constant bed care and intensive medical supervision.[15]

Medical diagnosis and treatment also become more difficult for older prisoners, as the elderly are more likely to suffer side-effects from medicine and to be poor candidates for surgery.[16] Due to the fact that current prison medical and nursing staff have only a limited knowledge of the special needs of the elderly prisoner, inappropriate diagnosis and treatment efforts have a profound impact on expenditures as well as a noted increase in civil actions.[17]

Aging results in a myriad of changing physical, physiological, and mental needs of the inmate. As the inmate ages, his ability to produce antibodies to fight disease declines dramatically, his overall muscular strength is diminished, his kidney filtering capacity is reduced, and his blood pressure increases. These predictable physiological consequences of aging create difficult medical demands for the existing understaffed, underfunded system. These costs are exacerbated by increased accidents due to declining eyesight, arthritis, reduced coordination and balance, medicative disorientation, poor

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[15] Kratcoski, Peter C., "Federal Bureau of Prisons Programming for Older Inmates", Federal Probation, June 1989.

[16] Lipson, Steven, M.D., M.P.H., Medical Concerns for the Elderly, Forum on Issues in Corrections, Record of the Proceedings, Long Term Confinement and the Aging Inmate Population, December 7, 1990, Page 120.

[17] Id.

physical conditioning and mental depression.[18]

As the population and institutional costs of older offenders rise exponentially, the federal system will find it increasingly difficult, if not dangerous, to ignore this unique segment of its prison population. This is not to suggest the need for some categorical release policy for high cost older prisoners but rather a recognition of the peculiar offender characteristics presented by this insular group. Age is clearly significant but not determinative for sentencing. Only a balancing of age with recidivism can guarantee all of the institutional objectives expressed in the statutory mandate of the Commission. Few of these objectives, however, can be guaranteed for the future without a more comprehensive approach to the graying of the federal prison population.

III. PROPOSALS FOR CHANGES TO THE UNITED STATES SENTENCING GUIDELINES AND PRACTICES RELATING TO OLDER OR GERIATRIC OFFENDERS

A. Redefining the Relevance of Age and Recidivism under Chapter Five, Parts H and K.

In its Guidelines Manual, the Sentencing Commission

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[18] Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population," Page 42, December 7, 1990.

commented that

> Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

United States Sentencing Commission, Guidelines Manual, § 5H1.1 (Nov. 1991). This policy statement suggests that age alone is not a satisfactory basis for a downward sentence. Indeed, the fact that a prisoner is elderly does not provide absolute assurances that he or she is no longer a threat. When considered with other factors, however, age is a valuable predictor of recidivism: generally as age rises recidivism falls. To the detriment of the system, the policy guidelines do not adequately allow for recidivism to be factored into the sentencing decision. Presently, age may be considered as a reason to depart from the sentencing guidelines only when the offender is elderly and infirm and where another form of punishment might be used. A more equitable sentencing system and a more effective use of prison space would be accomplished if a downward departure from the sentencing guidelines were permitted when the offender is "elderly or infirm or where a form of punishment might be equally efficient and less costly than incarceration." By amending section 5H1.1 in this manner and establishing clear guidelines, sentencing judges would be given the discretion to use age in their sentencing decisions subject to strict recidivist standards. An older offender would not be sentenced to less than

the statutory requirement unless he or she satisfied all of the risk assessment guidelines.

An alternative section which could be amended to reach these objectives is Part K of Chapter Five of the guidelines. That section describes various circumstances which might suggest to a sentencing court that a departure from the sentencing guidelines is warranted. Section 5K1.1 allows for a downward departure where the defendant has provided substantial assistance in the investigation or prosecution of another. Other grounds for a downward departure include circumstances where the victim's conduct provoked the offense;[19] where the defendant committed the offense to avoid a perceived greater harm;[20] where the defendant committed the offense because of coercion, blackmail or duress;[21] or where the defendant committed the offense while suffering from reduced mental capacity.[22] Like diminished capacity, old age and low recidivism risk are personal characteristics of the defendant which warrant consideration at sentencing. An amendment could be crafted to state that, "if the defendant is elderly and has been determined to be at low risk for recidivism, the court may decrease the sentence below the applicable guideline range." This amendment would be in line with the underlying policies of

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[19] United States Sentencing Comm'n, Guidelines Manual, § 5K2.10 (Nov. 1991) (hereinafter [Guidelines]).

[20] Guidelines § 5K2.11.

[21] Guidelines § 5K2.12.

[22] Guidelines § 5K2.13.

Part K and allow for situations in which a reduced sentence better serves justice and the needs of the community.

Amending the guidelines to enable judges to consider the age of the offender would satisfy the policy requirements articulated in the Sentencing Reform Act. (See 18 U.S.C. §§ 3551-3673 (1990) and 28 U.S.C. §§ 991-998 (1990).) The possibility that age might impact sentences was recognized in the enabling statute creating the United States Sentencing Commission. In establishing categories of defendants as well as policy statements, the Commission was directed to consider whether any factor listed had "any relevance to the nature, extent, place or service, or other incidents [sic] of an appropriate sentence." Heading the list of factors to be considered was "age." (28 U.S.C. § 994(d)(1) (1990).) While the Commission chose not to establish a "category of defendants" to be given special sentencing consideration solely on the basis of age, the importance of age as one factor which might impact sentences has been manifest from the beginning, and the guidelines should be amended to allow age to be taken into account as it relates to recidivism.

Further policy guidelines are suggested in 28 U.S.C. § 991, which states that the purpose of the United States Sentencing Commission is to develop sentencing policies and practices which avoid

> unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and [which]

> reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

28 U.S.C. §§ 991(b)(1)(B)-(C) (1986). Amending either Part H or Part K of Chapter Five to allow courts to consider early release for older, low-risk offenders is in line with the mandate against sentencing disparities. Under either proposed amendment, the older prisoner who has a low risk for recidivism but who is not physically ill will be treated similarly to the older, infirm prisoner who has committed the same crime. As the guidelines presently stand, the former would be ineligible for early release or alternative confinement, while the latter might have his sentence reduced. See, United States v. Doe, 921 F.2d 340 (1st Cir. 1990) (360 month sentence on a 54 year old man upheld despite the fact that, because of defendant's age, the sentence amounted to life imprisonment, because, at the time of sentencing, the defendant was neither elderly nor infirm).

The present guidelines also fail to reflect fully "the advancement in knowledge of human behavior as it relates to the criminal justice system," because they do not reflect the considerable data showing that older prisoners have a lower rate of recidivism. In this sense, the current guidelines do not adequately "take into account the nature and capacity of the penal, correctional, and other facilities and services available," nor do they "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." 28 U.S.C. § 994(g) (1990). An amendment to the

federal sentencing guidelines which allows age to be used as an indicator of recidivism will enable sentencing judges to give due weight to more of the policy considerations reflected in the Federal Sentencing Act by allowing them to take advantage of alternate forms of incarceration such as less restrictive facilities and home monitoring. Such alternative forms of incarceration are particularly effective for securing older prisoners.

Furthermore, the enabling statute indicates a preference for judicial discretion at the time of sentencing. Section 3553 allows a judge to consider not only the existence of aggravating and mitigating circumstances, but also mandates consideration of "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); "the need for the sentence imposed to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C); the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D); and "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). Amending section 5H1.1 or Part K to provide judges with more opportunities to impose alternative sentences for older prisoners complies with clear relevance of offender characteristics when making sentencing decisions under the federal law. The Courts of Appeals have recognized the discretion granted to sentencing judges and upheld their authority to grant downward departures from the sentencing

guidelines. See, e.g., United States v. Ruklick, 919 F.2d 95 (8th Cir. 1990) (reversed and remanded where district court erroneously underestimated its authority to consider a downward departure based on defendant's diminished capacity); United States v. Lara, 905 F.2d 599 (2nd Cir. 1990) (district court acted within its discretion in departing downward based upon defendant's personal characteristics that made him particularly vulnerable to in-prison victimization).

Full consideration of age as an offender characteristic is further supported by § 3577, which states that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This concept is echoed in § 3552, which allows the court to order a study of the defendant if it desires more information than is otherwise available in order to determine the sentence. That the guidelines require courts to consider all relevant information prior to sentencing suggests that discretion at this stage of the proceedings is acceptable and, so long as it is used judiciously, may contribute to more balanced and equitable sentencing.

Permitting a judge to consider an offender's age without the burden of establishing infirmity will not enlarge the courts' discretion to the point of creating sentencing disparities. Infirmity of the offender and availability of alternative methods of punishment would still remain important in the determination

of a downward sentence, but they would not be determinative on the issue of recidivism. The offender's age will simply be used as a means to initiate a recidivism analysis. The discretion of the court in sentencing decisions, therefore, will not be so great as to conflict with the policies of the guidelines. Furthermore, § 3553(b)(2) would naturally continue to apply to any departure from the guidelines, requiring the court to articulate the specific reason for the imposition of the lesser sentence. A simple statement by the court saying, in effect, "the offender is old therefore he will not commit any more crimes," will not suffice as a satisfactory rationale under the proposed amendment anymore than it does now. An example of the importance of articulating the reasons for a downward departure from the sentencing guidelines can be seen in United States v. Carey, 895 F.2d 318 (7th Cir. 1990). In Carey, the court of appeals vacated a judgment by the district court which departed downward from the applicable sentencing range. The lower court stated that "the combination of the defendant's age (62) and the fact that he has had several operations as a result of a brain tumor are significant enough to allow the Court some flexibility in a downward departure." Id. at 324. The court of appeals held that "without more particularized findings and analysis we cannot conclude that the district court's reliance on Carey's age and physical condition in departing from the applicable sentencing range was reasonable." Id. An amendment to 5H1.1 or to Part K will not alter the requirement that a judge who departs from the

sentencing guidelines on the basis of age will have to clearly articulate his or her reasons for so doing.

