of Additional Proposed Amendments

The Commission proposes an additional thirty-six amendments to the guidelines and four changes in policy statements and

commentary. It also asks for comments on a number of other proposed changes in the guidelines.

1. We support Amendment 2, Part (A), which makes clear that information provided by a defendant pursuant to a plea agreement should not be used to increase a defendant's sentence.

2. We support Amendment 3, which, in substance, states that guidelines may provide a starting point for the sentencing of juveniles, that sentencing above the guidelines for juveniles should be accompanied by reasons, and that a defendant's youthfulness may make a sentence below the range appropriate. The amendment properly leaves a large degree of discretion to the sentencing judge.

3. We make no recommendation with respect to Amendments 4 through 14 of Chapter 2. Many of the amendments appear to be a response to a sentence imposed by one or more district courts, and each amendment will further limit the discretion of the sentencing judge.

4. We make no recommendation as to Amendment 15, which provides for a three-level enhancement where a felony was committed to promote terrorism.

5. We take no position with respect to Amendment 24, which essentially gives more weight to prior offenses.

6. We oppose Amendment 25, Part (A), Option 1, which will further limit the discretion of the district courts.

7. We support Amendment 30, which provides guidance to judges in determining fines of greater than $250,000 or fines for each day of violation. We also support Amendment 31, which permits but does not require a sentencing judge to consider the cost of incarceration when setting fines; and Amendment 34, which eliminates the requirement of a government motion for a 5K1.1 departure, but directs the court to give substantial weight to the government's evaluation.

8. We support Miscellaneous Amendment 36, Parts A, B, C, D, and E. These are, in the main, clarifying amendments.

9. We oppose Miscellaneous Amendment 36, Part F as tending to unduly limit the discretion of the sentencing judge.

10. We take no position on Miscellaneous Amendment 36, Parts H and J. We support Part I, which clarifies the counterfeiting guidelines.

11. We support Miscellaneous Amendment 36, Parts K, L, M, N, O, P, and Q. All are clarifying amendments.

12. We support Miscellaneous Amendment 36, Parts R, S, and T.

13. We take no position on Miscellaneous Amendment 36, Part U.

14. We support Miscellaneous Amendment 36, Parts V and Y.

We have been asked to comment on the following amendments:

1. Amendments 21 and 22. We would prefer to leave the matters covered in these amendments to the discretion of the district judges.

2. Amendment 28, Parts A and B. In general, these amendments seek to give the district courts more latitude in giving probation to offenders with whom the likelihood of recidivism is low and to give the district courts more latitude in imposing longer sentences on persons with a very serious criminal record. Our concern is that the Commission is trying to do this by establishing additional directives that will mandate a particular sentence. We believe a better approach is to permit district courts to depart downward when the danger of recidivism is low and upward when the danger is high.

Sincerely,

GERALD W. HEANEY

GWH:bn

#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?

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.

THE ROSENBERG LAW FIRM
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January 17, 1992

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

Re: Armed Career Criminals

Dear John:

I see from the January 2, 1992 published amendments for comment that the Commission is considering amending the commentary to § 4B1.1 as it relates to the meaning of "offense statutory maximum" in cases where a sentence enhancement statute is involved.

As an aside, it seems to me that option 1 is more in keeping with the Commission's policy against double counting, however, the statutory directive seems to more clearly indicate that option 2 was the intended result. Also, this question should not be addressed in isolation from the effect of the enhanced mandatory minimum penalties for second or subsequent drug offenders because the Commission likely will discover that with option 1 the enhanced mandatory minimum drug penalty will exceed or be very near the career offender guideline range.

On to my point. In both option 1 and 2 the example enhancement statutes include 18 U.S.C. § 924(e), the armed career criminal enhancement statute. Effective November 1, 1991, however, the commentary to § 4B1.2 was amended to clearly state that possession of a firearm by a felon was not a crime of violence under the career offender guideline. As a consequence, the meaning of "offense statutory maximum" under § 4B1.1 in the context of Section 924(e) should never arise. To suggest in the public comment request that § 924(e) is involved has the potential to "color" the responsive comments.

I do note, however, that the armed career criminal guideline, § 4B1.4, still suggests that the offense level for armed career criminals could be determined under the career offender guideline. In this regard, the guidelines with respect to offenders sentenced under 18 U.S.C. § 922(g) and subject to enhancement under Section

924(e) are still unclear with respect to the application of the career offender guideline. This should be cleared up by eliminating (b)(2) in § 4B1.4. I still believe that Section 4B1.4 belongs in Chapter 2 with language telling courts not to double-count the prior convictions under Chapter 4, part A if those convictions were used to enhance the statutory penalties.

Perhaps of equal importance on this point are the inter-related retroactivity issues under Section 1B1.10. Some offenders subject to enhancement under Section 924(e) have been sentenced as career offenders on the theory that the court could look to the facts underlying the Section 922(g) offense of conviction. See e.g. U.S. v. Douglas Cornelius, No. 90-2187SI (8th Cir. April 23, 1991). It was my impression and understanding that two things were true about armed career criminals under the guidelines: 1. It was inappropriate to look beyond the Section 922(g) indictment language in making the career offender determination, particularly after the November 1, 1989 amendment to § 4B1.1 went into effect; and, 2. The guidelines directed a 15 year sentence for offenders subject to the Section 924(e) enhancement prior to the enactment of § 4B1.4. I seem to recall these issues were addressed in the working group report that proposed an armed career criminal guideline.

In sum, the Commission should make old amendment 433 retroactive under § 1B1.10, or if option 1 is chosen, and Section 922(g) and Section 924(e) offenders were properly sentenced under the career offender guideline previously, then the new amendment should be retroactive under § 1B1.10. If amendment 433 is purely clarifying and carries forth the original intent of the Commission, then cases such as Cornelius were wrongly decided to the substantial detriment of the defendants.

In any event, please put this letter together with other miscellaneous public comment. If you have any questions, please feel free to contact me.

Sincerely,

Dean Stowers

Dean Stowers

DS/rc

#39

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ATTORNEY AT LAW
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MORGANTOWN, WEST VIRGINIA 26505

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March 2, 1992

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

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

Gentlemen:

I have had an opportunity to review the "Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines", and offer the following comments and suggestions regarding two of the issues which have been raised.

The Commission has requested comment on whether the proposals regarding expanded availability of non-prison sentencing options "compromise the structure of the Guidelines as originally drafted?". As I understand it, the Guidelines were implemented to bring about uniformity in sentencing. Unfortunately, from my experience it appears that the Guidelines have created a type of "cookbook" justice which seriously deprives the Court from tailoring a sentence to meet the facts of a particular case. I believe Option 6 is well advised and would provide the Court with needed flexibility in dealing with non-prison sentencing options as well as creating more opportunities to consider such under the framework of the Guidelines. Furthermore, I agree that available sentencing options should be expanded to include additional alternative programs listed on Page 4 of the synopsis. My experience practicing in state court indicates that the more options available to a sentencing judge the more likely it is that the court can fashion an appropriate penalty that is geared to have a specific impact on the particular defendant.

With respect to departures based on offender characteristics, I endorse the amendment to consider age as an important reason to impose a sentence below the applicable guideline range, if combined with another factor. Furthermore, I agree that the courts should be able to consider a defendant's "lack of youthful guidance, history of family violence or similar factor as a ground for departure" from the Guidelines.

Although these limited comments deal with two specific issues, I would hope that generally the Guidelines would provide more opportunities for flexibility, depending upon individual situations. The Guidelines have provided a structure which encourages uniformity in sentencing. What they have failed to do is provide opportunities for judges, prosecutors and defense attorneys come to appropriate dispositions in certain cases.

Thank you for your consideration of these matters.

Very truly yours,

William F. Byrne

WFB/drg

x.c. The Honorable Robert E. Maxwell

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
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April 14, 1992

MEMORANDUM

TO: *Judge Wilkins*
Commissioners
Senior Staff

FROM: *Brenda Allen*

The attached letter from Ralph Ardito, Jr., and Gregory A. Hunt, with the Federal Probation Officers Association, dated April 9, 1992 is forwarded for your information.

Attachment

FEDERAL PROBATION OFFICERS ASSOCIATION

April 9, 1992

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

RE: 1991 Amendments

Dear Judge Wilkins:

Thank you for the opportunity to meet with the U.S. Sentencing Commissioners on March 24, 1992, to express our views regarding the 1991 amendments to the sentencing guidelines. At that meeting, Commissioner Nagle asked us to provide the Commission with a written statement as to those amendments the Federal Probation Officers Association supports and wishes adopted this year. This letter is to provide the Commission with a brief list of our priorities in amending the guidelines.

The issue that concerns us most is relevant conduct, U.S.S.G. Section 1B1.3. We highly support Amendment I, Parts (A) and (B). We believe that this change in the guidelines will make relevant conduct more explicit and less confusing. The next most important amendment is the amendment concerning the increase in the availability of probation as per Amendment 29, Option 4. We believe that by adding 3 additional cells to the guidelines, it provides us with more flexibility toward minor offenders for sentencing. Our next priority item is acceptance of responsibility. We concur with Commissioner Nagle in regard to adding 1 additional point for acceptance of responsibility under U.S.S.G. Section 3E1.1 for those defendants with at least a base offense level of 32. We also believe that this point should be earned by the defendant by pleading guilty at an early stage of the negotiations and by being cooperative during the presentence investigation. This amendment would provide more of the same to individuals who have high offense levels that plead guilty. Lastly, we concur with Chairman Wilkins in regard to placing a cap on the base offense level for couriers in drug distribution offenses. We believe those caps should be the same for all couriers and should not deliberated by substance in which he was a courier.

We remain grateful for the continuing support all probation officers receive from you and the Commission. Your willingness to solicit our opinions is testimony of the Commission's committment to obtain the practitioner's perspective of the issues that directly impact on our day-to-day work. Thank you again for the opportunity to express our views and we look forward to working with you in the future.

Sincerely,

Ralph Ardito Jr.

Ralph Ardito, Jr.
President, FPOA

Gregory A. Hunt
U.S. Probation Officer/Guideline Specialist

GAHUNT/RARDITOjr:deb

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
PROBATION AND PRETRIAL SERVICES OFFICE

IAN E. MUGLESTON
ROBATION/PRETRIAL
VICES OFFICER

FEDERAL BUILDING
& U.S. COURTHOUSE
222 W. 7TH AVENUE, #48
ANCHORAGE, ALASKA 99513-7562
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FEDERAL BUILDING
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101 12TH AVENUE, BOX NO. 3
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(907) 456-0266

December 13, 1991

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

RE: U.S. Sentencing Guidelines

Dear Public Information Office:

As a Probation Officer writing Presentence Reports, I have a suggestion for restructuring U.S.S.G. §5C1.1(c) and §5C1.1(d) which I now find confusing. My idea is to present the guidelines in tables as follows:

§5C1.1(c) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is at least one but not more than six months, the **minimum** term may be satisfied by:

(1) a sentence of imprisonment or;
(2) a sentence of probation that includes a condition or combination of conditions that substitute: (A) intermittent confinement or; (B) community confinement or; (C) home detention for imprisonment according to the schedule in §5C1.1(e) or;
(3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes: (A) community confinement or; (B) home detention according to the schedule in §5C1.1(e) but in no event less than one month is satisfied by imprisonment.

§5C1.1(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the **minimum** term may be satisfied by:

(1) a sentence of imprisonment or;
(2) a sentence of imprisonment that includes a term of supervised release with a condtion that substitutes: (A) community confinement or; (B) home detention according to the schedule n §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

Thank you for considering my suggestion.

Sincerely,

Eric D Odegard

Eric D. Odegard
U. S. Probation Officer

#44

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
POST OFFICE BOX 985
CHEYENNE, WYOMING 82003-0985

CLARENCE A. BRIMMER
CHIEF JUDGE

TELEPHONE:
(307) 634-6072
FTS: 238-2463

March 13, 1992

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

Re: **Proposed Amendments to Sentencing Guidelines**

Gentlemen:

I have reviewed the Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines and offer the following comment.

Expanded Availability of Non-prison Sentencing Options:

I recommend adoption of Amendment 29 to include those combinations of options which provide the most sentencing discretion. Many defendants with a top guideline of 12 months or less are the type of defendants whom the Court would have placed on straight probation, or given the suggested term of "shock incarceration" prior to guideline implementation. Under the present system, the Court has wrestled with cases in which the guidelines required incarceration or sentencing options the Court would not otherwise impose. At the same time, these cases have not met the departure standard and a sentence outside the applicable guidelines has begrudgingly been avoided. Many of these offenders have some resources in place with some chance for reform under the guidance of the probation office. This Court is in agreement, under the theory of "shock incarceration" any term too distant from the clang of the cell door gives rise to diminishing returns.

Acceptance of Responsibility:

I recommend adoption of Amendment 23, Option 3, which provides for an additional 1 point reduction in the offense level, based on admission of relevant conduct beyond that required to form a factual basis for the offense of conviction. I oppose Option 4 which would require that a defendant forfeit eligibility for any offense level reduction by exercising a constitutional right to trial.

Role in the Offense:

I believe the entire Role guideline should be eliminated. In the case of a defendant acting alone, there is no opportunity for a role reduction in contrast to a similar defendant who happens to be involved in a similar offense with the prescribed number of codefendants. It is a certainty that any Role enhancement recommended in the presentence report will be challenged and assessing culpability within a hierarchical structure envisioned by the guidelines is not realistic. This Court believes that a defendant's role and relative culpability can be reflected in selecting an otherwise applicable guideline range.

Plea Bargaining Policies:

Amendment 35, Part (A), is highly recommended. Thorough plea agreements setting forth all guideline relevant facts would forestall many objections to the presentence report which remain in effect at the time of sentencing.

Sincerely yours,

CLARENCE A. BRIMMER,
Chief Judge

CAB:cjt

#36

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Probation Office

David R. Looney
Chief Probation Officer

Gus J. Solomon
United States Courthouse
620 S.W. Main, Rm. 312
Portland, OR 97205-3027
503/326-2117

February 28, 1992

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

RE: Proposed Amendments to the Sentencing Guidelines

Dear Judge Wilkins:

Thank you for the opportunity to comment on the proposed amendments to the Sentencing Guidelines.

We recognize that the guidelines represent an evolutionary process and as such, change is inevitable. Since their inception, however, we have been presented with ever more complex versions of the guidelines with each new amendment cycle. The November 1, 1991 edition, for example, contained several amendments that have proven, in practice, to be very difficult to implement. Examples include 2J1.7 (Commission of an Offense While on Release); 2P1.2(a)(3) [Possession of Contraband]; 2L1.2 Application Note #7 (Illegal Re-Entry); 2K2.1 (Unlawful Possession, Transportation of Firearms); 5G1.3 (Imposition of Sentence on a Defendant Subject to an Undischarged Term) and 4A1.1(f) [gives additional points for certain crimes not counted due to the "related cases" rule].