Because age is one of the most reliable predictors of recidivism, its relevance in sentencing decisions cannot be overlooked. By amending section 5H1.1 or Part K to enable judges to consider old age independent of infirmity, the Commission can maximize resources by making use of less expensive, alternative forms of punishment. It will also provide more space in already overcrowded prisons for offenders likely to have a high rate of recidivism. Finally, sentencing disparities would be minimal, as age would be used as only one factor in a recidivism analysis, and judges sentencing decisions would remain subject to stringent scrutiny.

B. REDEFINING THE MEANING OF "EXTRAORDINARY AND COMPELLING" UNDER 18 U.S.C. § 3582(C)(1)(A)

While the focus of the listed issues for comments centered on amended parts H and K of Chapter 5, age can also be considered at a post-sentence reduction stage with a new policy statement from the Commission. Under the guidelines,

> the court may not modify a term of imprisonment once it has been imposed except that -
> (1) in any case -
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A) (1990). A direct amendment could be drafted to allow a prisoner's advanced age and low risk of recidivism to constitute "extraordinary and compelling reasons" for a sentencing reduction.[23] Alternatively, rather than amend § 3582(c)(1)(A) directly, the Commission could, under § 994(a)(2)(C)[24] and § 994(t),[25] issue a policy statement declaring a combination of old age and a low likelihood of recidivism to be an "extraordinary and compelling" reason to

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[23] An amendment of 18 U.S.C. § 3582(c)(1)(A) could take several forms, including the addition of a clause qualifying "extraordinary and compelling" to include cases of old age when coupled with low risk assessments. Another approach might be to add a separate subsection to 18 U.S.C. § 3582(c)(1) which states that the court may reduce the term of imprisonment "if it finds that an older or geriatric offender's age and low recidivist predictor warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." While POPS is prepared to pursue such amendments, the current proposals will focus instead on a policy statement change that redefines "extraordinary and compelling."

[24] This section provides in part:

> (a) The Commission shall promulgate and distribute to all courts ...-
> (2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of-
> (C) the sentence modification provision set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18.

[25] The provision provides in part:

> (t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18 shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

modify a term of imprisonment. It is expected that such a policy statement would include strict guidelines and commentary on the interpretation of "extraordinary and compelling," thereby limiting the discretion of the courts.

Before a court may modify a term of imprisonment under § 3582(c)(1)(A), it must first consider those factors listed in § 3553(a), which apply to the imposition of a sentence. This suggests that the court has a certain degree of discretion, even when modifying a term of imprisonment, to consider factors such as the personal characteristics of the defendant. Low recidivism, which is indicated in part by a prisoner's advanced age, should be considered a characteristic relevant to the early release of an older prisoner under § 3553(a)(1). It is particularly relevant to an overcrowded system burdened by high cost, low risk prisoners.

A new interpretation of § 3582(c)(1)(A) would also advance public safety, a policy underlying § 3553(c). Reducing a term of imprisonment on the basis of the prisoner's old age and low likelihood of recidivism is intended to ensure that only the least dangerous offenders are released at a time of limited resources. Furthermore, because a modification of a term of imprisonment might include placing low risk prisoners in alternative forms of incarceration, such as home confinement, the ultimate effect is to protect the public at the lowest cost, furthering the goals of the sentencing guidelines. The use of alternative means of punishment also satisfies the requirement of

§ 3553(a)(3), that courts consider the kinds of sentences available. Although a form of punishment other than imprisonment might not have been applicable at the time of sentencing, the offender's advanced age might bring added significance to that provision after a person has been incarcerated for a number of years.

Section 3553(a)(1)(D) states that when imposing a sentence, the court should consider that medical care is to be provided in the "most effective manner." Allowing for a reduction for some elderly offenders is the most direct means by which to satisfy this goal. Because elderly prisoners are most likely to suffer from health problems, removing them from conventional incarceration can dramatically reduce medical costs by placing older prisoners in settings equipped and experienced to deal with and prevent geriatric illness.

Finally, section 3553(a)(2)(A) provides that potential offenders be deterred from criminal conduct. The possibility of a reduced sentence for older prisoners will not detract from this important policy. Because prisoners will only have their terms reduced if they are both elderly and have a low risk of recidivism, sentences will be reduced only after the propensity or ability to commit a repeat offense has passed. Furthermore, a shortened term of imprisonment does not necessarily mean freedom. The possibility of home confinement, confinement to a prison nursing home, or a form of supervised release is still very real. Moreover, an amendment to section 3582 or the applicable policy

statements in no way suggests that all, or even a majority of older prisoners will go free. Only a few older prisoners who meet strict recidivist guidelines will be eligible for a reduction in the term of imprisonment, and only when courts act within the strict policy guidelines set down by this Commission.

CONCLUSION

The suggested proposals outlined above are direct measures that the Commission can take to develop a policy for older offenders. The relationship of old age and recidivism is well-documented and widely recognized. This body of knowledge will be essential to the federal system as it struggles with a rising population of older prisoners. Under its statutory mandate, the Commission is uniquely qualified to respond to the changing demographics of the prison population and to incorporate new ideas on the most efficient use of prison resources.

POPS stands ready to assist the Commission in exploring possible modifications to the federal sentencing laws, guidelines or policy statements considering the relevance of age and recidivism. Accordingly, POPS would be amenable to a joint short-term study with the Commission on the federal system and the aging prison population. In addition to the proposals discussed, this study could include an evaluation of a possible pilot program of electronic monitoring for older offenders that would reduce maintenance costs and relieve overcrowded

conditions. Such a study could also explore a possible guideline for risk-based releases for prisons under serious or chronic overcrowding conditions. While the federal system has utilized "rental cells" from state jurisdictions and has moved prisoners long distances to available cells, this practice has created a bidding practice for cell space that at least one federal judge has attempted to halt. Williams v. McKeithen, 1990 WL 265971 (M.D. La.; July 20, 1990) (No. Civ. A. 71-98-B) rev'd, 939 F.2d 1100 (5th Cir. 1991). The sentencing guidelines can create a "safety valve" for chronic conditions that would permit a selective release under 18 U.S.C. § 3582(c) or other provisions. While their application to older offenders is novel, these ideas are not new and can be found in various forms among the state systems. The viability of such approaches to the federal system should be of great interest and certainly merits greater attention by the Commission and this organization.

POPS appreciates this opportunity to address the Commission and looks forward to a full exchange of ideas on older offenders at the public hearing on February 25, 1992.

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Budget - Cost / Excellence

[redacted]

Testimony before the
United States Sentencing Commission
on the Structure and Operation
of the Federal Sentencing Guidelines

Dr. Edward J. Burger, Jr.
Member of the Board of Directors
Council for Court Excellence
Washington, D.C.

February 25, 1992

Mr. Chairman and members of the Commission, my name is Dr. Edward Burger. I am pleased to have the opportunity to comment on aspects of the Federal Sentencing Guidelines. I represent the Council for Court Excellence of the District of Columbia. I am a member of its Board of Directors and Chairman of the Criminal Justice Committee of the Council. The Council for Court Excellence is a nonprofit civic organization that works to improve the administration of justice in the local and federal courts, and related agencies, in the Washington metropolitan area and in the nation.

The Council for Court Excellence embraces, by design, several groups interested in seeking improvements in the courts - jurists, U.S. attorneys, practicing lawyers, members of the business sector and the general community of the citizenry. My remarks this morning should not be understood as necessarily representing the opinions of the separate institutions from which some of the Council's members come.

The Council for Court Excellence has, from near its beginning ten years ago, contributed to the discussions of sentencing and sentencing reform. The Council, early in its history, played an important role in bringing to the attention of the local courts, prosecutors and defense

lawyers and the District's legislative council, in a systematic fashion, the fund of experience across the nation concerning sentencing reform efforts and the relationship of sentencing practices to broader matters, including parole and prison capacity.

In December 1986, we testified before the Commission on aspects of what were then Preliminary Draft Sentencing Guidelines. Our position at that time was to commend the Commission both for the concept and for the then emerging guidelines process. We applauded and associated ourselves with the Commission's goals of moving the federal courts towards reducing sentencing disparity, preserving sentencing authority in the court, increasing the correspondence between the sentence imposed and the sentence served and, as a result, enhancing public confidence in the criminal justice system. At the time, we commented on eight specific features of the guidelines:

1. We expressed concern that the draft guidelines were highly detailed and overly specific.

2. We observed that it was not clear how proposed guidelines were linked to past sentencing practices and experience.

3. We applauded the adoption of the concept of modified real offense

sentencing.

4. At the Commission's specific request, we commented on the proposal to reflect "other offender characteristics" such as age, education, or community ties, as mitigating or aggravating factors in reaching sentencing judgments.

5. We observed that the draft guidelines at that time seemed to give little focus to alternatives to incarceration such as fines and restitution.

6. We noted our concern that at that time, there appeared to be no provision for analysis of the effects of the operation of the guidelines on prison use in the face of pressures on prison capacity.

7. Finally, the draft guidelines at that time were silent as to procedures for departures from the prescribed guidelines.

The institution of the federal sentencing guidelines process four years ago was unquestionably a bold step, conceived by Congress and developed by the members of the Sentencing Guidelines Commission. Development of the Federal Sentencing Guidelines followed in time the introduction of several other sentencing guidelines systems in state courts. The results and effectiveness of the federal guidelines in practice are only now beginning to

be understood.

There is still little empirical information of recognized quality, and what data there are reflect only a portion of the period since the guidelines process was introduced. At the same time, the institution of the federal guidelines process has been accompanied by proffered appraisals from many quarters, including a very large number of severe criticisms.

The evidence thus far does seem to indicate that, since the U.S. Sentencing Commission's guideline process was put into effect, disparity of sentence among similar offenders and similar offenses has been reduced. Further, there is strong indication that there is now greater certainty in sentencing. Finally, as the Commission itself reports, with the abolition of parole, there is correspondence between the sentence awarded and the sentence actually served.

I must qualify these judgments by pointing out that empirical data to support the conclusion of reduced disparity, pre-guidelines versus post-guidelines, are still quite limited. The only real data bearing on this subject come from Commission itself. They cover only 2 1/2 years of experience and are drawn from relatively few cases.

In our view, there are two features of the present system which

threaten to compromise the ability of the guidelines process to achieve its intended goals. One derives from the combining of the guidelines system with the series of statutory mandatory minimum sentences. The other concerns the highly mechanical and formulaic character of the guidelines, themselves. As the Commission's own reviews have noted, the evolution of the Federal Sentencing Guidelines corresponded in time with the Congress' enactment of a large number of statutory mandatory minimum sentence laws directed especially at drug- and weapons offenses. In our view, and in the opinion of others, this enforced admixture has compromised the intended workings of the guidelines, has contributed to a number of perverse outcomes and may be a principal factor provoking criticism of the guidelines themselves.

The Commission's challenge, when crafting the guidelines, of incorporating the statutory minimums into the guidelines framework has led to numerical values for base case categories which, in the view of some, may not be justified in all instances. In some instances, undesirably harsh sentences are said to have emerged from the resulting combined numerical values. The mandatory minimum sentences appear to have further exaggerated an unwanted transfer of sentencing discretion from judges to

prosecutors, who are able to craft charges to match intended sentencing outcomes. Finally, the mandatory minimum sentencing values appear to have compromised the intended operation of real offense sentencing. It is this latter process which was designed by the Commission as a mechanism intended to provide a balance to the findings of prosecutors.

The Commission staff have also pointed to the fact that statutory mandatory minimum sentence penalties have tended to diminish the achievement of the principal goal of the guidelines process - reduction in disparity in sentencing. As the Commission's own analysis has shown, patterns of prosecutors' selection of charges to bring to the court have varied among geographic regions and among racial groups of offenders. The Commission's assertion that "...lack of uniform application creates unwarranted disparity in sentencing..." is a serious matter to the extent that it may undermine the singular goal of the guidelines process.

The second issue I would like to underline for the Commission is the highly mechanical, structured process that is the character of the federal guidelines. The determination of a numerical value in the federal guidelines system is supposed to be a process which anticipates all possible factors which could shape the character of both the offender and the offense. The

federal process appears highly complex, overly mechanical and highly specific. Judicial discretion appears to have been substantially reduced to a point which exceeds what the Commission had originally intended. As you know, a plea for more flexibility in the structure and operation of the guidelines was the sense of the recent recommendations of the Judicial Conference of the United States.

Again, I would note that this comment is consonant with our testimony on this matter in 1986. The Commission should examine again the perverse and undesired effects of the high degree of attempted specification in the guidelines and the constraining, formulaic character of the process of determining sentences. In doing so, the Commission would do well to study the experience and character of some of the mandatory state guidelines systems designed around more conceptual structures. For example, Minnesota's 10-year experience is a worthy example.

Finally, as we did in our earlier testimony, I would urge the Commission to put in place mechanisms for keeping track of the effect of sentencing practices under the guidelines system, among other factors, on prison use. Burdens on prison capacity and on public expense for incarceration will continue to be important issues raised by the public and

legislators. An understanding of these relationships will be important in future support for sustaining confidence in the elements of the criminal justice system.

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Revised 2/23/92

[redacted] Kamenar [redacted]

TESTIMONY OF

PAUL D. KAMENAR,
EXECUTIVE LEGAL DIRECTOR
WASHINGTON LEGAL FOUNDATION

before the

UNITED STATES SENTENCING COMMISSION

February 25, 1992

Mr. Chairman and Members of the Commission:

My name is Paul D. Kamenar; I am the Executive Legal Director of the Washington Legal Foundation, a nonprofit public interest law and policy center that has participated in Commission hearings and proceedings over the years. Thank you for the opportunity to testify again today before the Commission on the proposed revisions of the sentencing guidelines and other aspects of the guidelines. My remarks will be brief although I hope to supplement these comments with further written comments for the record.

While I will focus my testimony on the proposed changes to the environmental guidelines, specifically Proposed Amendment 10 to Section 2Q1.2, I would also like to make some general observations about proposed changes to certain other parts of the guidelines.

Proposed Change To Section 2Q1.2

As the Commission is well aware, we have been urging the Commission over the years to remedy the fundamentally flawed environmental guidelines that mandate offense levels of 16 or higher for minor regulatory environmental offenses. Such levels result in minimum prison terms of 21-27 months for first time offenders where little, if any, harm to the environment occurred. In some cases, the court is required to sentence first time offenders to prison for the statutory maximum term (e.g., three years for a Clean Water Act violation or one year for negligent violation) because the guidelines dictate sentences that exceed those statutory maximums. I refer the Commission to the prior testimony and submissions we have made describing this problem in greater detail and incorporate them here by reference.

These statutory maximum sentences as the mandatory minimum are clearly unjust and undermines the credibility of this Commission as Commissioner Gelacak pointed out to then Assistant Attorney General Dick Stewart at last year's Commission's hearings regarding the levels of fines to impose for environmental offenses.

A major part of the problem with the environmental guidelines (but by no means the only one) is one recognized by the Commission in the proposed change: the inappropriate double-counting of offense characteristics. To illustrate: a person who places topsoil or clean building sand on their own property without a permit which the EPA deems to be a wetland is charged with "discharging pollutants without a permit" under the Clean Water Act. That person receives a level 6 for the base offense under 2Q1.3 for discharging pollutants without a permit; 4-6 more points under 2Q1.3(b)(1) for discharging the so-called pollutant; and 4 more points for not having the permit under 2Q1.3(b)(4), for a total of a 14-16 offense level for a minor offense resulting in substantial prison time (up to 27 months) for a first offender. That sentence is not only clearly unjust, it is inconsistent with Congress' command 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).

While we believe that the environmental guidelines are in need of major revision, we nevertheless support the proposed revision that would at least partially address the double-counting problem by excluding the 4 points to the offense level for not having a permit where the underlying offense already includes the failure to have the permit as an element of the offense.

As for the Commission's inquiry as to whether this change in Section 2Q1.2 (dealing with toxic/hazardous substances) should be applied to the parallel provision in Section 2Q1.3 for non-toxic substances, we believe the changes should apply to both sections to be consistent. There is no principled reason why a double-counting flaw should be eliminated in one section but not the other.

The Commission also seeks comment as to whether there should be any adjustments to (b)(1)(A) or (b)(1)(B) upward of 2 to 4 levels each. We strongly oppose any adjustments

in this regard; there has been no evidence or showing that these offense characteristics are too low; if anything, they are too high. As it now stands, a typical environmental case involving a discharge of a pollutant, regardless of whether any harm to the environment occurred, automatically results in a score of at least 12-14 under 2Q1.2 (8 points for the base; 4-6 for the discharge) and 10-12 levels under 2Q1.3 (6 for the base; 4-6 for the discharge). There is no reason why these already high levels should be increased further to the high levels of 14[16] to 16[18] under 2Q1.2 and to 12[14]-14[16] for non-toxic substances under 2Q1.3.

Indeed, one could argue that even with the current levels in (b)(1)(A) and (B), double-counting would still occur in many cases because that specific offense characteristic--requiring 4 to 6 additional levels-- apply to a discharge of a pollutant; yet the discharge is also the underlying conduct charged in the indictment and presumably already accounted for in the base offense level. Thus, in accordance with the Commission's query as to whether "other adjustments should be made to the specific characteristics in subdivisions (b)(1). . . to address the perception of double counting," this problem should also be addressed. In short, the current guidelines impermissibly allow for triple-counting in many cases, and the Commission's proposal to eliminate at least one source of the double-counting (i.e., the permit provision) should, at a minimum, be adopted.

Consideration of Prior Offender Misconduct As Offense Characteristics

While this concludes our comments with respect to this specific environmental proposal, we would also like to comment generally on any future changes of the environmental guidelines, or indeed, of any other category of offenses, that would include as a specific offense characteristic the prior misconduct of the defendant as it pertains to past violations of administrative orders and the like. We believe that the Commission is improperly blurring the distinction between offense characteristics and offender

characteristics. One of the latest staff drafts to the environmental guidelines, for example, would have a specific offense characteristic based on past violations of administrative or civil orders or directives.