In Chapter I the Commission has articulated the problems attendant with an overly complex set of guidelines and wisely chose to carve out a "heartland" of guidelines intended to address typicai cases. Nonetheless, the guidelines do take into account a wide range of human behavior and they are complicated. The question to be asked is this: "Are the guidelines becoming 'overly' complex?" We believe that many of the proposed amendments would, in fact, result in complex combinations that are increasingly impracticable. Indeed, the sheer number of substantive amendments forthcoming each year makes for an unworkable situation.

As we approach the fifth anniversary of the guidelines, the manual is now published in two volumes. The second volume, Appendix C, represents some 250 pages of text dealing only with amendments made to the guidelines over the past few years. Perhaps it is time to take a closer look at the amendment process and the impact this volume of amendments inevitably has on the trial court.

There should be at least an informal presumption on the part of the Commission that any amendment will now unduly complicate sentencing for the trial court. Then, perhaps, a "reasonable doubt" standard can be employed by the Commission to determine whether a proposed amendment should nonetheless be adopted: i.e. the Commission should "prove" that the necessity for the proposed amendment does, beyond a reasonable doubt, outweigh its complication to the sentencing process. I say this with tongue in cheek, but the point is, change should now be the exception and not the rule.

While some clarification of terms and intent may be warranted, a common sense interpretation of the guidelines should not be foreclosed by endless redefinition of words and phrases through amendments. Instead of a heartland, the Commission finds itself delineating each peak and valley, thereby introducing the very uncertainty and disparity the guidelines are intended to cure. In the comments below I have attempted to identify proposed amendments that appear to be unnecessarily complex and, in some cases, suggestions are made for alternative means for the Commission to achieve the desired result.

I. NON-PRISON SENTENCING OPTIONS

We support Option 6, which appropriately enlarges the sentencing alternatives available for the less serious offenders without significantly compromising the original structure of the guidelines. The existing "split sentence" option represents only 2 rows of cells (out of a possible 43) on the Sentencing Table. Option 6 offers some additional flexibility and is a proposal that would simplify a determination of the appropriate sentence in these cases.

We do, however, urge the Commission to reject complex formulas for equating "alternative" options with jail, as was proposed in a recent working group report. Such formulas do not appear to be necessary to fulfill the purposes of sentencing. Nor does it seem necessary for the Commission to specifically exclude certain offenses from consideration for alternative sentencing. Application Notes and Background Commentary provide the Commission with the opportunity to express their views on the appropriate use of alternative sanctions without unduly complicating the sentencing process. A good example of this is found in the current Application Notes to 5F1.1, 5F1.2 and 5F1.3.

II. DEPARTURES BASED ON INADEQUACY OF THE CRIMINAL HISTORY SCORE

Guidance in the form of Commentary may be welcome to assist the Court in arriving at appropriate incremental punishment when an upward departure for Criminal History Category VI offenders is deemed necessary. We support the approach suggested in Option 2. However, we recommend against implementation of Part C to Option 2 which would prohibit downward departures for Career Offenders. In the District of Oregon we have seen what we perceive to be an application of the Career Offender guideline for minor offenders that was never intended by the Commission. I have attached a presentence report which is an example of this.

III. ACCEPTANCE OF RESPONSIBILITY

We agree that some clarification is necessary and would support an amendment that makes it clear the defendant must only accept responsibility for the "offense of conviction". Reasonable people can disagree about what constitutes relevant conduct and a defendant should not have to wonder to what extent he/she must make admissions of guilt in order to be eligible for this adjustment.

We also agree that some additional adjustments for acceptance of responsibility at the higher offense levels are warranted but we caution against arbitrary and complicated exercises such as suggested in Options 2, 3 and 4. Commentary suggesting modest departures for higher offense levels is sufficient.

IV. RELEVANT CONDUCT

Clarification proposed in Amendment 1, Parts A and B appears necessary. As you note, this is a very difficult guideline and it is the crux of correct application of the Chapter Two and Three adjustments. The Commission must be confident that the proposed amendments will be sufficient. The repeated re-writing and redefining of this guideline only results in confusion. The Commission would be better advised to do nothing than to implement amendments that will again be "clarified" next year.

V. ROLE IN THE OFFENSE

We recommend that the Commission leave 3B1.1 and 3B1.2 and the Commentary as general as possible to allow the Court the flexibility necessary to construct an appropriate sentence for each individual defendant. Specifically, proposed Amendment 16, Part B appears to be unnecessary. Amendment 17 is appropriate for clarification. Amendment 18, Part A is a good example of a proposed change that reduces complexity and Part B is a good example of a way in which the Commission can provide guided departure language in the Commentary without unduly complicating sentencing.

The Commission asked for comment on five issues under consideration for role adjustments. We urge the Commission to reject each one. All of these proposals would greatly increase the complexity of any such adjustments for role and, in our view, each one is unnecessary to achieve the purposes of sentencing. In particular, Amendment 19 and each of the options therein may invite varied manipulations in the plea bargaining process. The real problem appears to be the inequity we all perceive when minor participants in a crime are subject to very lengthy prison sentences. Perhaps one option the Commission may consider to assist the Court in mitigating such sentences would be general guided departure language in the Commentary to 3B1.2.

VI. CAREER OFFENDER, 4B1.1

Regarding Amendment 27, Part A, we do not agree that clarification of "Offense Statutory Maximum" is needed. I confess, though, that you stumped me with Option 1. Perhaps I do not appreciate the problem posed by enhancements under 18:USC 924(e) [Armed Career Criminal]. Since the Commission made it clear that Ex-felon in Possession of a Firearm does not constitute a crime

of violence (Commentary to 4B1.2) these offenders are not subject to application of 4B1.1. And in our District we see few bank robbers or drug traffickers charged with an enhancement under 924(e). Regarding Parts B, C, D, E and F to this amendment, we urge the Commission to reject each one. Particularly with the amendments effective November 1, 1991 calculation of the defendant's criminal history has become even more complex and time consuming. Accurate calculation requires the probation officer to obtain the following documents: sentencing order, charging instrument (indictment or information), documentation of attorney representation, date of release from confinement and investigative report. It can often be very challenging just to document the elements of the offense of conviction (e.g. Was the offense of conviction burglary of a dwelling or the lesser offense burglary of a building?) and whether the offense of conviction was finally a felony (i.e. Was the felony conviction later reduced to a misdemeanor?). Finally, it is necessary for the officer to determine whether otherwise related offenses may have been separated by arrest. Many prior felony convictions are for offenses that occurred well over a decade ago and records sufficiently complete to make all required calculations are not always available.

Part B to Amendment 27 would additionally require the officer to determine the statutory maximum penalty for the prior felony conviction, even tho the conviction may have taken place many years ago in another state. Parts B and D would both add two more special classes of prior offenses, all with presumably different definitions. (See e.g. 2L1.2 Application Note #7 and 4B1.2.) For career offenders the difference between the bottom and the top of the imprisonment range is wide, usually exceeding 24 months. The Court can easily take into account such things as "lesser crimes of violence" by imposition of a sentence at or near the bottom of the range.

Part C would require the officer to obtain documentation showing date of conviction, yet another court document separate from the judgment/sentencing order. Why interject one more piece of data necessary to make a correct application? The date of sentence is used in 4A1.2(e) to establish the applicable time period for counting prior convictions. This is likewise sufficient for application of the Career Offender guideline.

Part E is unworkable in any context--it is simply too subjective.

VII. CHAPTER FOUR GUIDELINES AND COMMENTARY

We recommend against Amendments 24, 25 and 28. These are the type of situations that can be appropriately sanctioned by a particular point within the already established guideline range. These proposed amendments would unnecessarily complicate sentencing. Our thoughts concerning the complexity of the existing Chapter Four guidelines are set forth in more detail above. Correct application of Chapter Four guidelines requires a high degree of competency with the guidelines and experienced investigative skills. This chapter has been significantly amended several times and it would be my earnest suggestion that the Commission resist any temptation to tinker with it again this year.

VIII. CHAPTER FIVE GUIDELINES AND COMMENTARY

We recommend the Commission reject all four of these proposed amendments. Amendments 30, 31 and 32 appear unnecessary. Amendment 34, I believe, would put the Court in the difficult position of attempting to evaluate a defendant's substantial assistance to the government when the government does not agree that the information was so valuable as to warrant departure. Great weight is already given to the government's position on all aspects of the guideline applications. This particular guideline appears uniquely within the government's purview to evaluate.

Respectfully yours,

Katherine Zimmerman
Deputy Chief Probation Officer

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

The Honorable James A. Redden
Chief U.S. District Judge
District of Oregon
620 SW Main
Portland, Oregon 97205

FAMM
Families Against Mandatory Minimums

#31

February 25, 1992

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

Dear Sentencing Commission Members:

Families Against Mandatory Minimums (FAMM) is a rapidly growing national organization working for the repeal of mandatory minimum sentences.

I am writing on behalf of FAMM's 4000 members, to support the Judicial Conference's recommendations for improving the sentencing guidelines. We strongly support the increased flexibility in sentencing of young, old, and first time offenders; alternatives to incarceration; and an increased adjustment for acceptance of responsibility. Each of these recommendations are improvements that will help maintain the American tradition of justice--that judges provide sentences that are designed to fit the crime and the culpability of the offender.

In addition, the members of FAMM applaud the U.S. Sentencing Commission's Report to Congress on Mandatory Minimum Sentences, released last August. The report did an excellent job of highlighting the inequities and many problems resulting from the use of mandatory minimum sentences. The Commission's report should be the first step in an ongoing effort to capitalize on the momentum in Congress to repeal mandatory sentences. FAMM now urges the Sentencing Commission to recommend to Congress that all mandatory minimum sentences be repealed.

Families Against Mandatory Minimums is available to help the Commission educate the Members of Congress and the public, to the gross injustice, high cost, and counterproductivity of mandatory minimum sentences.

Sincerely,

Julie Stewart

Julie Stewart
President

Families Against Mandatory Minimums
1001 Pennsylvania Ave., N.W. #200-S
Washington, D.C. 20004
(202) 457-5790

AGENDA

United States Sentencing Commission

Public Hearing on Proposed Amendments to the Sentencing Guidelines

United States Courthouse, Washington, D.C., February 25, 1992

9:00 a.m.	Judge William W. Wilkins, Jr. Chairman, U.S. Sentencing Commission
9:00 a.m.	Judge Vincent Broderick Judge Mark Wolf Judicial Conference of the United States Committee on Criminal Law
9:20 a.m.	Bob Edmunds, Jr. Steve Easton U.S. Department of Justice
9:40 a.m.	Henriette Hoffman Tom Hutchison Federal and Community Defenders
10:00 a.m.	Jeffrey Weiner Marcia Shein National Association of Criminal Defense Lawyers
10:20 a.m.	Steve Salky ABA Criminal Justice Section
10:40 a.m.	Barry Bohrer New York Council of Defense Lawyers
11:00 a.m.	Paul Kamenar Washington Legal Foundation
11:20 a.m.	Edward Burger, Jr. Council for Court Excellence
11:40 a.m.	Peter Vaira George Cotsirolis American College of Trial Lawyers
12:00 p.m.	Jonathan Turley The Project for Older Prisoners
12:20 p.m.	Judge Fredric Smalkin U.S. District Court, Maryland

DOS - Edmunds

STATEMENT

OF

ROBERT H. EDMUNDS, JR.
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF NORTH CAROLINA
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

FEBRUARY 25, 1992

Mr. Chairman and Members of the Commission:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the sentencing guideline amendments the United States Sentencing Commission has recently proposed. The amendments cover a number of important guideline areas, and we commend the Commission for considering many of the concerns we raised with you early in this amendment cycle.

I would like to highlight a few of the most important proposed guideline amendments in my statement today.

DOWNWARD DEPARTURES FOR CAREER OFFENDERS AND ARMED CAREER CRIMINALS (Amendment 26(C))

We urge the Commission to adopt the proposed amendment of policy statement §4A1.3 to specify that the adequacy of a defendant's criminal history category not be a basis for downward departure when a guideline mandates a particular criminal history category, such as for career offenders and armed career criminals. In the case of a career offender, guideline §4B1.1 establishes an offense level related to the statutory maximum for the offense of conviction and places the defendant in Category VI, rather than the category that would apply to the defendant if his criminal history score were calculated under the guidelines.

However, several courts of appeals have undermined the career offender guideline by ruling that the sentencing court may depart downward from the guideline range where the court determines that Category VI overstates the defendant's criminal

history. These courts have relied on policy statement §4A1.3 on the adequacy of the criminal history category. See, e.g., United States v. Lawrence, 916 F.2d 553, 554-555 (9th Cir. 1990); United States v. Brown, 903 F.2d 540, 544-545 (8th Cir. 1990); United States v. Adkins, 937 F.2d 947, 950-953 (4th Cir. 1991). In our view the Commission's placement of a career offender in the highest criminal history category is simply a guidelines mechanism to assure fulfillment of the statutory directive in 28 U.S.C. § 994(h) that career offenders be sentenced at or near the statutory maximum for the offense of conviction. It was not meant to reflect the defendant's actual criminal history category calculated under the guidelines. Under the courts' reasoning any career offender whose actual criminal history category was less than Category VI could be eligible for a downward departure on the basis of his inadequate criminal history, and the career offender guideline would become meaningless.

A similar problem could occur with respect to the armed career criminal guideline, §4B1.4, which may place a defendant in a higher criminal history category than the criminal history calculations would otherwise provide. The criminal history component of the armed career criminal guideline operates more in the nature of a specific offense characteristic by recognizing that certain conduct (e.g., possession of a machine gun) warrants an enhanced sentence and also operates to provide a guideline sentence commensurate with the mandatory minimum 15-year term provided by statute, 18 U.S.C. § 924(e). If the defendant's

actual criminal history can be used as a basis to depart below the guidelines, the factors reflected in the criminal history component of the guideline would be lost.

To overcome these problems, policy statement §4A1.3 should provide that downward departure on the basis of the adequacy of a defendant's criminal history category is not warranted when the guidelines specify a particular criminal history category in lieu of the category that would otherwise result from calculation of the criminal history points under guideline §4A1.1.

REVISION OF DECAY FACTOR (Amendment 25(B))

In its letter proposing guideline amendments to the Commission last fall, the Department had sought the elimination of the decay factor applicable to career offenders. (Letter of October 3, 1991, from Deputy Assistant Attorney General Paul L. Maloney.) As the guideline now operates, a sentence of more than one year and a month that was neither imposed nor served during the 15 years prior to the commencement of the instant offense is not counted as a predicate offense for the career offender guideline. Similarly, a lesser sentence does not count unless it was imposed within 10 years of the commencement of the instant offense. See guideline §4B1.2, Application Note 4. These limitations are inconsistent with the statutory mandate to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of

violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. § 994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for criminal history purposes to the career offender provision, which is designed to look at the defendant's entire life span.

The Commission did not propose the simple elimination of the decay factor for career offenders, as we had suggested, but instead took a broader approach in amendment 25(B). The proposal excludes from the applicable time periods for purposes of calculating the defendant's criminal history score periods during which the defendant was continuously imprisoned if such periods exceeded a time to be designated in the guidelines of one to five years. These periods of incarceration would be excluded from the applicable time periods regardless of whether the defendant were a career offender.

Two options are presented. One excludes periods of imprisonment only in the case of the 15-year decay factor for sentences of more than one year and one month. It does not affect lesser sentences, currently subject to a 10-year decay factor. The other option excludes periods of imprisonment for all sentences but provides a uniform time period of 12 years.

We favor the first of these options and believe that the exclusion for imprisonment should apply to periods of imprisonment that lasted over one year. The uniform 12-year decay factor is too short for serious offenses. A third option

we would have preferred would have provided a uniform 15-year decay factor for all categories of sentences with exclusions for periods of imprisonment.

CRIMINAL HISTORY CATEGORY VII (Amendment 28(B))

The Commission has proposed a new criminal history Category VII to provide increased sentences for offenders with particularly extensive criminal backgrounds. We strongly believe that this new criminal history category is needed to provide adequate sentences for the most serious recidivists. Under the current guidelines defendants with criminal history scores of 13 or more are all included in Category VI. Unless the sentencing judge departs from the guidelines on the basis of criminal history, a defendant with a criminal history score of 18, for example, would receive the same sentence for a particular offense as a defendant with a score of 13. Of course, a judge is not bound to depart from the guidelines, even when sentencing a defendant with a substantial criminal history score, and defendants with extremely diverse backgrounds may be sentenced alike. We urge the Commission to include an additional criminal history category in order to recognize distinctions that so far have been ignored.

The Commission has proposed three alternative approaches to creating a new Category VII. We favor the third, which provides that Category VI would include cases with 13 to 15 criminal history points and Category VII would include those with 16 to 18

points. Option three follows the pattern established for Categories III, IV, and V, each of which incorporates a three-point spread in criminal history points.

Option three best addresses the need for an additional criminal history category by focusing on those offenders whose criminal history scores exceed the current cap of 13 by just several points. These offenders belong in a new criminal history Category VII to reflect the more extensive nature of their criminal backgrounds. Of course, upward departures should be authorized for defendants with even more extreme criminal backgrounds under the policy statement on the adequacy of criminal history, §4A1.3 (which would require some adjustment if Category VII were adopted). The number of offenders with high criminal history scores is substantial: 39 percent of Category VI offenders had more than 15 criminal history points in fiscal year 1990 guideline cases. See Memorandum of February 21, 1992, from Phyllis Newton to the Commission.

LACK OF YOUTHFUL GUIDANCE (Amendment 33(A))

The Department strongly urges the Commission to amend its policy statements to provide expressly that a court may not consider a defendant's lack of youthful guidance as a ground for a departure from the applicable guideline range. The recent case of United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991), completely undermines the guidelines by allowing -- indeed encouraging -- courts to impose unlimited downward departures for

lack of youthful guidance. We can envision defendants requesting downward departures on this ground in every case, not only complicating and lengthening sentencing hearings with complex expert psychological, medical, and social science testimony, but also introducing totally subjective factors into the sentencing process, which will lead to the kind of inequality which the guidelines were intended to replace. We believe it is necessary for the Commission explicitly to eliminate the factor of "lack of youthful guidance" as a basis for departure in order to maintain the integrity of the guidelines system and ensure uniformity in sentencing. "History of family violence" and other similar factors would also have the same effect and should not be considered as a basis for downward departure. Consistency, fairness, and certainty will not be served unless these factors are eliminated from sentencing decisions.

IMMIGRATION OFFENSES - ALIEN SMUGGLING (Amendment 8)

The Department supports, with certain modifications, the Commission's amendment of guideline §2L1.2 concerning alien smuggling, and related guidelines concerning entry or citizenship documentation. The amendments would make alien smuggling offenses increase in severity depending upon the number of aliens smuggled, transported, or harbored.

The proposed amendment provides graduated increases for smuggling six or more aliens, with a five-level increase for smuggling 100 or more. We suggest that the proposed amendment be

revised to provide for a five-level increase if the defendant smuggles 100-200 aliens and to instruct the court to consider an upward departure if the defendant is involved in smuggling over 200 unlawful aliens. Large-scale cases should not be overlooked by specific guideline enhancements.

As presently drafted, the increase for smuggling six or more aliens would apply only if the defendant committed the offense for profit. We believe the increase based on the number of aliens smuggled should apply whether or not the defendant violated the law for profit. It might be appropriate to reduce the base offense level to level six, as now required by §2L1.1(b)(1), when the defendant has smuggled three or four aliens into the country for reasons other than profit. However, smuggling many aliens, even though not for profit, should be more severely penalized to recognize serious violations of the immigration laws. Conforming amendments would also be required for the other proposed amendments to the related immigration offenses in Part L of Chapter Two.

In addition, we urge the Commission to revise the guideline language to instruct the court to consider an upward departure in cases in which a defendant is involved in smuggling, transporting, or harboring unlawful aliens who engage in or are connected with unlawful activity upon their arrival in this country. For example, certain smugglers are known to assist in the smuggling of narcotics traffickers into the United States. While these smugglers would not be convicted of conspiring to

traffic narcotics, their activity necessarily furthers the narcotics violations engaged in by the individuals whom they bring into the country.

The Department wholeheartedly supports the addition of upward adjustments to the immigration guidelines in cases involving death, bodily injury, possession of firearms, and possession of other dangerous weapons. Because of the seriousness of these offenses and the need for uniformity in the imposition of the increased punishments, we believe these factors should be addressed as enhancements rather than departures. The enhancements should be consistent with the level of similar enhancements in other sections of the guidelines.

ALTERNATIVES TO INCARCERATION (Amendment 29)

We have serious concerns about the options regarding alternatives to incarceration in Amendment 29 and strongly urge the Commission not to adopt these proposals. Fundamentally, these amendments may compromise the fair and appropriate sentences achieved through implementation of the guidelines.

The proposed amendments would bring about a number of changes, such as (1) redefining the "split sentence" to require only one month of incarceration rather than one-half the minimum term of the applicable range; (2) authorizing probation with confinement conditions at higher offense levels; (3) substituting a range of zero to six months for several categories in the Sentencing Table with higher levels of imprisonment; and

(4) making the "split sentence" available for more serious offenses than under the current guidelines. On the whole, the proposals vastly increase judicial discretion and make non-incarceration sentences available for many more offenders than under the current guidelines.

The Commission has not provided a clear justification for expanding either the number of offenders eligible for alternative sanctions or the types of alternatives available. While most state corrections systems have been motivated by severe overcrowding to implement alternatives, we cannot see that issue as justifying experiments at the federal level. Overcrowding at Bureau of Prisons minimum security facilities is not great, and it is to these facilities that the majority of offenders who would be affected by the amendments are sentenced. Moreover, the question of alternatives should be considered separately from prison population issues; overcrowding is not an appropriate rationale for implementing a program of alternatives.

The proposed amendments generally would provide a level of discretion to judges inconsistent with the Sentencing Reform Act's purpose of reducing unwarranted sentencing disparity. For example, Option 2 would authorize a probationary sentence with conditions of confinement, including home detention, for offenders through offense level 12. In addition, it would authorize imposition of a split sentence with just one month of imprisonment. As a result, two level 12 offenders, for whom the guidelines provide a sentencing range of 10-16 months, could

receive vastly different sentences. One may be sentenced to no imprisonment at all, while the other may be sentenced to 16 months' imprisonment -- both within the applicable guidelines. Of course, the former must be placed on probation with a condition of home detention (or other confinement condition) for 10 months. Thus, a range of 10-16 months of imprisonment is effectively transformed by these amendments into a range of 0-16 months, provided home detention or other condition of confinement is imposed.

Home detention, however, is simply not the same sanction as imprisonment since it protects the defendant from separation from home, family, and work. For many it is more nuisance than punishment. Clearly, the potential for significant disparity in sentences for similar offenses would be reintroduced by adopting these options. Guidelines directing a judge's decision as to **whether** to impose imprisonment are as crucial to reducing unwarranted sentencing disparity as are guidelines on **how long** a term of imprisonment to impose.

We also believe that a number of the options presented by Amendment 29 would produce guidelines that violate the statutory requirement that the maximum of an imprisonment range not exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. §994(b)(2). The purpose of this requirement is to foster the goal of reducing unwarranted sentencing disparity by creating a sentencing system whereby a judge must choose a sentence from a fairly narrow range.

Expanding the use of alternatives to incarceration may also compete with the objective of deterrence in sentencing. While alternatives to incarceration may address the just punishment and rehabilitation purposes of sentencing, fairly short prison terms followed by supervised release can also serve these objectives while providing an adequate deterrent to criminal activity. The threat of spending time behind bars is a powerful deterrent for many would-be offenders, particularly white collar offenders, and should not be jettisoned lightly.

We also see no reason to expand the use of alternatives to additional offenders when we understand from the Commission's research that the current options are underutilized. A more constructive option would be for the Commission to educate judges and prosecutors on the current alternatives. It would seem more appropriate to consider expanding the availability of alternatives after more experience has been gained with the current options available. While the Department might consider the desirability of increasing the types of alternatives available under the guidelines, support for the creation of new, intermediate punishments does not require support for their application to a greater number of offenses than are now subject to non-incarceration sentences.

The Commission specifically requested comment on whether the options listed under Amendment 29 should apply to all defendants at the offense levels specified or whether an offense-by-offense approach should be adopted. The Department believes that, if any

of the options are put into effect, certain offenders should be excluded: white collar offenders generally, those who have abused a position of trust, those convicted of firearms or controlled substance trafficking offenses, and those who have been sentenced previously for a similar offense.

One of the objectives of the sentencing guidelines was to ensure sentences for white collar offenses that are appropriate to the severity of the crime. In general, the guidelines resulted in longer sentences for these offenders. See, e.g., guideline §2T1.1, background commentary. The Department believes strongly that the fairness instituted by guideline punishments for white collar offenders should not be eroded by reducing the time served under the split-sentence option or by offering alternatives to imprisonment where currently there are none. The proposed criminal history Category zero (Amendment 28) would also contribute to this erosion of sentences for white collar offenders and in combination with the proposals expanding alternatives to incarceration would significantly rewrite the guidelines for these offenders.

In addition, the Department recommends that the Commission deny alternative sanctions to those who have previously committed a similar offense. It is obvious in these cases that the earlier sanction was insufficient to deter further similar criminal behavior. The offender needs to experience the full consequences available under the guidelines. Finally, firearms and drug

trafficking offenders should also be excluded because of the dangers they present to society.

SUBSTANTIAL ASSISTANCE TO AUTHORITIES (Amendment 34)

The Commission has proposed an amendment to policy statement §5K1.1 to eliminate the requirement that a motion by the government be made before a court may depart below the applicable guideline range to reflect a defendant's substantial assistance in investigating or prosecuting others. However, the amendment would retain this requirement in the case of departure below a mandatory minimum sentence.

We strongly oppose this amendment. It will result in routine requests by defendants for reduction of sentence and burden the courts unduly. Defense attorneys will view this area as an opportunity to escape guideline sentencing and argue for reduction in many unwarranted cases. The prosecutor is in the best position to determine whether a defendant has provided substantial assistance in investigating or prosecuting others. Even if the policy statement were amended as proposed, the court would have to give substantial weight to the government's evaluation of the defendant's conduct from the standpoint of substantial assistance, and the proposed amendment so directs. Finally, the government has an incentive to seek substantial assistance reductions where warranted in order to encourage defendants to cooperate. The Supreme Court has recently granted certiorari in a case presenting the issue whether a district

court has the authority to review the government's decision not to file a "substantial assistance" motion for a reduced sentence (where a mandatory minimum was applicable). United States v. Wade, 936 F.2d 169 (4th Cir. 1991); cert. granted, No. 91-5771 (1991). For all of these reasons, we urge the Commission to reject this proposed amendment.

SCHEDULE III, IV, AND V CONTROLLED SUBSTANCES (Amendment 7)

The Commission has asked for comment regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants so that violations of large quantities of these substances will result in higher sentences. We strongly urge the Commission to remove the current limitations on sentences for trafficking in these controlled substances. In our view the current provisions, which limit sentences to those applicable to 20 kilograms of the substances involved regardless of how much greater the actual quantities may be, are inconsistent with the overall approach of the guidelines.

Guideline §2D1.1 provides that a violation involving 20 kilograms or more of a Schedule I or II depressant or Schedule III substance results in offense level 20 (33-41 months for a defendant in the lowest criminal history category). The same sentence applies to 40,000 or more units of anabolic steroids. A defendant who violates the law by selling hundreds of kilograms of a Schedule I or II depressant or Schedule III

substance would be treated in the same manner as a defendant who sells 20 kilograms. Schedule I and II depressants are serious drugs of abuse and include, for example, methaqualone (Schedule I) and glutethimide (recently moved to Schedule II from Schedule III), which is used with codeine preparations as a heroin substitute. Schedule III substances include codeine preparations such as Tylenol or aspirin with codeine. The Department has prosecuted cases involving far larger quantities than 20 kilograms. Also included in Schedule III are anabolic steroids, which are often distributed illegally in large quantities because of the continuing nature of an athlete's abuse of this controlled substance. Yet, the guidelines treat sales of hundreds of thousands of units of anabolic steroids in the same manner as sales of 40,000 units.

If the current guideline reflects the concern that the guidelines should establish an offense level commensurate with the statutory maximum available, the guideline could still provide a much greater offense level for violations involving large quantities of Schedule I and II depressants, which are subject to a maximum 20-year term of imprisonment, 21 U.S.C. §841(b)(1)(C). Although the maximum term of imprisonment for offenses involving Schedule III substances is five years, 21 U.S.C. §841(b)(1)(D), offenses involving multiple transactions properly result in multiple counts, with the five-year maximum applicable to each count.

Guideline §2D1.1 also places an artificial limitation on sentences involving Schedule IV substances (level 12 for 20 kilograms or more) and Schedule V substances (level 8 for 20 kilograms or more). Schedule IV substances include, for example, Xanax, which has been abused in combination with Schedule I and II substances; and Halcion, which can produce temporary memory loss. Again, larger quantities of these drugs should result in longer sentences. This approach would be consistent with the operation of the drug guidelines for substances such as heroin and cocaine.

The extension of the guidelines for quantities of more than 20 kilograms of Schedule I and II depressants and Schedule III, IV, and V substances and more than 40,000 units of anabolic steroids would correct an unfortunate message the guidelines currently send to would-be violators -- that they may as well engage in large-scale violations since they may do so with impunity beyond the maximum quantities currently in the guidelines.

FRAUD INVOLVING FINANCIAL INSTITUTIONS (Amendment 6)

As we have repeatedly emphasized in letters and in testimony before the Commission during the past two years, the Department has serious concerns about the inadequacy of the guidelines for fraud offenses involving financial institutions. Thus, we strongly support the Commission's proposed amendment of guideline §§2B1.1, 2B4.1 and 2F1.1 to provide a four-level enhancement for

theft and fraud offenses which affect a financial institution, in addition to other enhancements already in these guidelines.