This issue, however, is already addressed by the Commission in Commentary 9 to Section 2Q1.2 which cross-references to Section 4A1.3 (Adequacy of Criminal History Category). That section allows the court to depart from the guidelines if the criminal history score does not adequately represent the prior misconduct of the defendant. Accordingly, that notion of past misconduct, whether for prior crimes or violations of administrative orders, should not be built into the offense characteristics for this or any other category.

In that regard, we note the Commission is currently considering such a proposal with respect to Section 2N2.1 regarding violations of Food and Drug laws. Option 2, for example, proposes to increase the base offense level by at least two levels under (b)(1) for a prior conviction, and under (b)(2) by at least two, and more likely four levels for a single violation of a administrative order. Putting aside the anomalous result that a person can receive up to an additional 4 points for a technical violation of an FDA administrative order, whereas that same person would get assessed only 2 points for a felony criminal conviction, any consideration of prior misconduct more properly should be left to the sentencing court to decide where within the range dictated by the guidelines should the court set the sentence.

We believe, as do many other observers, that the Commission should not attempt to account for every conceivable aspect of an environmental offense, all of which results in a higher offense levels. Once that level is reached, there really is nothing left for the judge to consider in deciding where within that range a sentence should be imposed. Indeed, the same alleged aggravating characteristics that drove the offense levels higher may be used by the court yet again to impose a sentence at the high end of the range in the high offense level, causing yet another, more sinister double-counting problem.

Past misconduct for regulatory offenses also should not be considered as a specific offense characteristic because that factor is considered by the government in deciding whether to bring criminal charges in the first place or allowing less drastic civil or administrative remedies solve the problem. Thus, with respect to two individuals who engaged in identical conduct and had the same intent to commit the offense, the government may choose to resolve one case administratively or civilly, and the other criminally. The fact that the latter individual is branded a felon because the government decided to prosecute based on past administrative misconduct, already accounts for this past conduct and should be used again against the defendant to punish him further; this too, would be another form of double-counting. Indeed, there are many regulatory cases where more serious offenses with repeated past administrative violations are still prosecuted civilly while less serious offenses are prosecuted criminally.

For example, the same U.S. Attorney's office in Philadelphia that prosecuted our client John Pozsgai for putting clean fill on his property with no resultant environmental harm and sending him to prison for 27 months, the longest sentence in U.S. history for any environmental crime, resorted only to civil proceedings against BP Oil for causing major pollution of the Delaware River by repeatedly violating EPA discharge levels over six years. I am also enclosing a recent letter from WLF to EPA Director William Reilly disputing his testimony to Congress that EPA seeks criminal prosecutions against wetland violators only after less drastic measures have failed to further demonstrate the arbitrariness of the prosecutorial decisionmaking process.

As the Commission revises the environmental guidelines, it should not only eliminate the double-counting, but also take into account the multitude of environmental laws with sentences ranging from 60 days to 5 years or more. The one-size-fits-all approach of the current guidelines are producing grossly unfair prison sentences not only disparate within the same category of offenses, but also as noted earlier, producing disparate sentences compared

to other more serious crimes.

For example, as noted in my prior testimony, the Commission has set a base level of only 16 for running a crack house under Section 2D1.8 where the maximum term for that serious crime is 20 years. Yet a level 16 is easily reached for many minor environmental offenses with statutory maximum terms of three years or less. Likewise, the Commission would provide only for a level 6 with no specific offense characteristics for illegal using registration numbers to manufacture controlled substances. This would invariably result in probation; yet Congress set the maximum term of 4 years for this crime. Thus, where "heartland" violations of certain drug laws occur, the Commission's guidelines produce sentences on the low range of the scale; on the other hand, where non-heartland or non-serious violations of the environmental laws occur, the resulting prison sentence is at or near the top of the statutory maximum.

There are several ways to solve this problem. One is to have a guideline for each environmental statute; after all, if the Commission can devise some 20 separate guidelines for drug offenses under Part D, it can do the same for environmental statutes. The other approach would be to have one guideline with some kind of multiplier to apply at the end of the computation process with the multiplier based on the maximum sentence allowed under the particular statute so that statutory maximum or near maximum sentences are not the norm. To use a rough example, if a the particular environmental statute calls for a one-year maximum and the guideline produces a range near that level, if the offense is an average type of offense, then the multiplier could be .5, thereby allowing the sentence to fall in mid-range of the statutory maximum. If the offense is not serious, and it is a first offense, we emphasize yet again that probation should be the norm as Congress intended. Furthermore, the Commission should keep in mind the basic sentencing principles that Congress mandated in 18 U.S.C. 3553(a) and 3572 relating to conservation of punishment. In other words, fines, restitution, conditions of probation (such as clean up costs, etc.) constitute punishment

and that in many regulatory infractions, any prison sentence, let alone excessive ones, simply constitutes gratuitous punishment. It is one thing for the Commission to conclude that in a particular case, a prison sentence should be imposed; the Commission has yet the further responsibility for ensuring the sentence range actually arrived at is one that is reasonable and proportionate. As it now stands, there is a sharp cliff between level 12 and 13 with the latter level (and one easily reached under the environmental guidelines) resulting in a mandatory prison term of one year (comparable to three years for pre-Guideline sentences where parole after serving one-third the time was the norm for minor offenses). We will be glad to work with the Commission in the coming months to develop just and reasonable environmental guidelines.

Category O Offender Level

As a final and general comment on the Commission's proposal to have a Category O for criminal history, we support such an idea. Indeed, we believe that this concept is consistent with what Congress has stated with respect to special treatment of those who are first offenders who have not committed a serious crime. As we study the Commission's report in this regard, we hope to provide further comment on this proposal.

Thank you for this opportunity to testify before you today.

FEBRUARY 25, 1992

U.S. Department of Justice

United States Attorney
Eastern District of Pennsylvania

3310 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
(215) 597-2756

October 23, 1990

PRESS RELEASE

United States Attorney Michael M. Baylson and EPA Regional Administrator Edwin B. Erickson announced today an agreement between the United States and BP Oil Corporation, Incorporated under which BP Oil will pay the largest fine assessed by the United States against a company in 13 years for water pollution violations. The agreement, reflected in a Consent Decree lodged with the Court today, assesses a penalty of $2.3 million against BP Oil for discharging pollutants over a period of six years into the Delaware River in violation of its wastewater permit and the Clean Water Act. BP Oil owns and operates an oil refinery in Marcus Hook, Delaware County, Pennsylvania.

Baylson stated that this is the second largest penalty ever collected by the United States in an enforcement action under the Clean Water Act. "No company will be allowed to profit from violating our environmental laws," according to EPA Administrator William K. Reilly. "The Bush Administration is committed to assuring clean water for all Americans."

As a result of this enforcement action, BP Oil spent over $25 million to build a new wastewater treatment system to cure the

years of violations of the Clean Water Act. Prior to this settlement, BP Oil was in constant violation of the law. Its unlawful discharges included excess oil and grease, ammonia, solids and various oxygen demanding pollutants.

BP Oil's violations contributed to two important pollution problems in the Delaware River that the United States is seeking to correct through this and other enforcement actions. First, oxygen demanding pollutants placed into the River deplete the River's oxygen supply, making it impossible for many fish to survive and reproduce. Second, poly aromatic hydrocarbons present in the oil and grease in the discharge from BP have the potential to become concentrated in fish and shellfish to undesirable and unsafe levels. Although BP Oil is not the only source of the pollutants, their past violations were a major contributor to the pollution problem in the River.

Erickson stated that, "The penalty paid in this case demonstrates the government's commitment to protecting the Delaware Estuary. It sends a message to industrial polluters that cutting corners in protecting the environment does not pay. EPA intends to assure a steady improvement in the quality of water in the Delaware River through vigorous enforcement actions against polluters."

Under a separate agreement BP Oil paid the Commonwealth of Pennsylvania $109,00 for the same permit and Clean Water Act violations and will pay the United States $2,191,000.

This $2.3 million settlement recovers the money BP Oil saved by not installing the wastewater treatment equipment necessary to

WASHINGTON LEGAL FOUNDATION
1705 N STREET, N. W.
WASHINGTON, D. C. 20036
202-857-0240

January 10, 1992

The Honorable William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Wetlands Enforcement Policy

Dear Mr. Reilly:

On October 22, 1991, you testified before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation about the EPA's wetlands policy under Section 404 of the Clean Water Act in general and about EPA's wetlands enforcement policy in particular. On page nine of your testimony, a copy of which was recently brought to my attention, you told the subcommittee that "Section 404 enforcement is another area plagued by misinformation" and that you welcomed the opportunity to explain "the process under which we choose enforcement actions." In the course of doing so, however, it appears that you may have misled the committee about EPA's enforcement policy. The Washington Legal Foundation demands that you clarify your remarks and set the record straight.

You initially noted that EPA's "primary goal in enforcement is environmental protection. Therefore, EPA seeks timely removal of the illegal discharge and restoration of the site, where appropriate." You then proceed to respond to charges that the EPA is engaged in heavy-handed treatment of alleged wetland violators by seeking criminal prosecution. In particular, you mention WLF's client John Pozsgai, a self-employed truck mechanic who was criminally prosecuted and imprisoned for three years for putting topsoil and clean fill on a couple acres of his own land to build a garage. The property was an old dumpyard zoned light industrial that he cleaned up which, even by EPA's strict standards, contained wetland areas of marginal ecological value at best, and one where an after-the-fact permit would be normally processed.