We believe adoption of amendment 6 is critical if the guidelines are to properly reflect the dramatic increases in the penalties for financial institution fraud enacted by Congress during the past several years. Congress has made the maximum terms of imprisonment for ten major title 18 bank fraud and embezzlement offenses as much as 15 times greater than they were in 1988, sending what is clearly a strong signal that individuals whose criminal conduct jeopardizes the integrity of our nation's banking system should receive harsh sentences, including lengthy periods of incarceration. The current guidelines are clearly inadequate and were structured for these fraud offenses as they existed before 1988, with two and five year maximum penalties. See guideline §2F1.1, background commentary. We believe that in raising the maximum penalties for major bank fraud offenses six-fold and more, Congress intended that the sentences be increased over the entire range of offense levels, including those at the lower and middle levels. The proposed amendment would do just that.

In summary, we strongly urge the Commission to adopt amendment 6 in order to respond to the Congressional determination that defendants convicted of fraud affecting a financial institution in the majority of fraud cases be subject to substantially greater punishments. Our testimony with respect to the fraud and theft guidelines is limited to amendment 6

affecting financial institutions. We believe significant revisions to the fraud and theft amendment 5 are needed; the Department will discuss these in other comments to the Commission.

We also will provide comments on a number of other proposals published by the Commission, including our opposition to the proposal to end alleged "double counting" in environmental offenses and our support for increased sentences for violations of wildlife protection statutes.

This concludes my prepared comments. I will be happy to answer any questions you may have.

Notice Cont.

#13

STATEMENT

of

VINCENT L. BRODERICK, Chair,

Committee on Criminal Law

Of the Judicial Conference of the United States

and

MARK L. WOLF, Chair,

Subcommittee on Sentencing Guidelines and Procedures

before the

UNITED STATES SENTENCING COMMISSION

February 25, 1992

Introduction

We speak on behalf of the Judicial Conference of the United States. The Judicial Conference, through its Committee on Criminal Law and its predecessors, has been involved with the Guidelines since the beginning, and has been mandated by Congress to comment on the operation of the Guidelines and to assess the work of the Commission.

In partial discharge of that mandate the Judicial Conference in September, 1990 submitted eight recommendations to the Commission, expecting that they would be considered in connection with the 1991 amendment cycle. They were not. We have already -- and on several occasions -- expressed to the Commission our concern that the considered

recommendations of the Judicial Conference were being slighted. We were given to understand, however, that those recommendations were being carefully analyzed by the staff of the Commission, and welcomed Chairman Wilkins' assurance to the Judicial Conference at its September, 1991 meeting that in its 1992 amendment cycle the recommendations of the Judicial Conference (along with those of the Corrothers Committee, on which the Chief of the Administrative Office's Probation Division and the chair of the Criminal Law Committee served) would receive primary focus. We are gratified that they have.

The Judicial Conference recognizes that the Sentencing Commission has been deprived of a level playing field by statutorily required mandatory minimum sentences, and thus has welcomed the splendid report of the Commission to Congress on mandatory minimums and the havoc they have created in the sentencing area. The Judicial Conference and the judges of all the circuits involved with criminal sentences have adopted resolutions in opposition to mandatory minimums. We all recognize that until the preemptive effect of mandatory minimums is eliminated, the work of the Sentencing Commission will necessarily -- despite the best intentions of the members of the Commission -- be skewed and flawed. We enthusiastically support, therefore, the implicit recommendation contained in the Commission's report on mandatory minimums that they be repealed. Recognizing that an "effective, humane and rational sentencing policy" cannot be developed within a mandatory minimum regimen we suggest that next year, in connection with or, indeed, in lieu of an amendment cycle, the Commission make

recommendations to Congress, pursuant to 28 U.S.C. § 995(a)(20), to modify those statutes which presently mandate minimum sentences.

It has been -- and is -- the position of the Judicial Conference that it will work to improve the Sentencing Guidelines, and not to abolish them. Thus it rejected, more than a year ago, a recommendation tentatively proposed by the Federal Courts Study Committee that the Guidelines be made optional. It recognized, as indeed did Congress (see 28 U.S.C. § 994(m)), that in the first instance the starting point for certain Guidelines would be the average of sentences historically imposed, and that only in time would Guidelines be developed which would conform in all particulars to the statutory purposes of sentencing.

A primary tool in the development of "an effective, humane and rational sentencing policy" is the statutory authority which a judge has to depart when, in determining the sentence to be imposed, he finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" by the Commission in formulating the Guidelines. We have discussed the importance of this power to depart many times with the Commission, and it has certainly been our impression that the members of the Commission agree that departure by judges in appropriate cases, and the careful consideration of the rationales for those departures by the Commission, will be essential elements in the meaningful development of the Guidelines.

But year after year the Guidelines Manual has contained language which suggests to judges that departures are inappropriate. I refer to Chapter One, Part A, §4(b) of the current Manual. It sets forth, in a self-fulfilling prophecy, that the Commission believes "that despite the courts' legal freedom to depart from the guidelines, they will not do so very often;" and that while it believes there may be cases in which a departure outside suggested levels is warranted, in its view "such cases will be highly infrequent." This language has undoubtedly discouraged departures by judges where departure was compellingly indicated: it has strongly suggested to some appellate judges -- particularly those who have not had sentencing experience -- that departures constitute rejection of the Guidelines, and are a form of what the Commission formerly (and happily no longer) characterized as "non-compliance."

The text of the Introduction to the Guidelines Manual is not part of the Guidelines. It can be changed by the Commission itself. It should be changed -- for two very good reasons.

The first reason is that the Guidelines at the present time are still largely a "heartland." The Commission has not yet had the experience -- or the input from the field -- that justifies any given Guideline on more than a tentative basis. That input will come from sentencing judges if they understand that their explained departures -- up or down -- and the Commission's consideration of the basis for those departures, are the best hope for the ultimate achievement of fairness in the sentencing process.

The second reason is that we must not let ourselves drown in large numbers. The Commission provides Guidelines for a statistical universe: each time a judge sentences there is not only a factual pattern before him but there is an individual, different from every other individual in the world. Circumstances which differentiate that fact pattern and that individual from all others are circumstances which judges should be encouraged to consider in determining whether the statutory standard for departure -- up or down -- has been met. If it has been met the judge has a duty -- not a right but a duty -- to depart, and the discharge of that duty should be encouraged by the Commission. We respectfully recommend, therefore, that just as "non-compliance" language has been eliminated from the Commission's lexicon, the Introduction to the Manual which presently discourages departures should be revised.

The Judicial Conference has exhibited considerable restraint, to this point, in suggesting amendments to the Guidelines. Those proposed amendments it did suggest 17 months ago, and which are reflected in the array which the Commission now has under consideration, were carefully drafted and subjected to intensive scrutiny by sentencing judges and by the Committee on Criminal Law before they were finally approved by the Judicial Conference. Other recommendations were considered and rejected. Many of the same problems which these recommendations address were identified by the Federal Courts Study Committee. Appendix B of the Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines (hereafter "Report and Recommendations"), which is attached

and which was delivered to the Commission this past August, explains how the recommendations were developed, and references additional possible recommendations which were considered and rejected.[1]

The pendency of these recommendations -- and the confident expectation that they will be adopted by the Commission, together with the knowledge that the Commission through the Corrothers Committee was sensitive to and was forthrightly addressing many of the same problems which prompted the Judicial Conference recommendations -- have acted as a brake on a strong movement within the judiciary more aggressively to confront manifest inequities which are occasioned by application of certain of the Guidelines in their present form. Many federal judges are unhappy with the Sentencing Guidelines -- these judges believe that to a great extent the Guidelines have sacrificed fairness on the altar of uniformity; that they have introduced disparities of their own; that their application often results in sentences which are disproportionate to the offense of conviction; and on the other side of the coin that some of the Guideline offense levels are unduly lenient. Several requests by individual judges and by local associations of judges have been made to the Judicial Conference and to its Criminal Law Committee to initiate independent studies of the Sentencing Guidelines; some have asked for a drastic overhaul of the Sentencing Guidelines system. We have opted, to this point, to refrain from confrontational activity and on a cooperative basis to seek necessary changes in the system.

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[1] There is attached to this statement a copy of the Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines.

We stress this to underline the importance which the Judicial Conference, representing the federal judiciary, places upon the adoption of its recommendations at this time.

We comment on those proposed amendments which encompass, in whole or in part, the recommendations of the Judicial Conference. In making those comments please understand that we speak on behalf of, and with the full authority of, the Judicial Conference of the United States. We are not in a position, representing the Judicial Conference, to make substantive comments on behalf of the Judicial Conference with respect to other 1992 proposed amendments which have been published for comment. The Judicial Conference is, in perhaps the best sense of the term, a deliberative body, and it takes time for it to decide matters which are presented to it. It has simply not been possible, through the relatively short window the Commission has provided between publication and time for comments, to give the Commission's 1992 cycle the comprehensive consideration it warrants. We discussed this matter with the Commission last year. We understand that there are statutory time restraints, but we suggest that some system be devised which will provide more time for consideration and evaluation of proposals published for comment.

We also suggest that there must be a reduction in the volume of annual amendments. The probation officers in federal service are a superb and highly intelligent group of public servants, and they have received excellent training by the Sentencing Commission in Sentencing Guidelines

matters. The yearly spate of amendments is, however, taking its toll. The publication of Appendix C may turn out to be of some help, but questions of retroactivity, or of substance versus clarification, are matters which non-lawyers should not be required, as a matter of routine, to deal with. Defense counsel and prosecutors are lawyers, but most defense lawyers (with the notable exception of federal defenders) have great difficulty in coping with a single volume of the Guidelines and do not understand that in may cases resort is necessary to more than one volume. It is hoped that, after the Commission adopts the amendments proposed by the Judicial Conference, a moratorium will be called on piece-meal amendments on a grand scale.

The practice of publishing numerous disparate possible amendments in the Federal Register, without meaningful explanation, makes it extremely difficult for us -- and almost impossible for others not so familiar with the Guidelines -- to understand the purposes of proposed amendments and to comment helpfully concerning them. Rather, we would urge that in the future the Commission build each generation of proposed amendments around a unifying theme, such as relevant conduct or acceptance of responsibility. We would further urge that the proposed amendments be accompanied by a Commission report setting forth the policy issues involved, indicating what approaches to those issues have been considered by the Commission, and describing the rationale for the amendments proposed. Such an approach, if coupled with early notice, would permit judges and others interested in federal sentencing matters to

participate with you in an informed and effective dialogue concerning the amendments proposed.

Comments on Proposed Amendments Which Reflect the Judicial Conference's Recommendations

First a general word about the Judicial Conference recommendations. The recommendations are aimed primarily at giving judges greater flexibility to tailor sentences to the individual within the Guideline structure. They are largely aimed at situations which affect the first offender at the lower end of the sentencing scale, where the possibilities are prison or no prison. They also address the situation of offenders for whom the offense level is affected by a determination of relevant conduct, with respect to which confusion has led to disparate and poorly-individualized sentences. The recommendations also seek to insure that explicit incentives for pleading guilty will be found within the Guidelines so that manipulation of the Guidelines can be reduced.

The comments which follow pertain to those published proposed amendments which reflect the Judicial Conference's September, 1990 recommendations.

1. Flexibility at the Low End of the Guidelines

A principal problem which the Judicial Conference recommendations addressed is the lack of flexibility at the low end of the Guidelines, with particular reference to first offenders. Before the Guidelines took effect, 40% of federal offenders were sentenced to terms of probation instead of imprisonment. For cases sentenced under the Guidelines, this number has dropped to 23%.[2] This is the area where acceptance of the Guidelines by judges has proven most difficult, and where judges see the greatest need for change.

In developing its recommendations, the Judicial Conference gave careful consideration to the structure of the current Guidelines and to the Commission's statutory mandate. The recommendations proposed modest changes to the Guidelines that would further the Congressional purpose of providing adequate flexibility to individualize sentences when warranted. 28 U.S.C. § 991(b)(1)(B). Most judges agree with Congress that the Guidelines should "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

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[2]The preGuideline probation rate comes from the D5 tables published by the Administrative Office of the U.S. Courts. In 1987 (excluding cases with fines only) probation was imposed in 40% of the cases (pp. 282-283, Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts (1987)). The guideline case figure comes from the 1990 Annual Report of the U.S. Sentencing Commission, Appendix B.

This is especially true given the demand on prison resources. The federal prison population has grown over 10% a year since 1989, and the federal prison system was crowded to 151% of rated capacity by the end of 1990. (Bureau of Justice Statistics, "Prisoners in 1990," May 1991). The proposed amendments that expand the availability of alternatives to imprisonment can help the Commission meet its statutory obligation to formulate Guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." 28 U.S.C. § 994(g).

Proposed amendment 29 includes six options which would increase the within-Guidelines sentencing options at the lower offense levels. We urge the Commission to adopt Options 1 through 3, which would implement three of the Judicial Conference proposals. Attachment A shows how the zones on the Guideline table where alternatives are permitted would be changed by these proposals.

Option 1: Option 1 would eliminate the requirement that offenders sentenced under the Commission's "split sentence" provision must serve at least one-half of the minimum Guideline range in prison. This would let the court determine the appropriate mix of imprisonment and confinement conditions when imposing a "split sentence." The proposed change would maintain the current structure of mandating some period of imprisonment, but would recognize that a briefer period of prison would serve the purpose of "shock incarceration."

Option 2: Option 2 would extend the alternative of probation with a condition of intermittent confinement, community confinement, or home detention to offense levels with minimum terms of imprisonment of up to and including 10 months. It thus extends this alternative to offenders who are currently eligible for only the "split sentence" option. The proposal continues to provide for, but does not mandate, a "split sentence" where it is now permitted. It also incorporates the redefinition of the split sentence as proposed in Option 1.

Allowing judges to set the mix of prison and alternative confinement in split sentences, or to require substitute punishments such as home confinement, will ameliorate the "cliff" between the lower Guideline ranges and those just above them, where imprisonment for at least the minimum term of the Guideline range would still be required. Offenders sentenced to a split sentence, or to probation with alternative confinement, will lose much of their liberty and will be punished; the court would have discretion only to choose the place of confinement in view of the other purposes of sentencing. We believe such changes would also better enable the court to implement other statutory directives, such as consideration of the need to provide correctional treatment in the most effective manner and the need to provide restitution to victims, while still providing just punishment for the offense.

Options 3 and 4: Option 3 would expand the availability of straight probation to two additional offense levels within Criminal History

Category I. The Guideline range in these cells would be changed to 0-6 months from their current ranges of 1-7 and 2-8 months.[3]

Option 4 would expand straight probation to three additional Guideline cells, one each at Criminal History Categories I to III.

We recommend Option 3 rather than Option 4. Straight probation is more appropriate for first offenders, who present less risk to the public, than for repeat offenders.