You assured the congressional committee that in the Pozsgai case "[a]s in other criminal wetlands enforcement cases, the federal government initiated stiff [criminal] enforcement action [against Pozsgai] only after less drastic and more conciliatory measures failed." (emphasis added). The clear import and context of this statement suggests that EPA seeks criminal action in wetland cases only after less drastic administrative and civil enforcement actions have been exhausted. If this was the impression which you were trying to convey to the committee, it is clearly a false one based on a review of the criminal wetland actions brought by EPA. The facts show that EPA is quick to seek criminal action without either letting the less drastic civil enforcement measures take their course, or by by-passing those less drastic measures altogether, with the result that the allegedly offending fill material remains on the so-called wetland while the offender spends months and years in prison for what many regard, even conservationists, as a minor regulatory offense.

With respect to the Pozsgai case, you suggested to the committee that criminal action was absolutely necessary to stop the filling activity because Mr. Pozsgai allegedly ignored

"10 warnings, as well as a temporary restraining order issued by a Federal judge, to stop filling wetlands on his property without first obtaining a Section 404 permit." Reilly Testimony at 11. According to the record in the case, there were only three written letters, two from the Corps of Engineers and one from the EPA; none of them constituted formal cease and desist orders as required by the Corps of Engineer's own regulations (33 C.F.R. 326.3(c)). With respect to the TRO, Mr. Pozsgai was arrested by EPA special agents on September 12, 1988 before there was any adjudication or finding of any violation of that order; indeed, all filling on the property ceased a week or so before he was arrested. As Chief Judge John Fullam who handled the civil TRO case admonished the government attorney at the September 16, 1988 hearing (transcript attached):

> THE COURT: Now, I read somewhere in the paper. . . that criminal prosecution has been instituted * * * [W]hose idea was that?
>
> GOV'T ATTY: Our criminal division, sir.
>
> THE COURT: Do you and the criminal division ever talk to each other?
>
> GOV'T ATTY: Yes, we do.
>
> THE COURT: Did it not occur to you this was a rather stupid kind of timing?
>
> * * * *
>
> It might have been a little more civilized and sensible to wait until after today.

Clearly the EPA was not really interested in letting the less drastic measures work; formal administrative proceedings were incomplete, and the civil proceedings were just getting started when the EPA and the Department of Justice sought the most drastic remedy possible --felony criminal charges-- when all filling had stopped even before any civil adjudication was made. Even the pretext of using less drastic civil proceedings has been abandoned in most, if not all, of the other criminal wetland proceedings:

United States v. Ocie Mills. Mr. Mills and his son served almost two years in federal prison for putting 19 loads of clean building sand on a quarter-acre lot of his in Florida. The EPA did not file any civil enforcement action and instead sought criminal indictments. If EPA's goal was truly environmental protection, EPA would have filed a civil suit ordering the removal of the so-called "pollutant." Instead, the sand remained on the property over two years while Mr. Mills and his son were in prison; and now that they're out, it appears that the property was not even a wetland to begin with, let alone an important one, and that criminal prosecution may have motivated because of Mr. Mills' public complaints about the EPA's enforcement tactics.

United States v. Jones; Ellen. Criminal charges were brought against a property owner and his project manager for disturbing wetlands in the course of creating a 2,800-acre preserve and wildlife sanctuary. Approximately 14 acres of wetlands had been filled, but 56 acres, five times that amount, were created. Again, no civil action was brought which would require removal of the allegedly offending fill material; instead, the owner and project manager were indicted in May 1990 and later convicted.

United States v. Ramagosa, et al. A family-owned home-building business and its owners were indicted on felony charges for allegedly filling wetlands on a couple of home sites, even though the administrative proceedings had not been resolved, and the Corps

refused to process an after-the-fact permit. In any event, less drastic civil enforcement actions were never sought before the government resorted to criminal sanctions.

United States v. Hartford Assoc. In late June, 1991, attorneys for Hartford Assoc. agreed in an administrative proceeding to restore an area of land in Elkton, Maryland where the EPA claimed that some fill was placed on a wetland, although jurisdiction was questionable. Despite this apparent resolution of the matter, on July 3, 1991 EPA Special Agent Susan Helbert served Grand Jury Subpoenas for documents about the matter, and on October 7, 1991, no less than ten (10) FBI and EPA agents, armed with a search warrant, conducted a surprise raid (lasting almost nine hours) on the company's and lawyer's offices housed in the same building, at first refusing to give the attorney the search warrant or allowing him to call his outside counsel, grabbing the phone from his hand. Again, no civil enforcement action was filed, and indeed, the administrative resolution of the case was being undertaken; yet criminal enforcement proceedings were initiated. In both the Hartford case and the Pozsgai case, EPA also conducted video surveillance of the so-called wetland area.

Clearly, these cases suggest that the EPA prefers to utilize taxpayers' funds for what many have called Gestapo-type tactics against private property owners rather than more rational, and indeed, more environmentally prudent civil and administrative proceedings, contrary to import of your congressional testimony. It is incumbent upon you to correct your testimony, and indeed, to provide the committee with the case information on all criminal wetland enforcement actions to demonstrate whether the government exhausted less drastic enforcement measures as you suggest.

The criminal enforcement actions are particularly reprehensible where your agency is regulating private property, and where the definition of what even constitutes a wetland is a highly controversial and debatable subject, as evidenced by the EPA's current proposal redefining wetlands.[1] In addition, Executive Order 12,630 (Mar. 15, 1988) requires government agencies to be sensitive to private property rights, and there are serious takings implications under the Fifth Amendment of the failure by the government to provide permits in these cases as evidenced by the Loveladies Harbor case in the court of appeals and the Lucas v. South Carolina Coastal Council case before the Supreme Court. Thus, property owners being sent to prison for putting topsoil on their property without a permit may even be entitled to compensation for a denial of an after-the-fact permit.

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[1] In the Pozsgai case, for example, the government conceded that his property is above the headwaters and thus is covered by Nationwide Permit No. 26. Under government regulations, "an application for a . . . permit does not have to be made." 33 C.F.R. 320.1(c)(emphasis added). Indeed, even in your testimony, you accurately state that fill material on such isolated wetlands "will have only minimal adverse environmental effects." And yet Mr. Pozsgai received the longest prison term in U.S. history for any environmental offense, including the dumping of toxic and hazardous wastes, and all he did was place topsoil and clean fill on his property which he cleaned up. Indeed, the tiny drainage stream adjacent to his property in Morrisville, PA actually runs clearer today thanks to his clean-up efforts. The flooding incident you cited in your testimony regarding Pozsgai's property is also misleading since it was a minor isolated event which occurred long before most of the fill was placed on the property; rather, it occurred shortly after Pozsgai removed the blockage of tires from the stream which was then re-aligned to flow closer to his neighbors property, suggesting that the incident was not caused by unpermitted filling activity. In any event, under the proposed EPA wetland regulations, it is clear that Mr. Pozsgai's property would not even qualify as a wetland because it is not saturated to the surface or inundated with water. According to the U.S. Sentencing Commission, the three-year prison sentence imposed is longer than the average sentence imposed on repeat criminals convicted of larceny, fraud, many drug offenses, and other serious crimes. WLF has pending with President Bush a commutation petition to allow Mr. Pozsgai to serve the remainder of his three-year prison term under home detention so he can return to work there as a truck mechanic and take care of his 62-year old ailing wife.

I would also like to call your attention to a letter WLF sent early last year to Congressman John LaFalce of the House Small Business Committee (copy enclosed) pointing out that recent government reports show that we are not losing 500,000 acres of wetlands a year, or 250,000 acres, figures which you and others at EPA are fond of repeating without citing any authority, and which, in turn, are reported in the press as fact. Indeed, we may be actually gaining wetland acreage as farmers allow converted cropland to revert to wetlands. Your touting the values of wetlands in your October 1991 testimony is also misleading since not all wetlands have the same function and values, and it is wrong to treat them so categorically. Thus, when you boasted in your testimony, "I know of a wetland outside of Chicago that removed 90% of the toxics and heavy metals that entered it," Reilly Testimony at 3, you could just have easily stated that the government knows of a salt marsh in Massachusetts where pollutants of nitrogen and phosphorus increased 20 percent as water filtered through the wetland. Wetlands: Their Use and Regulation (Washington, D.C.: U.S. Congress, Office of Technology Assessment) at 51 (1984).

The point is that not all wetlands are of equal ecological value, and if the government begins compensating property owners for requiring them to keep their wetland property in its natural state, it will begin to prioritize its values and refrain from regulating, let alone filing senseless criminal charges, against private property owners who, like Mr. Pozsgai, own wetlands of marginal ecological value. The real policy issue should be not how many inches water must be within the surface of the property or for how long before it is a wetland; rather, the real question is whether the federal government is willing to pay for these wetlands, or whether it should use creative incentives such as the "Swampbuster Program" under the Food Security Act of 1985 or tax breaks to encourage property owners to voluntarily keep their property in its natural state.

Your pseudo-market approach to preserving wetlands that you outline in your testimony which entails "mitigation banking" and "compensation" by the owner to the federal government is fundamentally flawed. Property owners are not required to "compensate" the government for the reasonable use of their property, it's the other way around. Indeed, all of the mitigation requirements you and the Corps have imposed on property owners over the years can be properly characterized as "out and out extortion" to use a phrase the Supreme Court did to characterize similar exactions in the Nollan v. California Coastal Comm'n case. Millions of dollars of liability by the government, with interest, are looming over all of these past wetland conditional permits and denial of permits, not to mention the negative impact on the economy where jobs were lost in the name of preserving wetlands. For some reason, this larger issue seemed lost, or was never raised, in the no net-loss of wetlands debate.

We look forward to your correction of your public statements regarding EPA's criminal enforcement policy.

Sincerely yours,

Paul D. Kamenar
Executive Legal Director

encl.
cc: Vice-President J. Danforth Quayle
Attorney General William P. Barr
Congressman Henry J. Nowak,
Chairman, House Subcommittee on Water Resources

#21

WASHINGTON LEGAL FOUNDATION
1705 N STREET, N. W.
WASHINGTON, D. C. 20036
202-857-0240

March 2, 1992

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

Re: Comments of Proposed Amendments to Guidelines

Dear Commissioners:

In addition to my testimony submitted and delivered on February 25, 1992, I would like to add the following comments on behalf of the Washington Legal Foundation to the Commission's proposed changes to Section 2Q2.1 relating to protection of Fish, Wildlife, and Plants.

In particular, we take exception to the Commission's proposed revision of Section 2Q2.1(b)(2)(A) and (B). With respect to (b)(2)(B), the Commission proposes increasing the sentencing level if the offense "involved a pattern of similar violations." As I pointed out in my testimony on February 25, 1992 with respect to Section 2Q1.2 and 2Q1.3 of the environmental guidelines and Section 2N2.1 regarding Food and Drug laws, past administrative, civil, or criminal history is totally inappropriate when considering offense characteristics. Rather, past misconduct is clearly an offender characteristic and is already accounted for either in the criminal history category, or in Section 4A1.3 which allows a court to depart if that history does not adequately represent the prior misconduct of the defendant.

With respect to revising the term "pecuniary gain" under 2Q2.1(b)(2)(A), the Commission proposes to add Application Note 1 which defines pecuniary gain to include cases where "losses are reduced (e.g., farmer destroys migratory birds to prevent their consumption of cereal grains." We think that this example is an extremely unfortunate one to use as one justifying an increase in punishment. Indeed, to prohibit a farmer from protecting his or her own property raises serious due process and "takings" considerations under the Fifth Amendment. See, e.g., Christy v. Lujan, 109 S.Ct. 3177 (1989(dissenting opinion to denial of certiorari by Justice White). The right to protect one's property as Justice White notes is a fundamental right at common law. See also Burrows v. City of Keene, 432 A.2d 15, 19 (N.H. 1981).

In the Christy case, the farmer killed a grizzly bear which had been eating the farmer's sheep; an administrative action was filed against him under the Endangered Species Act and he was fined $2,500. The farmer filed a civil suit arguing that the law constituted a taking of his property just as surely as if federal rangers took his sheep and fed them to the bears. The Commission appears to be insensitive to legitimate property rights of farmers and property owners (with respect to wetland violations) who reasonably use and protect their own property. Why should a farmer protecting his grain from the ravages of nature be faced with a criminal penalty greater than a person who wantonly and senselessly shoots and kills endangered species for no reason whatsoever? Why does the Commission equate the conduct of an farmer protecting his crop from being devoured by common blackbirds with greedy poachers who kill rare and endangered species and sell their parts here and abroad?

The Christy case further illustrates the capricious manner in which the Justice Department exercises its prosecutorial discretion in bringing criminal rather than civil charges as more fully described in my testimony. If a person poisons a common blackbird that is causing a nuisance, a violation of the Migratory Bird Treaty occurs which is a strict liability crime. In United States v. Von Fossan, 899 F.2d 636 (7th Cir. 1990), a criminal case was filed against a man who poisoned common blackbirds because the town fathers of Springfield, Illinois told him to get rid of the birds on his property making a nuisance. While it is perfectly lawful to shoot and kill them, the law prohibits poisoning them. As Judge Easterbrook noted in Von Fossan, "[c]an it be that the Migratory Bird Treaty Act condemns as criminal anyone who takes (effective) steps to rid his land of pigeons carrying histoplasmosis? The answer is 'yes' [because courts have held that] the Migratory Bird Treaty Act establishes a strict liability offense." 899 F.2d at 639. As Judge Easterbrook further noted, Mr. Von Fossan should consider himself "lucky" because he was sentenced to probation for a pre-guideline offense. A similar offense today would likely draw a prison sentence under the guidelines, and almost certainly so under the proposed amendments despite Congress' command that probation be the appropriate punishment for minor non-violent offenses (against humans) for first offenders.

The Commission also proposes to change 2Q2.1(b)(3)(B) by eliminating the notion that a quantity of protected fish or birds were killed, and to substitute "(ii) any fish, wildlife, plant on endangered or threatened species" list regardless of the number killed. Again, lucky for our farmer in Christy that only administrative charges were brought; if the proposed changes are adopted, we predict that the Commission will see more John Pozsgai-type cases where substantial prison time is imposed for minor regulatory offenses. The Commission has not indicated that there are any studies showing why the current guidelines in this area are not sufficient to meet the ends of punishment and are in need of revision. We urge the Commission not to make any changes in this section without further study, review, and justification.

Respectfully submitted,

Paul D. Kamenar
Executive Legal Director

[redacted]

J. Holland

[redacted]

#2

UNITED STATES DISTRICT COURT
District of Alaska
222 West 7th Avenue - No. 54
Anchorage, Alaska 99513-7545

H. Russel Holland
Chief Judge

January 17, 1992

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

Re: United States v. Floyd
945 F.2d 1096 (9th Cir. 1991)

Dear Judge Wilkins:

The above referenced case which appears in 945 F.2d 1096 (9th Cir. 1991) has, I am sure, already come to your attention. Hopefully there is something that the Sentencing Commission can do to avoid or ameliorate the consequences of this decision. Especially when considered with the prospect of mandatory minimum sentences, we have a form of disparity in sentencing that I personally view as far more pernicious than what existed before the institution of guideline sentencing. I have recently declined to apply Floyd to a case that had facts very, very similar to Floyd. I am hopeful that the decision will get appealed so that another panel of the Ninth Circuit will have an opportunity to look at this situation again. I have some concern, however, that no appeal will be taken and that even if it were that there are too many judges who do not like the guidelines and are only too willing to find any crack they can to avoid applying them. The big trouble with Floyd is that it turns the entire process on its head. Floyd will arguably be applicable as an exception to the guidelines in almost every case involving young defendants. I have no demographics on this; but I have a feeling that at least seventy-five percent of the young people whom I sentence suffer from a youthful lack of guidance in a very real way.

If I am right about this, the result of Floyd could be that the majority of young defendants will slip out from under the guidelines unless they have the misfortune of committing one offense with a mandatory sentence. Any judge with half a brain can mouth the right words to offer some reasons for restructuring the guideline computation once a departure is justified; and the net result is the same kind of subjective sentencing we had under the old law. I am still no big fan of guidelines sentencing; but if we're going to have it, we ought to do it correctly; and the Floyd decision will, I am afraid, create some very serious problems for those of us who are trying to abide by both the letter and the spirit of guidelines sentencing.

In fact with Floyd in combination with guidelines sentencing and mandatory minimum sentences, we can have some absolutely awful disparity. The judge in Floyd gave a defendant with a terrible record a very substantial break on his guidelines sentence. Today I sentenced a young man who was "trashed" by his family much as Floyd was but who has a criminal history category of 1. I think he could be rehabilitated; but I have had to send him away for five years because he was caught with a pistol in his car while he was completing a drug deal. The defendant plead to the weapons charges and the drug charges (which involved a sufficient quantity of crack cocaine to result in a guideline sentence of more than five years for even a first offender) were dismissed. The irony of the situation--and this is where the three-way disparity problem between Floyd, the guidelines, and mandatory minimum sentences really comes into focus--is that if the defendant had been willing to gamble with a longer sentence, pleading to the drug charges and bargaining for a dismissal of the weapons charges, he might have been sentenced under Floyd to less time that the mandatory minimum sentence on the weapons charge.

Plainly, disparity in sentencing is still very much with us. I still believe that non-binding guidelines and the abolition of mandatory minimum sentences are the only rational solution. That resolution being unlikely, I certainly hope that something can be done about the Floyd decision.

Sincerely yours,

H. Russel Holland

HRH:ke

J. Nesbitt

United States District Court
Southern District of Florida
301 N. Miami Avenue
Miami, Florida 33128-7784

February 12, 1992

Chambers of
Lenore Carrero Nesbitt
District Judge

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

Dear Chairman Wilkins:

Although I am a member of the Sentencing Procedures Subcommittee of the Judicial Conference Committee on Criminal Law and Probation Administration, I write to you as an individual District Court Judge to comment on the most recent notice of proposed amendments to the sentencing guidelines. Our Committee Chairman, Judge Vincent L. Broderick, and our Subcommittee Chairman, Judge Mark L. Wolf, will present separately the Committee's official position regarding the proposed amendments.

I respectfully, albeit strenuously, recommend that the Commission promulgate only a handful of the approximately eighty proposed amendments. As a busy District Court Judge, working with an already overburdened probation office, I urge you to resist promulgating "clarifying" amendments which are actually substantive changes to the guidelines. These substantive amendments are confusing judges, probation departments and parties who struggle to implement the guidelines. More important, these amendments have made it increasingly difficult, if not impossible, for sentences to withstand appellate and collateral challenges.