Option 5: While the rationale of the Judicial Conference's recommendations would suggest the desirability of expanding the availability of alternative approaches to sentences to the extent consistent with the purposes of sentencing under 18 U.S.C. § 3553(b), the Judicial Conference has not specifically considered or passed upon Option 5.

The Commission has requested comment on whether it should adopt an "offense-by-offense" approach, under which certain types of offenders, such as white collar offenders, would be excluded from eligibility for alternatives (Amendment 29, question 2). We oppose this approach as it would reduce the flexibility of the sentencing court. The Commission has already addressed what it considered the inadequacy of historical sentences for white-collar offenders in establishing starting offense levels in Chapter 2. Our Report and Recommendation (page 16) contained data

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[3] The "Reason for Amendment" section in the Federal Register at p. 110 misstates the guideline ranges for which the 0-6 would be substituted.

showing that the Judicial Conference proposals would not create leniency for white-collar defendants, and we have seen no new data suggesting that they would. Any effort further to constrain judges' sentencing options should be based only on clear evidence that they are somehow being misused.

The Commission has also requested comment on whether the Amendment 29 proposals "compromise the structure of the guidelines as originally drafted" (Amendment 29, question 1). They do not. The Judicial Conference in deciding upon its recommendations gave careful consideration to the structure of the current Guidelines. None of our proposals would compromise the structure of the Guidelines as originally drafted. The newly expanded zones and ranges under our proposals would comport with the Commission's table construction principle of overlapping ranges across two offense levels and one offender category.

Finally, we respond to a question raised by Commissioner Nagel at the last meeting of the Criminal Law Committee, and repeated by other Commissioners and staff. Since data show that alternative punishments are imposed on only a proportion of offenders currently eligible for them, why are new options needed? National figures for October 1989 through September 1990 show that only 70% of persons eligible for straight probation, only 32% of those eligible f or alternative confinement, and only 16% of those eligible for split sentences actually received those options. Since judges are not using the options that are available now, is there a need to expand the availability of alternatives?

There is. These data should in fact reassure the Commission that if it expands the availability of sentencing options, they will not be used in inappropriate cases. If judges always used options when they are available, they would be subject to the criticism of failing to take account of circumstances in individual cases that call for imprisonment instead of one or more of the available alternatives. But, as the data cited shows, judges do exercise discretion.

In any event, the number of offenders who are presently eligible for, but do not receive, a sentencing alternative does not speak to the need for expanded options. What matters is the number of presently-ineligible offenders who do deserve consideration for an option not now available for them. With respect to many offenders now falling in ranges where only limited options are available, it would be appropriate to consider straight probation or another alternative to imprisonment. Even if less than half of all the defendants eligible for alternatives under our proposals actually receive them, thousands of people will in the long run be diverted from prison to alternatives that are better-suited to the purposes of sentencing.

Some alternatives, such as half-way houses, are not available everywhere. Nation-wide implementation of home confinement has been complete only for a few months. By far the largest number (46%) of defendants placed under home confinement in the fourteen districts to which it was expanded last year were placed there as a condition of probation. Of the 597 persons who had been terminated from the home

confinement program through October 1991, 81% completed it successfully. Of the failures who were sent to prison after an unsuccessful period in home confinement, most were for technical violations (e.g. failure to return home promptly after work, or a positive drug test). Seven absconded, and 10 committed new offenses while under supervision. (Report of the Probation Division of the Administrative Office to the Committee on Criminal Law, December 1991.)

These alternative programs deserve further encouragement. We will continue our work with the Probation Division of the Administrative Office and with the Federal Judicial Center to educate judges and probation officers in the use of alternatives and to monitor the track record of these programs.

2. Relevant Conduct and Role in the Offense

Judges have been troubled that under the Guidelines they have imposed draconian sentences on drug "couriers," "cooks," "mules" or other persons who were essentially minor cogs in drug distribution machines controlled by others. These people often knew little about the overall scheme, received little benefit, and were dramatically less culpable than the "kingpins" whom they served.

The Judicial Conference recommendations in this area were predicated upon a general sense that egregious sentences for such defendants often resulted from the inclusion of large amounts of drugs in

the base offense level, through application of the relevant conduct Guideline. A close reading of the Guideline and its accompanying commentary suggests that this broad interpretation is not the only possible reading of the Guideline, and may not have been the intended reading. But the complicated structure of the Guideline and related commentary has led many probation officers and judges to neglect limiting language about foreseeability or scope of the defendant's agreement, and to emphasize broad language about common schemes and plans.

Proposed Guideline Amendment 1 (A) contains much that can help courts tailor relevant conduct to each defendant. We applaud the consolidation of definitions from the commentary into the Guideline itself. It will help to ensure that defendants are sentenced only on reasonably foreseeable acts of others that are in furtherance of the jointly-undertaken activity.

Proposed revisions to the commentary and accompanying illustrations also contain some helpful definitions and examples. We are still troubled, however, that taken as a whole, it remains difficult to discern the precise contours of relevant conduct from the proposed amended Guideline and commentary. The illustrations do not all seem consistent with the Guideline, with each other, or with how relevant conduct has been understood in the courts. Reading the illustrations, it is not immediately obvious how one arrives at the "right" answer. This portends continuing trouble, and suggests that the proposed amendment

may not be enough to end disparate application or appropriately to limit the sentences for low-level participants.

A few examples may illustrate the continued complexity of the Guideline under the proposed amendment. To make sense of the illustrations (e.g. drug dealer's girl friend accountable only for the one drug transaction she participated in, even though she knew of boy friend's other activity; street-level dealer accountable only for amount he sells, even though he knew of others selling for same supplier, unless they pool resources and profits) one must understand that determining whether an activity was "jointly undertaken" is a crucial step in applying the Guideline. The proposed new commentary asserts that determining "the scope of the criminal activity the particular defendant agreed to jointly-undertake is required." And, indeed, the illustrations can be harmonized if we understand that the scope of a defendant's agreement limits his liability.

But this is not exactly what the proposed amended Guideline says. It says that "all reasonably foreseeable [conduct] of others in furtherance of the jointly-undertaken criminal activity" may be attributed to a defendant. The commentary and the illustrations appear to be narrower than the Guideline language. If the Commission intends to limit the scope of relevant conduct further it needs to say so clearly and explicitly.

The commentary to the proposed Guideline may complicate application. The first illustration indicates that if a defendant aids and

abets a criminal activity (e.g. helps off-load a ton of marijuana from a ship), it makes no difference what the scope of his agreement was, nor whether he could foresee the amount of drugs involved -- he is liable for the whole thing. Aiding and abetting "trumps" other limitations. But the distinction between an aider-and-abettor and a co-conspirator is a slippery slope at best. It seems arbitrary and unrealistic to suggest that if a defendant is a co-conspirator, his liability is limited to what he understood to be the scope of his involvement in the conspiracy; but if one is labeled an aider-and-abettor, he is liable for the entire operation no matter how limited his knowledge.

The Guideline and commentary contain so many confusing phrases that both limit and expand the scope of relevant conduct -- e.g. "common scheme or plan," "foreseeable," "in furtherance of," "jointly- undertaken," "scope of the agreement" -- that we think consolidation and simplification are needed more than new definitions and new phrases. While the definitions offered in Part (B) of the amendment may be addressed to some of this confusion, we question how useful they will be. The proposed 120-day limitation seems especially troublesome.

The relevant conduct Guideline is not working fairly in its present form; change is needed. The problem of disproportionate sentences for low-level participants could be solved if a way could be found to allow courts to fix the defendant's offense level based on the reasonable scope of the particular defendant's involvement. Some of the language contained in the commentary -- limiting relevant conduct to the scope of the

defendant's agreement, based in part on his knowledge and the benefit he derived from the joint activity -- moves us in this direction. But we are concerned that the presently proposed amendment and comment may not be clear enough, and we hope that you will improve it before submitting it to Congress this year. The scope of relevant conduct for defendants should be limited, and this amendment will constitute a welcome change from current practice in some circuits. But there should be some commentary that makes it clear -- directly and explicitly -- that such limitation is the purpose of the amendment.

3. Capping the offense level for minimal participants

Evidence suggests that, historically, "role in the offense" has been a more important sentencing factor than drug amount in the sentencing of lower-level drug offenders. (Memo on file at the Federal Judicial Center.)

Amendment 19 would set caps on the offense level of minor or minimal participants. Proposals by the Commission to cap the offense levels of minimal participants provide a useful supplementary approach to the proposals which the Judicial Conference made with respect to relevant conduct and role in the offense. While this "cap" approach has not specifically been reviewed by the Judicial Conference we have no hesitancy in supporting it as a supplement to the Conference's recommendations.

Of the three Options proposed in this amendment, we prefer Option 3. First, we believe that these caps should apply only to minimal

participants, not minor participants as in Options 1 and 2. Judges can then use their discretion to cap the offense level for truly low-level participants, such as those who are paid a one-time fee for acting as a "mule." Second, the type of drug involved, taken into account in Option 2, is not as relevant in these cases as is the fact of the defendant's minimal role. Finally, we believe that the cap should be low. We endorse offense level 16 as suggested in the proposed amendments, because it is the lowest point proposed. We would prefer, however, to have the cap set at 14, so that with the acceptance of responsibility adjustment, first offenders would be eligible for "shock incarceration" or other sentencing alternatives.

4. Departures

The proposed amendments include several which reflect the recommendations of the Judicial Conference concerning departures. Amendment 26, part (B) addresses the Judicial Conference's concern with departures based on the adequacy of the criminal history score, and we urge its adoption. It would clarify that departures due to the inadequacy of the criminal history score may be based on either degree of risk or type of risk. This clarification was proposed in response to concern that the Guidelines do not give enough flexibility to depart upwards based on offender dangerousness.

Amendment 26, part (A) addresses the problem of offenders with extensive criminal histories for whom Criminal History Category VI is inadequate. We favor the departure approach in Option 2, which gives

judges advice about which factors to consider and how to structure the departure. This approach is preferred to adding a new Criminal History Category VII to the Guideline table, as described in Amendment 28, part (B).

5. Offender characteristics

The area of offender characteristics has been of deep concern to judges, and we recommend that the Commission adopt Proposed Amendment 33, part (A). This simple change would send a clear signal that judges are encouraged to look for offender characteristics that are present to an unusual degree or in unusual combinations, and that they should depart if the purposes of sentencing would be served. Part (B) also puts symmetry into the policy statement on age, so that offenders who are young and less culpable may benefit from departures when appropriate.

Parts (C) and (D) do not seem advisable to us at this time. Ambiguous standards such as "lack of youthful guidance" in Part (C) are likely to make the sentencing hearing a battleground over discrete factors that are poorly defined. A departure for advanced age as in Part (D) is addressed to a real concern -- our aging prison population. But this important problem needs additional study.

6. Acceptance of responsibility

We applaud the serious study the Commission has given the "acceptance of responsibility" Guideline, as reflected in Proposed Amendment 23. The Judicial Conference recommended that the Commission reconsider the "acceptance of responsibility" Guideline to address our concern that the incentives to plead guilty are sometimes not adequate, especially at the upper end of the sentencing table. Absent adequate incentives within the Guidelines, manipulation and use of surrogate incentives may result, which would undermine the Guidelines System and lead to disparity.

As to Option 1 the Commission seeks comment on ways to clarify the scope of conduct for which a defendant must accept responsibility. The central question is whether a defendant must accept responsibility for both the offense of conviction and any additional relevant conduct. There is a split in the circuits as to the constitutionality of requiring a defendant to accept responsibility for more than the offense of conviction. The constitutional issue would be eliminated if the Guidelines were amended to require acceptance only for the offense of conviction. This would also permit elimination of the somewhat murky language in the present Guideline requiring that the defendant accept responsibility for "his criminal conduct."

The reduction for pleading guilty should be increased above the current two levels, especially for crimes at higher basic offense levels. At

least a three-level reduction should be allowed, but not required, for a guilty plea. The addition of a separate one-level reduction for other convincing demonstrations of acceptance of responsibility, such as assistance in the recovery of fruits of the offense, etc. would be useful.

Conclusion

We appreciate the consideration given the Judicial Conference recommendations this amendment cycle, as well as your attention to the other suggestions made by judges and probation officers for improvements to the Guidelines. We note with approval, for example, Amendment 31 that addresses a request from probation officers to simplify the application of Guideline § 5E1.2(b) concerning the setting of fines.

With continued communication and cooperation between the courts and the Commission, we believe the Guidelines System can be improved so that the experiment in sentencing reform begun in 1984 will bear fruit.

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1-7~~ 0-6	2–8	4–10	8–14	12–18	15–21
8	~~2-8~~ 0-6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
B 10	6–12	8–14	10–16	15–21	21–27	24–30
B 11	8–14	10–16	12–18	18–24	24–30	27–33
C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

Report and Recommendations

of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines

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Appendices

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Why the Judicial Conference has recommended changes in the Sentencing Guidelines

In late 1989, the Federal Courts Study Committee (FCSC) published a draft report regarding methods to improve the efficiency of the Federal courts. This report cited problems in the workability of the new Sentencing Guidelines that had been reported to the FCSC in its questionnaires and at its hearings. The FCSC sought comment on its tentative recommendations prior to submission of its final report to Congress. At the January 1990 meeting of the Judicial Conference Committee on Criminal Law and Probation Administration, the Committee members considered those FCSC tentative recommendations that would affect the operation of the criminal courts. One such recommendation was to make application of the Guidelines advisory rather than compulsory for the sentencing judge.

After considerable deliberation, the Committee, noting that the Guidelines system had been fully operational in the courts for less than one year, determined not to support making the Guidelines merely advisory. However, the Committee agreed with one of the findings of the FCSC that Federal judges need more flexibility in sentencing than are afforded by the Guidelines, particularly at the low end of the guideline table. As an alternative to the FCSC recommendations, the Committee decided to develop proposed modifications of the Guidelines, to be considered by the Judicial Conference for recommendation to the U.S. Sentencing Commission. The proposals would be aimed at giving judges more flexibility within the constraints of the Sentencing Reform Act of 1984.

The Judicial Conference accepted the Criminal Law Committee's position concerning the FCSC proposals,[1] and authorized the Committee to develop recommendations for amendments to the Guidelines for approval by the Conference. The 1990 recommendations were developed and approved by the Committee, and endorsed by the Conference. They address some of the problems identified by the FCSC and by the Criminal Law Committee, with advice from judges throughout the country.

The goals of the recommendations

A principal problem which the recommendations were intended to address is a lack of flexibility available to judges at the low end of the Guidelines, with a concomitant emphasis upon prison as a sentence for first offenders. This was seen as violating the carefully structured statutory imperative that the Guidelines should "reflect the general appropriateness of imposing

[1]The final report of the Federal Courts Study Committee agreed that it was inappropriate to recommend that the Sentencing Guidelines be made advisory, but rather called for further study of the impact of the Guidelines.

a sentence other that imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" (24 U.S.C. §994(j)).

The Guidelines developed under the Commission's empirical approach---which relied substantially on the mainstream of past sentencing practice---work well to inform judges what the average imprisonment for various types of crimes and offenders has been. They thus help judges identify in each case a fair sentence, and they restrain those who might otherwise have imposed an atypical sentence, due to lack of familiarity with general practice or to idiosyncratic sentencing philosophy. The departure power gives judges the additional discretion they need when the Guidelines have not taken into account an important factor present in a given case. The Guideline system has generally been accepted and faithfully implemented.

The Guidelines can create problems if they impair a judge's ability to fashion a fair sentence in an unusual individual case. They can also create problems if they so reduce sentencing options and explicit plea bargaining incentives that the system becomes unfair or unworkable. For the Guidelines to be properly applied and serve the interests of the administration of justice, as well as the equities of individual cases, they should accommodate the need of judges for sentencing flexibility and of prosecutors for negotiating flexibility. The 1990 Judicial Conference recommendations seek, among other things, to ensure that explicit incentives will be found within the Guidelines so that prosecutors will not resort to, and judges will not accept, plea agreements that misrepresent the real offense.

The specific recommendations

The 1990 Judicial Conference recommended revisions to the Guidelines are attached in Appendix A.[2] The Judicial Conference recommendations were carefully selected, after debate and deliberation, from a much larger number of proposals. The history of how the recommendations were developed, including proposals that were rejected, is found in Appendix B. The final recommendations are summarized below:

1. **Redefine the split sentence to require at least a month of imprisonment, but not 50% of the minimum term.**

2. **Remove the requirement for some term of imprisonment in cells with minimum terms of 7 to 10 months, permitting the use of currently available substitutes at current ratios.**

3. **Permit straight probation at two additional offense levels for category I offenders.**

4. **Revise the policy statement pertaining to age to permit, in limited circumstances, departure for young offenders.**

5. **Add an application note clarifying that departures may be appropriate when offender characteristics are present to an unusual degree, and combined in ways important to sentencing purposes.**

6. **Clarify policy statements pertaining to departures for dangerousness.**

7. **Clarify the relevant conduct Guideline to ensure that offense levels are tailored to individual culpability.**

8. **Consider modification of the acceptance of responsibility Guideline.**

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[2] Please note that this version has been revised from the version originally transmitted to the Commission by letter on September 28, 1990, and the copy attached to the March 5, 1991 testimony of Judges Vincent Broderick and Mark Wolf before the Commission. The revision eliminates some typographical and editing errors and takes account of amendments to the Guidelines proposed since these recommendations were first made. The red-lining format has been changed to be compatible with that used by the Commission in the Federal Register. Appendix A should replace previous versions.

Types of offenders for whom judges need greater flexibility than is now available

The Judicial Conference recommendations would permit judges to tailor a suitable sentence for some persons for whom no presently available option is practical, or where the multiple goals of punishment, deterrence, protection of the public, and provision of training and treatment are most efficiently met with a sentence not now available. The examples below, based largely on decided cases, show where the recommendations create the flexibility needed for a sentence that better fits the offense and offender than options now available.

1. Redefine the split sentence to require at least a month of imprisonment, but not 50% of the minimum term.

Defendant X was office manager for a federal government agency in a midwestern town. Part of his responsibilities included maintenance of a petty cash fund for office supplies. Over the course of several months, he took amounts from petty cash to spend at the race track. In his final weeks at the job, his performance deteriorated and his stealing increased. The total taken was over $5,000. With the adjustment for more than minimal planning and acceptance of responsibility, the offense level was 9. The probation officer's criminal record check revealed that the defendant had been convicted of minor gambling offenses twice in the past decade. He was given probation both times. The defendant reported that he had made great progress through Gamblers Anonymous until recent financial problems increased his stress level. His criminal history category is II, resulting in a Guideline range of 6-12 months. The judge's options are 1) probation with some form of home, community, or intermittent confinement for 6-12 months, 2) prison for 6-12 months, 3) prison for at least 3 months, with the remaining 3-9 months in alternative confinement.

In many cases, the present Guidelines force a choice between a term of imprisonment that is longer than needed, or no imprisonment at all. A judge may want to give some prison time to punish the offender who is slipping back into criminal habits and to send a clear signal to the community. But 3 months is longer than necessary, and could be counter-productive. Prison could introduce the offender to new criminal lifestyles and would tax crowded prison facilities. With a term of less than 6 months, no treatment for his compulsive gambling would be attempted during his imprisonment. After the first month of imprisonment, there are diminishing returns both in general deterrence and punishment value. The difference between one and five or even three months in prison will, for some defendants, be the difference between losing or keeping their jobs, finding family to care for children, or being able to make prompt restitution. Judicial Conference recommendation 1 would allow a sentence of one

month shock incarceration followed 5 months of home confinement, with a condition that he attend a community treatment group for compulsive gamblers.

2. Remove the requirement for some term of imprisonment in cells with minimum terms of 7 to 10 months, permitting the use of currently available substitutes at current ratios.

Defendant and her husband were arrested after search of a suspicious package delivered from Florida to their home in Maine. Secreted in the package were two ziplock plastic bags, each containing 30 grams of cocaine. Defendant told the probation investigator that she went along with her husband's dealing in order to buy things and pay her bills. She described the affair as "a living nightmare." At the time of sentencing she was 7 months pregnant and frightened, not knowing what was going to happen to her, her husband and baby, and their home. Her husband agreed that she had nothing to do with the drug business beyond enjoying the financial benefits. The judge applied the adjustments for acceptance of responsibility and minor participant. He also concluded that the defendant got into this matter because she loved her husband despite his drug habit, and that her pregnancy, their marital relationship, the effect of her husband's punishment on her, and the lack of a halfway house in Maine justified a downward departure. The Court of Appeals reversed. The applicable Guidelines call for 10-16 months of imprisonment, half of which can be served in home, community, or intermittent confinement. See U.S. v Pozzy, 902 F.2d 133 (1st Cir. 1990).

Recommendation 2 would permit the judge to impose 10 months of home confinement in lieu of imprisonment, or combined with Recommendation 1, would permit a judge to impose just one month of shock incarceration, with the remaining time in home confinement. The home confinement could be electronically monitored and include random drug testing and drug treatment. Fines could be imposed to deprive the defendant of the financial benefit of any of her husband's illegal activity.

3. Permit straight probation at two additional offense levels for category I offenders.

Defendant B participated in a scheme to embezzle $7,500 from a bank in a small Tennessee community. Because more than minimum planning was involved, and because she showed remorse, the adjusted offense level was 8. Under the Guidelines, the judge could impose 1) 2-8 months in prison, 2) 2-8 months in

community, home, or intermittent confinement, or 3) 1-4 months in prison with 1-4 in a half-way house. The judge in the case departed to impose 3 years probation due to the degree of remorse, community and family ties, promptness of restitution, the aberrant nature of the conduct, and the victim bank president's recommendation of clemency. On Appeal the Circuit Court found these grounds inadequate to warrant departure.See U.S. v Brewer, 899 F.2d 503 (6th Cir. 1990).

Some jurisdictions do not have half-way houses or a home confinement program. This leaves only the options to imprison or to send to a half-way house in another city. Many judges feel prison is a waste of space for offenders like this, and a half-way house is better used to ease hard-core offenders back into life outside of prison. Under Judicial Conference recommendation 3, judges would have the option of probation for remorseful first offenders convicted of embezzling less than $10,000, if other offender characteristics justified a non-prison sentence; they could, however, still impose a prison sentence if deemed appropriate. Similarly, remorseful first offenders convicted of growing 10 to 25 marijuana plants could be given a sentence of probation with drug testing and treatment, rather than the 2-8 months of confinement now required.

4. Revise the policy statement pertaining to age to permit, in limited circumstances, departure for young offenders.

Defendant was a 19-yr-old in his first year of college. He purchased 25 doses of "blotter" LSD, which he planned to resell at a party in his fraternity house. His roommate told the probation officer that it was common practice for members to purchase drugs for resale to other members at parties, and that this was considered an occasional "duty" much like helping to clean the house. The defendant has no prior criminal record. With the adjustment for acceptance of responsibility, the offense level is 16, and the guideline range is 21-27 months imprisonment with no alternatives to incarceration available.

For some young first offenders, the terror of arrest and a short term in jail is enough to turn them from the influence of peers and drugs and back onto a productive path. Two years in prison, however, may permanently embitter them. A departure from the applicable guideline range, as would be permitted under Judicial Conference recommendation 4, can better serve the statutory purposes of sentencing. Combinations of a short period of imprisonment, home confinement, and drug testing can help ensure that the offender turns away from drugs and permit him to continue his education and the development of a productive career.

5. Add an application note clarifying that departures may be appropriate when offender characteristics are present to an unusual degree, and combined in ways important to sentencing purposes.

Defendant was a 64-yr-old man with no criminal history, who had recently required repeated surgery to reduce a brain tumor. He was president of a trucking company which had engaged in a check-kiting scheme, where insufficient-funds checks were perpetually circulated between accounts at two banks. The total overdraft reached $219,000 before the scheme was discovered. The remorseful defendant developed a plan for voluntary restitution before conviction, resulting in repayment of all but $20,000 prior to sentencing. With the acceptance of responsibility adjustment, the guideline sentencing range was 12 to 18 months imprisonment with no options available. The court departed downward and imposed a sentence of one month imprisonment, two years supervised release (including the first thirty days in a community treatment center), full restitution, reimbursement of the costs of confinement, and 200 hours of community service. Reasons for departure were: (1) the age, and (2) physical condition of the defendant, (3) the probable successful completion of a plan of restitution, and (4) that the offense was a single act of aberrant behavior. On appeal, the Circuit Court determined that none of the four reasons could individually justify a departure, and that the cumulative effect of characteristics not individually legitimate was also insufficient. The sentence was vacated and remanded for resentencing under the guidelines See U.S. v. Carey, 895 F.2d 318 (7th.Cir 1990).

Judicial Conference recommendation 5 is addressed to unusual cases such as this where the "total picture" created by a combination of offender characteristics suggests that sentencing goals can best be met with a sentence outside the guideline range. Some defendants who present no danger to the public can be adequately punished by a short period of imprisonment in combination with community confinement and other non-incarcerative sanctions. Restitution can be completed more promptly if the defendant can continue working.

6. Clarify policy statements pertaining to departures for dangerousness.

The defendant's present offense was drug trafficking, but the indictment included a count of assault on the arresting police officer. The presentence report revealed an additional history of dangerous behaviors. The defendant had been arrested for driving while intoxicated several years ago, but the charge was reduced and he was convicted only of improper parking. One year before the present offense he was again arrested and convicted

of driving while intoxicated, and the year before that again for assault. These earned him three criminal history points and placed him in Criminal History Category II.

Policy Statement §4A1.3 encourages departures where reliable evidence suggests that the criminal history category does not adequately represent the seriousness of the defendant's past conduct. The Judicial Conference is concerned that in some cases, however, judges may not appreciate that they can depart if there is reliable evidence that the defendant is more dangerous than the typical offender in his criminal history category. Judicial Conference recommendation 6 clarifies that evidence concerning both the degree and the type of risk presented by a defendant should be taken into account when considering whether to depart.

7. Clarify the relevant conduct Guideline to ensure that offense levels are tailored to individual culpability.

Defendant was a first offender, indicted as part of a conspiracy on two counts of drug trafficking and one count of use of a firearm during a drug offense. She plead guilty to one trafficking count. Her role was courier. She met with other co-defendants and arranged to pick up a truck and drive it across the border, for which she was to be paid $5,000. Another co-conspirator met her in New Mexico, where they were both arrested. The co-conspirator was carrying a gun. Though given the reduction for acceptance of responsibility and for playing only a minimal role in the offense, the 2 kg. of cocaine found in the truck and the presense of a gun led to an offense level of 24, with a guideline range of 51-63 months in prison. She claimed that she was told only marijuana was involved and that she knew nothing of the gun. The probation officer, applying the relevant conduct guideline, determined that the full amount of the cocaine in the truck and the adjustment for possessing a gun during the offense applied to the defendant, since it was all part of the "same course of conduct or common scheme or plan as the offense of conviction." Guideline §1B1.3(a)(2).

Some courts have held that quantities of drugs or firearms possessed by co-conspirators should not be attributed to a defendant unless she was aware of them or should have foreseen them. This limitation, as well as one concerning the scope of criminal activity in which a defendant agrees to participate, can be found in the application notes to the relevant conduct guideline. But these limitations are often overshadowed by the "common scheme or plan" language found in the text of the guideline itself. Revising the guideline to clarify that knowledge, foreseeablity, and the scope of a defendant's agreement can be used to tailor the offense level, as suggested in Judicial Conference recommendation 7, could help prevent imposing disproportionate punishment on couriers and other minor participants in conspiracies involving large amounts of drugs or money.

8. Consider modification of the acceptance of responsibility Guideline.

The defendant entered a plea agreement which included factual stipulations that he was the manager of an operation to distribute 1 kg. of cocaine, and that he accepted responsiblity for his crime. These facts would give him an offense level of 26 and a guideline range of 63-78 months. After discussion with the case agent, the probation officer determined that the defendant was actually the leader of a larger conspiracy to distribute over 5 kg. of cocaine, leading to an offense level of 36 and a Guideline range of 188-235 months. If the defendant pleads guilty and accepts responsibility, this could be reduced to 151-188 months. The prospect of a twelve-and-a-half year sentence, even with a guilty plea, leads the defendant to withdraw his plea and take his chances at trial.

Judges are confronted with some plea agreements that contain stipulations understating the defendant's conduct. The choice is to accept them and thereby undermine sentencing uniformity, or reject them and risk a trial. Without such plea agreements, the incentives needed to encourage guilty pleas are seen as insufficient, especially at higher Guideline levels. Judicial Conference recommendation 8 asks the Commission to explore whether the Guideline's major explicit tool for encouraging honest plea bargaining---the acceptance of responsibility reduction--might be modified to reflect its crucial place in a workable Guideline system.

The offenders who are likely to benefit from the recommendations are not serious offenders

Congress directed the Commission to "insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" 28 U.S.C. 994(j). The following tables demonstrate that most offenders who would potentially be affected by the Judicial Conference recommendations fit this definition.

Table 1 describes the offenders who would be affected by recommendations 1 and 3, which eliminates the 50% requirement for a split sentence and the need for imprisonment of all offenders with a Guideline minimum of 7-10 months. These offenders represent seven percent of the defendants sentenced in the first 29 months of the Guidelines. Forty-four percent of the offenders potentially affected by this change are first offenders. Only 3% have committed offenses against persons, and 12% have committed offenses involving weapons. Clearly, most of the crimes committed by these people are not violent. Nor are they "otherwise serious." The median amount of drugs and money involved for the 66% of offenders convicted of drug or property crimes is presented in the table. One-third of the drug offenses were for a median of 20 pounds of marijuana. While seriousness is in part a matter of opinion, empirical research over the last 50 years has consistently demonstrated that these types of crimes are generally judged by lay people as among the less serious.[3]

Table 2 describes offenders who could potentially be affected by recommendation 2, which permits straight probation at two additional offense levels for category I offenders. These offenders represent 5% of the total number of offenders sentenced in the first 29 months of the Guidelines. Seventy-nine percent of these new "probation-eligible" offenders are first offenders. The majority (52%) have committed property crimes, most of these involving less than $10,000. Immigration offenders are common (27%). A very small percentage of these offenders have committed weapons (6%) or person (2%) crimes; they are less likely to benefit from any increased flexibility than are less dangerous offenders.