For instance, recently a defendant was convicted of, and sentenced for, various counts which fell under different sets of guidelines. On appeal, the Eleventh Circuit relinquished jurisdiction for resentencing, without further instruction, after receiving the defendant's brief but before the government had responded. My only "clue" as to the reason for the resentencing was contained in defendant's brief which argued that the sentence "violated the ex post facto prohibition of the Constitution"

because the sentence was imposed under the 1989 amendments for conduct which occurred prior to the time those amendments became effective. (See Issue I, p. 10-15, Brief of Appellant Ramon Santana Roque, a copy of which is enclosed.)

An orderly and meaningful amendment process requires that the courts of appeals first resolve ambiguities and conflicts in the guidelines. This will enable the Commission to eventually promulgate necessary amendments based on empirical data and not general disenchantment or ad hoc suggestions from the public. Otherwise, promulgating the numerous proposed amendments will only create confusion and disparity in guideline applications.

When the first set of guidelines were promulgated I upheld their constitutionality and have endeavored in my sentencing to uphold their integrity ever since. I feel, however, that this will be impossible if the Commission promulgates these proposed amendments.

I appreciate you taking the time to entertain my views to the proposed amendments.

Very truly yours,

Lenore C. Nesbitt

LCN:jho
Encl.

cc: Hon. Vincent L. Broderick
Hon. Mark L. Wolf
Hon. Maryanne Trump Barry
Hon. George P. Kazen

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 91-5303

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

RAMON SANTANA-ROQUE,

Defendant/appellant.

BRIEF OF THE APPELLANT
RAMON SANTANA-ROQUE

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: Alison Marie Igoe
Assistant Federal Public Defender
Attorney for the Appellant
Ramon Santana Roque
301 North Miami Avenue
Miami, Florida 33128-7787

THIS CASE IS ENTITLED
TO PREFERENCE
(CRIMINAL APPEAL)

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ARGUMENT AND CITATION OF AUTHORITY

ISSUE I

THE DISTRICT COURT MISAPPLIED THE SENTENCING GUIDELINES AND VIOLATED THE EX POST FACTO PROHIBITION OF THE UNITED STATES CONSTITUTION WHEN IT SENTENCED RAMON ROQUE BASED UPON THE 1989 AMENDMENTS FOR CONDUCT WHICH OCCURRED PRIOR TO THEIR EFFECTIVE DATE

The indictment in this case charged that Ramon Roque knowingly made false statements for the purpose of acquiring firearms between September of 1989 through July of 1990. Count I charged Mr. Roque with making false statements for the purpose of acquiring ten (10) Titan .38 caliber revolvers on or about September 6, 1989. Count II charged Mr. Roque with making false statements for the purpose of acquiring two (2) Titan .38 caliber revolvers on or about September 8, 1989. Count III charged Ramon Roque with making false statements for the purpose of acquiring one (1) Sterling .22 caliber semi-automatic pistol on or about September 20, 1989. Count IV charged that Ramon Roque made false statements for the purpose of acquiring two (2) Browning .380 caliber semi-automatic pistols on or about October 13, 1989. The remaining counts V through XI charged conduct that occurred after November 1989. Although at least four of the eleven counts charged conduct that occurred prior to the November 1, 1989, amendments to the sentencing guidelines, the PSI and the transcript of the sentence hearing demonstrate that, upon the suggestion of the probation office, the district court applied the amendments which were not effective until November 1, 1989. R4:14.

a. Application of the November 1989 Sentencing Guidelines Amendments to Count I Through IV Violated the Ex Post Facto Prohibition of the United States Constitution[3]

In *United States v. Marin*, 916 F.2d 1536, 1538 n.4 (11th Cir. 1990), this court recognized the difficulty associated with applying amendments to the guidelines which became effective after the date of the charged conduct. Although the *Marin* court determined that the district court should generally apply the guidelines in effect at the time of a defendant's sentence hearing, it recognized the *ex post facto* problem raised by applying guidelines which were amended or became effective after the date of the charged conduct and which are more detrimental to the defendant. *Id; see also United States v. Robinson*, slip op. at 4054.

This situation was addressed by the Supreme Court in *Miller v. Florida*, 482 U.S. 423 (1987) which considered the *ex post facto* effect of amendments to the Florida sentencing guidelines. In *Miller*, the Court noted that the test for determining whether a criminal law is *ex post facto* derives from the principles which consider "'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Id.* at 430 (*quoting Weaver v. Graham*, 450 U.S. 24, 30 (1981)). To fall within the *ex post facto* prohibition, the law "'must be retrospective, that is, it must apply to events occurring before its enactment,'" and "'it must disadvantage the offender

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[3] United States Constitution, article 1, section 9, clause 3.

affected by it.'" *Miller*, 482 U.S. at 430 (*quoting Weaver*, 450 U.S. at 29).

The amendments in question were applied retrospectively. Counts I through IV of the indictment charged Mr. Roque with conduct that occurred on or about dates which preceded November 1, 1989. The amendments which permit the sentencing court to cross reference conduct penalized under section 2K2.1 with the specific offense characteristics under section 2K2.2 did not take effect until November 1, 1989. *Miller* addressed the situation of revised guidelines and decided that it "need not inquire whether this is technically an increase in the punishment annexed to the crime, because "'[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the [statutory] term.'" 482 U.S. at 432 (*quoting Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937)). In this case, application of the November 1989 amendments to Mr. Roque's conduct which occurred prior to that date deprived him of the opportunity to receive a lesser sentence and thus violated the *ex post facto* prohibition of the Constitution.

b. Mr. Roque Was Substantially Disadvantaged By the Application of the November 1989 Amendments

Prior to November 1, 1989, section 2K2.1 of the sentencing guidelines governed convictions under 18 U.S.C. § 922(a)(6). Under section 2K2.1, a violation of section 922(a)(6) carried a base

offense level of nine (9). Section 2K2.1 did not contain the cross reference that allowed for the application of section 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) that appears in the November 1, 1989 amendments, and thus penalties for convictions under 18 U.S.C. § 922(a)(6) did not calculate the number of weapons. Mr. Roque's base offense level for counts I through IV should have been nine (9) with a corresponding guidelines range of four to ten (4-10) months. *See* United States Sentencing Commission, Guidelines Manual, Sentencing Table (October 1987).

Under the November 1989 amendments, the base offense level would start at six (6). *See* U.S.S.G. § 2K2.1 (November 1989). Amended section 2K2.1 provides that if conduct in violation of 18 U.S.C. § 922(a)(6) "involved the distribution of a firearm or possession with intent to distribute, apply §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) if the resulting offense level is greater than that determined above." U.S.S.G. § 2K2.1(c)(1). Thus, applying the November 1989 amendments, if the court found that Mr. Roque's conduct charged in counts I through IV involved the distribution of firearms or the intent to distribute, it could properly apply section 2K2.2 to those counts.

Section 2K2.2(b)(1) provides for an increase in the base offense level as the number of firearms involved increased. Counts I through IV involved fifteen (15) firearms and thus the base offense level under the 1989 amendments would be increased by four

(4) to a level ten (10) which would result in a corresponding guideline range of six to twelve (6-12) months. *See* U.S.S.G. Sentencing Table (November 1989).

In addition to providing for a higher adjusted offense level, the November 1989 amendments allow the court to consider the number of weapons in excess of fifty as a basis of an upward departure. *See* U.S.S.G. § 2K2.2 Commentary, Application Note 2 (November 1989). In this case, not only was Mr. Roque prejudiced by the increased offense level under the amendments, the court included the weapons charged in counts I through IV in deciding the propriety and the range of the upward departure. *See* R4:40 ("The court agrees with the prosecutor that because there are 25 additional weapons that a reasonable departure would be an additional 50 percent increase, because that is half of the outer limits of your guidelines range score of 21 months.").

"[E]ven if the revised guidelines law did not 'technically . . . increase . . . the punishment annexed to the . . . crime,' [] it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law." *Miller*, 423 U.S. at 433 (*quoting Lindsey*, 301 U.S. at 401). Under *Miller*, a defendant who has lost his ability to challenge the imposition of a sentence longer than his presumptive sentence is "substantially disadvantaged" by the retrospective application of revised guidelines. *Miller*, 423 U.S. at 433.

Mr. Roque lost his ability to challenge the imposition of a

higher offense level as well as the ability to challenge the propriety of imposing an upward departure based upon conduct that occurred prior to the amendment which permitted the court's action. Mr. Roque was substantially disadvantaged by the district court's misapplication of the guidelines. This court should vacate the sentences imposed on counts I through IV and remand this case for resentencing.

LENORE CARRERO NESBITT
UNITED STATES DISTRICT JUDGE
301 NORTH MIAMI AVENUE
MIAMI, FLORIDA 33128-7784

MEMORANDUM

TO: Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission

FROM: Judge Lenore C. Nesbitt

DATE: February 12, 1992

SUBJECT: 1992 Guideline Amendments

The following are some of my thoughts and recommendations focusing primarily on the 1990 Judicial Conference's recommendations.

1. Amendment 29 (Expanded Availability of Non-prison Sentencing Options): After review of the six sentencing options, I would recommend that the first three options recommended by the Judicial Conference be implemented. I feel that these additional options would give the court a little more creativity and flexibility in sentencing. It also would not tax the probation office resources by significantly increasing the additional time one could serve on home detention or electronic monitoring. The other options would extend the time period beyond practicality. From my experience I have found that periods of more than six months on home detention are difficult for both the probation office and the offenders. Options one, two and three would only extend that time period slightly versus the other options which would be lengthier. I also feel that the other options would allow probation sentences for offenders who now may have prior records and subsequently create a higher risk to the community, which I do not believe is appropriate.