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[3] See Thurstone, L.L. The method of paired comparisons for social values. *Journal of Abnormal and Social Psychology*, 21, 384-400 (1927); Coombs, C.H. Thurstone's measurement of social values revisited forty years later. *Journal of Personality and Social Psychology*, 6, 85-91 (1967); Krus, D.J. et al, Changing values of the last century: The story of Thurstone's crime scales, *Psychological Reports*, 40, 207-211, (1977).

TABLE 1
A. PROFILE: OFFENDERS AFFECTED BY JUDICIAL CONFERENCE RECOMMENDATIONS 1 & 3

The following figures are based on 2,565 offenders--seven percent of those sentenced under Guidelines from November 1987 through March 1990--who, according to FPSSIS data, fell into the 10 Guideline table cells affected by recommendations 1 and 3.[4] A breakdown by cell is presented on the next page.

OFFENSE:	Drug	33%
	Property	33%
	Immigration	13%
	Weapons	12%
	Person	3%
	Other	7%
SEX:	M	85%
	F	15%

PRIOR * RECORD:	None	44%
	Minor	38%
	Serious	19%
MEDIAN AGE:		31
DRUG ABUSE		33%
GUILTY PLEA:		93%

*None=no prior convictions/ Minor=prior conviction(s), no sentence to incarceration for more than one year/ Serious=at least one prior sentence to incarceration for more than one year

Breakdown of Drug Offenses (n=838)

73 Opiates:	Median for 52 with known 100% pure weight:	9 gms
419 Cocaine:	Median for 328 with known 100% pure weight:	26 gms
273 Marijuana:	Median for 255 with known weight:	20 lbs
71 Other type:	Median for 48 with known 100% pure weight:	26 gms
2 Unknown		

Breakdown of Property Offenses (n=854)

172 Theft	Median for 166 with known value:	$13,555
114 Embezzlement	Median for 112 with known value:	$38,000
303** Fraud	Median for 257 with known value:	$35,000
41 Auto Theft	Median for 39 with known value:	$29,427
71 Forgery	Median for 66 with known value:	$8,505
64 Counterfeiting	Median for 60 with known value:	$22,505
96 Other Offenses with dollar values listed (not otherwise categorized)		$45,906

**Includes the 7 tax cases in the sample

[4] The data shown should be considered estimates. Although the reporting system asks that the "Guidelines as applied by the court" be submitted, there is doubt whether persons entering the data knew which Guidelines were used by the court. These data may represent only those offenders who would fall into Zone C if the Guidelines calculated by the probation officer in the Presentence Report were actually adopted by the court. Further, the reporting system asks for the number of criminal history points. Some offices may be reporting criminal history category rather than points. Such an error would not affect the classification of offenders with a reported score of 1 (they also fall into category I) and is unlikely for offenders with reported scores of either zero or greater than six (which would be invalid category entries). This leaves the possibility of an error in offender classification for 23% of the population from which this sample was drawn.

B. CELL BY CELL PROFILES: OFFENDERS AFFECTED BY RECOMMENDATIONS 1&3

Level 5 Category VI 9-15 mos. (n=28)		Level 6 Category V 9-15 mos. (n=154)		Level 7 Category IV 8-14 mos. (n=117)		Level 8 Category IV 10-16 mos. (n=93)		Level 9 Category III 8-14 (n=134)	
Offense		**Offense**		**Offense**		**Offense**		**Offense**	
Drug	14%	Drug	12%	Drug	1%	Drug	10%	Drug	1%
Property	61%	Property	23%	Property	16%	Property	44%	Property	29%
Immigra.	0%	Immigra.	53%	Immigra.	16%	Immigra.	29%	Immigra.	37%
Weapons	14%	Weapons	3%	Weapons	62%	Weapons	16%	Weapons	26%
Person	7%	Person	1%	Person	5%	Person	1%	Person	3%
Other	4%	Other	8%	Other	0%	Other		Other	4%
Prior Record		**Prior Record**		**Prior Record**		**Prior Record**		**Prior Record**	
None	0%	None	13%	None	2%	None	3%	None	3%
Minor	18%	Minor	30%	Minor	22%	Minor	25%	Minor	56%
Serious	82%	Serious	57%	Serious	66%	Serious	72%	Serious	41%
Sex		**Sex**		**Sex**		**Sex**		**Sex**	
M	93%	M	92%	M	98%	M	88%	M	94%
F	7%	F	8%	F	2%	F	12%	F	6%
Med. Age	34	**Med. Age**	31	**Median Age**	32	**Med. Age**	31	**Med. Age**	33
Drug Use	43%	**Drug Use**	41%	**Drug Use**	36%	**Drug Use**	54%	**Drug Use**	29%
Plea	82%	**Plea**	95%	**Plea**	93%	**Plea**	95%	**Plea**	90%

Level 10 Category II 8-14 (n=239)		Level 10 Category III 10-16 (n=233)		Level 11 Category I 8-14 mos (n=529)		Level 11 Category II 10-16 (n=132)		Level 12 Category I 10-16 (n=906)	
Offense		**Offense**		**Offense**		**Offense**		**Offense**	
Drug	43%	Drug	38%	Drug	11%	Drug	15%	Drug	59%
Property	28%	Property	23%	Property	54%	Property	39%	Property	28%
Immigra.	5%	Immigra.	7%	Immigra.	17%	Immigra.	16%	Immigra.	1%
Weapons	15%	Weapons	18%	Weapons	6%	Weapons	12%	Weapons	4%
Person	2%	Person	4%	Person	4%	Person	5%	Person	2%
Other	7%	Other	10%	Other	7%	Other	13%	Other	7%
Prior Record		**Prior Record**		**Prior Record**		**Prior Record**		**Prior Record**	
None	7%	None	3%	None	76%	None	4%	None	73%
Minor	77%	Minor	58%	Minor	23%	Minor	78%	Minor	26%
Serious	16%	Serious	39%	Serious	1%	Serious	18%	Serious	1%
Sex		**Sex**		**Sex**		**Sex**		**Sex**	
M	86%	M	90%	M	80%	M	86%	M	83%
F	14%	F	10%	F	20%	F	14%	F	17%
Med. Age	31	**Med. Age**	32	**Med. Age**	33	**Med. Age**	32	**Med. Age**	32
Drug Use	46%	**Drug Use**	54%	**Drug Use**	20%	**Drug Use**	33%	**Drug Use**	30%
Plea	97%	**Plea**	94%	**Plea**	93%	**Plea**	89%	**Plea**	91%

TABLE 2
A. PROFILE: OFFENDERS NEWLY ELEGIBLE FOR STRAIGHT PROBATION (RECOMMENDATION 2)

These figures are based on 1,913 offenders --five percent of those sentenced under Guideline: November, 1987 through March, 1990-- who, according to FPSSIS data, fell into the two cel would be changed to 0-6 ranges.[5] A breakdown by cell is presented on the next page.

OFFENSE:	Drug	9%	**PRIOR RECORD:**	None	79%
	Property	52%		Minor	20%
	Immigration	27%		Serious	1%
	Weapons	6%			
	Person	2%			
	Other	5%			
SEX:	M	75%	**MEDIAN AGE:**		32
	F	25%			
GUILTY PLEA:		97%	**DRUG ABUSE:**		15%

*None=no prior convictions/ Minor=prior conviction(s), no sentence to incarceration for more than one year/ Serious=at least one prior sentence to incarceration for more than one year

Breakdown of Drug Offenses (n=164)

9 Opiates:	Median for 7 with known 100% pure weight:	11 gms
75 Cocaine:	Median for 53 with known 100% pure weight:	28 gms
54 Marijuana:	Median for 49 with known weight:	6 lbs
17 Other type:	Median for 13 with known 100% pure weight:	167 gms
9 Unknown		

Breakdown of Property Offenses (n=1,005)

153 Theft	Median for 149 with known value:	$5,795
216 Embezzlement	Median for 216 with known value:	$7,500
358 Fraud**	Median for 254 with known value:	$7,000
25 Auto Theft	Median for 21 with known value:	$14,000
93 Forgery	Median for 91 with known value:	2,050
92 Counterfeiting	Median for 85 with known value:	$1,999
68 Other Offenses with dollar values listed (not otherwise categorized)		$6,804

**Includes the 8 tax cases in the sample

[5]These data have the same limitations as those in Table 1, as described in footnote 4.

B. CELL BY CELL OFFENDER PROFILES - OFFENDERS NEWLY ELIGIBLE FOR STRAIGHT PROBATION (JUDICIAL CONFERENCE RECOMMENDATION 2)

Level 7 Category I (n=1,065)	
Offense	
Drug	1%
Property	39%
Immigra.	46%
Weapons	9%
Person	2%
Other	3%
Prior Record	
None	80%
Minor	19%
Serious	1%
Sex	
M	79%
F	21%
Med. Age	31
Drug use	12%
Plea	98%

Level 8 Category I (n=848)	
Offense	
Drug	18%
Property	67%
Immigra.	3%
Weapons	2%
Person	1%
Other	6%
Prior Record	
None	77%
Minor	21%
Serious	1%
Sex	
M	71%
F	29%
Med. Age.	33
Drug use	19%
Plea	96%

The Judicial Conference recommendations would not disproportionately benefit white collar (and white skinned) offenders

The concept of "white collar crime" is not legally defined,[6] but the public image is of a person abusing a position of influence and trust for personal power and wealth. There are no data on precisely how many offenders who would be affected by the Judicial Conference's recommendations fit this profile, but it seems clear that the vast majority would not. Property offenses such as embezzlement and fraud are most closely associated with the white collar image. Only sixteen percent of the offenders affected by recommendations 1 and 3 have committed these crimes, with a median property value of $38,000 and $35,000 respectively. Thirty percent of the offenders affected by recommendation 2, expanding straight probation, have committed embezzlement or fraud, but the median property loss is only $7,500 and $7,000, respectively.

Another serious concern is that alternatives to imprisonment that are available to whites might not be available to equally deserving minorities. The data suggest that the Judicial Conference recommendations would not disproportionately exclude minorities from consideration for alternatives to incarceration. The next pages contain two tables from the report of the Sentencing Commission's Advisory Committee on Alternatives to Imprisonment. They compare the offender characteristics of those eligible for alternatives under current policy and under two different Advisory Committee recommendations (one of which includes offenders in Categories I and II; the other also includes offenders in Category III). There is very little difference in the distribution of offender characteristics. This indicates that these proposed policies to expand the availability of alternatives do not favor one particular type of offender any more than do current policies.

[6]See definitions in U.S. Department of Justice, *Report to the Nation on Crime and Justice, Second Edition* (1988)("White collar crime refers to a group of nonviolent crimes that generally involve deception or abuse of power.")

EXTRACTS FROM THE EXECUTIVE SUMMARY OF THE REPORT OF THE SENTENCING COMMISSION'S ADVISORY COMMITTEE ON ALTERNATIVES TO IMPRISONMENT (12/18/90)

OFFENDER CHARACTERISTICS
Criminal History Category I and II

"Groups A, B, and C" - All Offenders For Whom Alternatives Are Authorized

	Current Policy N = 3,362		Recommendation N = 4,279	
1) Sex				
Male	2,136	72.3%	2,879	75.8%
Female	819	27.7%	921	24.2%
Missing	407		479	
2) Race				
White	1,613	54.9%	2,043	54.0%
Black	723	24.6%	877	23.2%
Hispanic	497	16.9%	737	19.5%
Other	107	3.6%	127	3.4%
Missing	422		496	
3) Age				
17-20	192	6.2%	243	6.0%
21-25	588	19.0%	755	18.8%
26-30	616	19.9%	786	19.6%
31-40	946	30.5%	1,229	30.6%
41+	760	24.5%	1,004	25.0%
Missing	260		262	
4) Adult Convictions				
No Priors	2,065	69.9%	2,578	67.8%
1-2 Priors	709	24.0%	953	25.1%
3-4 Priors	112	3.8%	180	4.7%
5+ Priors	69	2.3%	89	2.3%
Missing	407		479	
	Current Policy		Recommendation	
5) Offense				
Homicide	4	0.1%	8	0.2%
Robbery	2	0.1%	26	0.7%
Assault	16	0.5%	23	0.6%
Burglary	10	0.3%	13	0.3%
Larceny	417	14.1%	453	11.9%
Embezzlement	332	11.2%	353	9.3%
Tax	22	0.7%	22	0.6%
Fraud	630	21.3%	718	18.9%
Drug Dist.	445	15.1%	905	23.8%
Drug Poss.	153	5.2%	179	4.7%
Auto theft	29	1.0%	36	0.9%
Forgery	172	5.8%	203	5.3%
Sex	19	0.6%	43	1.1%
Bribery	27	0.9%	37	1.0%
Escape	15	0.5%	22	0.6%
Firearms	160	5.4%	194	5.1%
Immigration	225	7.6%	227	6.0%
Extortion	12	0.4%	20	0.5%
Gambling	44	1.5%	52	1.4%
Other	221	7.5%	266	7.0%
Missing	407		479	

EXTRACTS FROM THE EXECUTIVE SUMMARY OF THE REPORT OF THE SENTENCING COMMISSION'S ADVISORY COMMITTEE ON ALTERNATIVES TO IMPRISONMENT (12/18/90)

OFFENDER CHARACTERISTICS
Criminal History Category I, II and III

*Groups A, B, and C - All Offenders For Whom Alternatives Are Authorized

	Current Policy N = 3,752		Recommendation N = 4,833	
1) Sex				
Male	2,418	73.7%	3,294	77.0%
Female	865	26.3%	986	23.0%
Missing	469		553	
2) Race				
White	1,766	54.1%	2,284	53.6%
Black	809	24.8%	1,004	23.6%
Hispanic	579	17.7%	840	19.7%
Other	113	3.5%	135	3.2%
Missing	485		570	
3) Age				
17-20	205	5.9%	259	5.7%
21-25	662	19.1%	858	18.9%
26-30	709	20.5%	911	20.0%
31-40	1,062	30.6%	1,405	30.9%
41+	828	23.9%	1,112	24.5%
Missing	286		288	
4) Adult Convictions				
No Priors	2,094	63.8%	2,614	61.1%
1-2 Priors	835	25.4%	1,142	26.7%
3-4 Priors	210	6.4%	316	7.4%
5+ Priors	144	4.4%	208	4.9%
Missing	469		553	

Conclusion

The Commission is asked to give a high priority to increasing sentencing flexibility, and to give careful consideration to these proposals as well as those from the Commission's Advisory Committee on Alternatives to Incarceration. Since we have been informed that these proposals will be considered together, Appendix C compares the Judicial Conference recommendations with those of the Advisory Committee.

Increased sentencing flexibility, especially at the lowest end of the Guidelines, is needed to improve the fairness and efficacy of sentencing. The 1990 recommendations of the Judicial Conference were designed to give judges this flexibility without undermining the goals of the Sentencing Reform Act. Throughout the recommendations, the focus is on sentencing flexibility for first offenders and those who present unusual circumstances. Flexibility is not the same as leniency. The Judicial Conference recommendations do not *require* judges to use alternatives to incarceration, or to sentence at the minimum end of the Guideline range in every case. They do sometimes *permit* judges to impose a sentence other than a term of imprisonment that is now required. The changes needed to give judges flexibility to individualize a sentence in the appropriate case necessarily build alternatives into the Guidelines. These might be used by some judges to impose more lenient sentences, tailored to the characteristics and the needs of a particular offender, in some cases at the lowest end of the Guidelines where they find the present Guidelines to be too mechanical and severe. Unless individualized sentencing in appropriate cases is to be completely foreclosed by rigidity in the Guidelines, judges must be trusted to use sentencing flexibility wisely.

Sentencing options and substitute punishments encourage judges to determine a mix of imprisonment and conditions of supervision that fit the seriousness of the crime and serve other sentencing goals. Experience with home confinement programs shows that alternatives to imprisonment can be as tough and punishing as prison itself.[7] A judge, working with the probation office, can fashion an individualized sentence and supervision plan involving electronically monitored home confinement, random drug testing, mandatory employment with a portion of earnings going for restitution to victims, and mandatory participation in community treatment programs. Such a sentence is not only punishing, it can help turn the offender away from a criminal lifestyle.

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[7]Petersilia, When Probation Becomes More Dreaded Than Prison, *Federal Probation*, March 1990, p.23.

Appendix A

The 1990 Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines

Recommendation #1: Redefine the "Split" Sentence

This proposal would redefine the split sentence to require imposition of at least 1 month of imprisonment, rather than the current requirement of imprisonment for at least one-half of the minimum term. The Judicial Conference believes that the proposed change would do little to diminish the punishment meted out to these offenders. The punitive value of short periods of incarceration is greatest at the start, with the "clanging of the prison doors," netting diminishing returns (at great cost) after that.

Recommendation #2: Remove the requirement for some term of imprisonment in guideline table cells with minimum terms of 7 to 10 months, permitting the use of currently available substitutes at current ratios.

This revision would combine the zones on the Sentencing Table where community alternatives and split sentences are now available. It would permit probation with community confinement or home detention conditions to substitute for imprisonment in 10 additional guideline cells. This change would remove the **requirement** for some term of imprisonment in cells with minimum terms of from 7 to 10 months, while maintaining the availability of the "split sentence" where it is now permitted.

Together these two recommendations require the following changes to the guidelines:

§ 5B1.1 Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized: .

(2) if the minimum term of imprisonment ... is at least one but not more than six *ten* months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in § 5C1.1(c)(2)...

§ 5C1.1 Imposition of a Term of Imprisonment

(c) If the minimum term of imprisonment ... is at least one but not more than six *ten* months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in§ 5C1.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.

§ 5C1.1(d) Imposition of a Term of Imprisonment [Delete this provision:]

(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

Recommendation #3: Permit Straight Probation at Two Additional Offense Levels for Category I Offenders

Category I includes first offenders. Judges have the greatest sentencing flexibility when the guideline range permits, but does not require, straight probation. Within these ranges, the decisions of whether to imprison and, if not, what conditions to impose, are left to the discretion of the court. Since the guideline table is expressed in "months of imprisonment," and all of the ranges include a term of imprisonment, all cells in the table would seem to be subject to the statutory requirement that the maximum of the range not exceed the minimum by the larger of 6 months or 25 percent (28 U.S.C. 994(b)(2)). Therefore, the only way to increase the availability of probation *without conditions specifically deemed the equivalent of prison* is to increase the number of 0-6 cells in the guideline table. Accordingly, the Judicial Conference recommends a revision to Offense Levels 7 and 8 in Category I only. This recommendation permits probation without confinement conditions at two additional offense levels for this category by changing the current range.

This recommendation requires a change in the Sentencing Table at Category I:

Offense Level	Current Range	Recommended Range
7	1-7	*0-6*
8	2-8	*0-6*

The following tables illustrate the effects of the first three recommendations on the availability of alternatives to incarceration.

TABLE 1

CURRENT AVAILABILITY OF ALTERNATIVES

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	1-7	2-8	4-10	8-14	12-18	15-21
B	8	2-8	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46

KEY: Zone A is where probation without confinement conditions is available
Zone B is where community, intermittent, and home confinement may substitute for imprisonment
Zone C is where part of the minimum term of imprisonment must be spent in prison

TABLE 2

EFFECTS OF JUDICIAL CONFERENCE PROPOSALS 1-3

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	*0-6*	2-8	4-10	8-14	12-18	15-21
	8	*0-6*	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
		⇩	⇩	⇩	⇩	⇩	⇩

KEY: Zone A is where probation without confinement conditions is available. Zone B is where the new split sentence is available, and where community, intermittent, and home confinement may substitute for imprisonment

Recommendation #4: **Revise the Policy Statement Pertaining to Age to permit, in limited circumstances departures for young offenders.**

The Judicial Conference believes that judges need greater flexibility to consider age as a basis for departure. Recently proposed amendments to the guidelines remove some restrictions on the consideration of age when determining whether sentencing options within the guidelines are appropriate. But they further restrict the ability of judges to consider age as a basis for departure. The Commission's policy statements regarding age go beyond the restrictions required by statute. U.S.C. § 994(e) does not define age as a factor that is generally inappropriate for consideration in sentencing. The following revision is recommended to make the guideline more consistent with the statute and less restrictive.

5H1.1 Age (Policy Statement)

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines propose sentencing options. Age may be a reason to go below the guidelines when the offender is *if combined with another factor (e.g. young and naive or* elderly and infirm*)* and where a form of punishment (e.g. home confinement) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is sentenced to probation or supervised release, *A*ge may *also* be relevant in the determination of the length and conditions of supervision.

Recommendation #5: **Add an application note clarifying that departures may be appropriate when offender characteristics are present to an unusual degree, and combined in ways important to sentencing purposes**

It is difficult to identify and articulate in advance the many ways that characteristics may combine to make an offender appropriate for a sentencing alternative. Judges should be encouraged to stay alert to unique circumstances and to depart from the guideline range to fashion a creative sentence if the purposes of sentencing would be served.

Application Note (to Chapter 5, Part H):

1. Those offender characteristics that are not ordinarily relevant when determining whether a sentence should be outside the guidelines, or where within the guidelines a sentence should fall, or the type of sentence to be imposed when the guidelines provide sentencing options, may be considered if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case.

Recommendation #6: Delineation of Policy Statements pertaining to departure for dangerousness

The Judicial Conference is concerned that the guidelines do not give enough flexibility to depart upward based on offender dangerousness. The guidelines address the concept of dangerousness at two places: the Career Offender provisions (§ 4B1.1) and the Adequacy of Criminal History Category (Policy Statement § 4A1.3). The former, however, applies only when the current offense involves violence or drug trafficking. The latter addresses both the degree of risk and type of risk, and, although obviously contemplated as the vehicle for addressing dangerousness, is not explicit.

The proposed revision would clarify the Commission's position on dangerousness by dividing its current policy statement on the adequacy of the criminal history category into two parts, one focused on the degree of risk (i.e., over- or under-representation of the likelihood that the defendant will commit further crimes); the other on the type of risk (i.e., if the defendant does re-offend, what type of crime is s/he likely to commit). In the following recommended amendment, current text that is moved is bracketed by asterisks and struck through in the place it is moved from. Material in new section (b) below that is moved or repeated from section (a) is not italicized.

§ 4A1.3 Adequacy of Criminal History Category: (Policy Statement)

(*a*) ***Degree of Risk*** If reliable information indicates that the criminal history category does not adequately reflect ~~*the seriousness of the defendant's past criminal conduct*~~ the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(a*1*) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(b*2*) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c*3*) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d*4*) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;

(c) ~~*prior similar adult criminal conduct not resulting in a criminal conviction*~~

A departure under this provision is warranted when the criminal history category significantly under-represents the ~~*the seriousness of the~~

~~defendant's criminal history~~* or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults *criminal acts* (3) ~~*had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding,*~~ *(43)* committed the instant offense while on bail or pretrial release for another serious offense or (54) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious *extensive* than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under § 4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents ~~*the seriousness of the defendant's criminal history*~~or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious *extensive* than that of most defendants in the same criminal history category (Category 11), and therefore consider a downward departure from the guidelines.

*(b) **Type of Risk**.* If reliable information indicates that the criminal history category does not adequately reflect *the seriousness of the defendant's past criminal conduct*, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning *the nature of the criminal conduct underlying a defendant's prior convictions, and* *prior similar adult criminal conduct not resulting in a criminal conviction*, *that establishes a pattern of particularly harmful or very minor criminal behavior.*

An *upward* departure under this provision is warranted when the criminal history category significantly under-represents the *seriousness of the defendant's criminal history*. Examples might include *offenders with a history of repetitive assaultive behavior, of repetitive sophisticated criminal behavior (e.g. a series of sophisticated frauds or* *a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding**), *and those with unusually extensive and serious prior records.*

A *downward* departure under this provision is warranted when the criminal history category significantly *over*-represents the *seriousness of the defendant's criminal history*. Examples might include *offenders whose points result from unusually harsh sentencing for misdemeanors or from a string of convictions for relatively minor, victimless crimes such as prostitution.*

(c) In considering a departure under this *these* provisions the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history of III significantly under-represents the seriousness *or extensiveness* of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category VI criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

Recommendation #7: Clarify the Relevant Conduct Guideline to ensure that offense levels are tailored to individual culpability.

The Judicial Conference proposes that the Sentencing Commission revise the relevant conduct guideline (1B1.3) and accompanying commentary to clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant was personally culpable.

Commentary accompanying the guideline defines the phrase "otherwise be accountable" in (a)(1) as "conduct that the defendant counseled, commanded, induced procured, or willfully caused" and also conduct of others in furtherance of jointly-undertaken criminal activity that was reasonably forseeable to the defendant, but not if the conduct was "neither within the scope of the defendant's agreement, nor was reasonably forseeable." The proposed amendment would make these supplemental definitions part of the guideline itself.

Most important, the revisions would clarify that the foreseeability and scope of agreement criteria apply to §1B1.3(a)(2) aggregable offenses. At present, the "common course of conduct or common scheme or plan" standard found in (a)(2) sometimes conflicts with the standards in the application notes, since offenses covered by (a)(2) are often also jointly-undertaken. The illustrations in the commentary suggest that defendants who aid and abet a joint criminal activity are liable for the full amounts of drug or money, notwithstanding claims that they were not aware of and could not reasonably foresee the amounts involved. This suggests that all conduct that is part of a common scheme or plan may be attributed to a defendant, regardless of foreseeability. Application note 2 may be intended to make the "common scheme or plan" standard secondary to the criteria in application note 1, but this is far from clear.

The purpose of Recommendation #7 is to clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.

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

(a) Chapters Two (Offense conduct) and Three (Adjustments).

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable, *or counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan,* that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for theat offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and *amounts* that were part of the same course of conduct or common scheme or plan as the offense of conviction, *and of which the defendant was aware or which were reasonably foreseeable to the defendant.*

Recommendation #8: Consider modification of the Acceptance of Responsibility.Guideline.

The acceptance of responsibility guideline allows for a reduction of two offense levels (or roughly a 25 percent reduction) when a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." The guideline

appears intended to accomplish three things: 1) encourage guilty pleas, 2) provide an incentive for cooperation with authorities and 3) recognize sincere remorse. In the United States Sentencing Commission amendments forwarded to Congress this spring, the Commission revised Application Note 2 to make clear that the two-level reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." As a corollary, Note 3 was amended to provide that entry of a guilty plea prior to trial and truthful admission of "related conduct" constitute "significant evidence" of acceptance of responsibility. Both notes provide "overrides" for unusual circumstances, for example, where a defendant goes to trial only to press a constitutional challenge to a criminal statute.

The effect of the amended notes read together is that a timely plea of guilty with admission of related conduct will likely result in a sentence reduction, while putting the government to its proof, regardless of other indices of acceptance or responsibility, ordinarily will not. This appears to respond to perceived concerns that there has been disparity in application of the acceptance of responsibility guideline where some defendants, even after going to trial, were given the reduction while others were unaccountably denied the reduction after entry of a guilty plea.[1] The amendment focuses this guideline almost entirely on the reward of a guilty plea.

However, this new focus may not be effective to achieve the multiple purposes of the acceptance of responsibility guidelines. The two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels. The Commission's own study of past practice showed that the average time served when a conviction results from a guilty plea was 30 to 40 percent below what would otherwise have been served.[2]

Moreover, to receive the reduction the defendant must acknowledge involvement in both the offense of conviction and "related conduct."[3] This makes the incentive especially weak when, in order to qualify, defendants must acknowledge wrongdoing to related conduct that can result in offense level increases of more than two levels. In addition, requiring admissions to related conduct may result in continued disparate application, as it is not always clear what degree of admission of such conduct is required. The Judicial conference therefore recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available

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1 For a discussion of different uses of this adjustment in districts in the Eighth Circuit, see United States v. Knight, 905 F.2d 189 No. 89-1799 (June 1, 1990).

2 The United States Sentencing Commission Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, June 18, 1987, pp. 48-50.

3 There is a split in the circuits as to whether it is constitutional to require admission of criminal conduct beyond the offense of conviction as a condition of giving the acceptance of responsibility. Compare United States v. Oliveras, 905 F.2d 623, No. 89-1380 (2d Cir. June 4, 1990) and United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989), holding that acceptance of responsibility should be assessed solely with respect to actual charges to which the defendant pleads guilty, with United States v. Gordon, 895 F.2d 932 (4th Cir. 1990), holding that the defendant must accept responsibility for all criminal conduct.

for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial.

The amended guideline also reduces the incentive for defendants to take other affirmative actions demonstrating acceptance of responsibility, such as payment of restitution or resignation from the office or position held during the commission of the offense. (See list of factors in the current guideline commentary, section 3E1.1, Application Note 1.) The Judicial Conference recommends that the Commission consider revising this guideline--or adding another--to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty.

The Judicial Conference also recommends that the Commission reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance. We are aware that such an approach was considered by the Commission in its 1987 Revised Draft Sentencing Guidelines but not adopted. We believe such an approach provides much needed flexibility in allowing the court to address the various elements of acceptance of responsibility and does not implicate the 25 percent rule set forth in 28 U.S.C. § 994(b)(2). Section 994(b)(2) provides that "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range...shall not exceed the minimum by...25 percent or 6 months." This section addresses the actual imprisonment range, and not the multiple determinations needed to arrive at such a range. Moreover, it is specifically limited to such ranges that include a term of imprisonment indicating that not all determinations be limited by the 25 percent restriction.