2. Amendment 33 (Departures Based on Offender Characteristics): This amendment is consistent with the Judicial Conference's recommendation 5 which is summarized in Part A of this amendment.

Parts B, C and D attempt to implement language that I foresee as being difficult to interpret. I also feel that in many of these areas there is too much room for disparity in interpretation. For example, determining a defendant's lack of "youthful guidance" would be very difficult to apply with any degree of consistency.

3. Amendment 26 (Departures Based on Inadequacy of Criminal History): Under Part A of this amendment I would favor option

number two which would provide for more structure and consistency in departures for criminal history. I do not favor a "hypothetical Category VII" guideline range in Option 1. I like the idea that the court is to consider the nature, rather than simply the number of prior offenses, in considering the seriousness of a criminal record in Option 2.

However, Part B does discuss the addition of a clarifying policy statement pertaining to departures for dangerousness which is consistent with recommendation 6 by the Judicial Conference. I would agree with the Judicial Conference recommendation that Part B be added to the guidelines.

Part C would add language prohibiting Judges from using the policy statement on inadequacy of criminal history as a reason to go below the guidelines when the criminal history category was set by either the career offender provisions or the armed career criminal provisions. I feel that this should not be adopted because it would limit the discretion of the court in not being able to assess all criminal history.

4. Amendment 1 Part A (Relevant Conduct): This amendment clarifies the relevant conduct to ensure that offense levels are tailored to individual culpability. This amendment implements the substance of the Judicial Conference recommendation 7 with some additional definitions and examples to the guideline commentary. I feel the new and expanded hypothetical examples do not clarify, but confuse and allow too much "wiggle room: for Judges disenchanted with the guidelines. I certainly feel that the inclusion of the 120-day qualifier is not appropriate or necessary especially in light of the last sentence which would allow Judges to override that time period.

5. Amendment 23 (Acceptance of Responsibility): This amendment deals with the changes in acceptance of responsibility. Of the four options that are presented, I favor option number three, even though I feel that the Judicial Conference's recommendation 8 more closely follows option number two. The primary reason that I prefer option three is that it encourages individuals to demonstrate their acceptance of responsibility by voluntary payment of restitution and assistance in recovery of fruits of the offense. It is my experience that judges are more likely to get restitution and other assets early on in the process rather than after sentencing or particularly, after a person has served a lengthy period of incarceration. As to option two, I like in some respects the increase for acceptance at higher levels, but it is not appropriate in the Southern District of Florida. Since most of our offenses involve drug cases (approximately 54%), an offense level of 30 would primarily pertain to cases who are being sentenced under minimum mandatory penalties. Therefore an additional reduction may be a moot point.

6. Concluding Comment

Lastly, the Commission may want to consider for discussion that any option that would allow for an increase in reduction for acceptance of responsibility may allow those individuals already sentenced the right to petition the court for a reduced sentence, alloging for the additional one level reduction. This may open up a flood of petitions for modifications of sentences previously imposed unless the retroactivity of the amendment is not fully addressed.

LCN:jho
cc: Hon. Vincent L. Broderick
Hon. Mark L. Wolf
Hon. Maryanne Trump Barry
Hon. George P. Kazen

[redacted]

19/1/24

[redacted]

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February 13, 1992

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

Attention: Guideline Comment

Dear Chairman Wilkins:

This letter comments on the Commission's proposal to amend Section 2Q1.2(b)(4), 57 Fed. Reg. 97, January 2, 1992. It supports the proposal but urges the Commission to undertake more substantial review of the guidelines for environmental offenses.

Proposed Amendment to Section 2Q1.2. The proposal is to clarify that an adjustment should not be made under Section 2Q1.2(b)(4) for offenses involving violations without or in violation of a permit, if an adjustment has already been made under Section 2Q1.2(b)(1) for violations involving a discharge, release or emission. The purpose of the proposal is to eliminate double counting of the same factor. There is double counting when an adjustment is made on account of the lack or violation of a permit in most offenses subject to this guideline, since most offenses prosecuted under it involve permit requirements.

Indeed, there is a good case for eliminating Section 2Q1.2(b)(4) altogether. Because most prosecutions for offenses covered by the guideline involve violations of requirements to secure a permit or of permit conditions, the real overlap is between the base offense and Section 2Q1.2(b)(4). Moreover, an offense flowing from the lack or violation of a permit is not necessarily more serious than an offense not involving a permit. The Clean Water Act, 33 U.S.C. §§1251 et seq., (CWA) for instance, forbids industrial discharges directly into our nation's water, except in compliance with a federal or state permit, but allows discharges indirectly into these waters without a permit, through publicly owned sewage treatment plants. Notwithstanding this permitting disparity, the CWA imposes similar technology based pollution treatment requirements on both direct and indirect

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discharges. Section 2Q1.2(b)(4) would enhance a penalty for a minor violation of a direct discharge permit but not for a serious violation of indirect discharge requirements. Some, but not all, of the latter might receive compensating enhancements for disruption of a public utility (the public sewage treatment plant), under Section 2Q1.2(b)(3).

Similarly, the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (RCRA), at §6925(a), forbids disposal of hazardous wastes at a facility lacking a permit or in violation of a permit. Excluded from wastes governed by RCRA are polychlorinated biphenyls (PCBs), which are regulated under the Toxic Substances Control Act, 5 U.S.C. §§2601 et seq. (TSCA), at §2605(a). See the exclusion in RCRA for PCB disposal at §6925(a). Regulations under TSCA forbid disposal of PCBs at a facility lacking EPA approval or in violation of the terms of the approval, but do not require a permit, 40 CFR §§761.70(d) and .75(c). Thus offenses involving the disposal of chemical wastes will ordinarily be subject to the permit enhancement of §2Q1.2(b)(4), unless the chemical wastes are PCBs. This is anomalous because Congress regarded PCB disposal to be serious enough to treat it in a separate statute.

Finally, Section 2Q1.2(b)(4) should be deleted entirely or modified substantially because it is fatally ambiguous. For instance, what does "permit" mean? The TSCA/PCB problem described above might be alleviated if "permit" includes government approvals not specifically denominated as permits. Does it? The CWA/indirect discharge problem described above might be alleviated if "permit" includes a permit issued to the indirect discharger by the sewage treatment plant. Does it? If so, what if the sewage treatment plant regulates indirect dischargers by contract or ordinance rather than by permit? While the broad readings suggested could alleviate apparent gaps in the enhancement, they go too far. They would enhance the sentence for a federal offense if it happened to violate the terms of a municipal permit of a type not contemplated by the federal statute violated. These are but some of the ambiguities in the enhancement that need to be cured if it is retained at all. Incidently, although Section 2Q1.2(b)(4) refers to transportation of hazardous substances without or in violation of a permit, no federal permit is required for transportation of any material under any of the statutes covered by §2Q1.2. RCRA comes closest, it establishes requirements for transporters of hazardous waste, but doesn't require them to secure permits, 42 U.S.C. §6923.

Comparable Amendment of Section 2Q1.3. If Section 2Q1.2 is amended as proposed, a comparable amendment should be made in 2Q1.3 for the same reasons. Indeed, if no comparable amendment is made, anomalous results would follow. Consider the case of two surface

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water discharges next to each other, each discharging in violation of its respective permit but one discharging an extremely hazardous waste grossly in excess of its permit limits, and the other discharging an innocuous waste marginally in excess of its permit limits. Only the innocuous violation would receive an enhancement, to the end that the innocuous violation would receive a more serious sentence than the extremely hazardous violation.

Possible Increases in Base Levels. Base levels should not be changed, and certainly not increased, without a thorough overhaul of the guidelines. The basic problem with the guidelines is that they do not differentiate serious from innocuous violations. That is not to gainsay the efforts of the drafters of the guidelines, for to do so adequately is truly difficult. Virtually every violation of the environmental statutes can be prosecuted civilly or criminally. Determining whether a given violation should be pursued civilly or criminally may be easy in extreme cases, but requires good judgment in others. Since almost any violation of these statutes will result in incarceration under the guidelines, even for first offenders, the Commission should either substantially revise the specific offense characteristics and application notes to truly let the punishment fit the crime or allow judges greater discretion for downward adjustments.

Consider the case of the loving father who takes his young son to the shores of Chesapeake Bay and teaches him to skip stones on its placid waters. Unfortunately, he is apprehended by a zealous EPA agent and is ultimately charged with violating the CWA for discharging a pollutant (the rock, see CWA 502(6)) into the waters of the United States (Chesapeake Bay) from a point source (his hand, a "discrete conveyance" under §502(14)) without a permit. Worse, the rock contains copper, a hazardous pollutant under Superfund (40 CFR §302.4). If you don't think the hand will qualify as a point source, substitute a sling shot. In calculating the sentence, Section 2Q1.2 will be used because the substance discharged is hazardous. The base level is 8. There is a discharge under §2Q1.2(b)(1), leading to an enhancement of at least 4, and of 6 if the activity is repeated. It is without a permit, for another enhancement of 4 under 2Q1.2(b)(4). The father played an organizing role leading to violations by his son, for an enhancement of 4 under §3B1.1(a). Thus the resulting offense level is at least 20-22, calling for a sentence of 33 to 51 months. Even without the permit adjustment, the level would be 16-18, for a sentence of 21 to 33 months.

If the example seems farfetched, consider actions that have been considered violations of the CWA or RCRA in the absence of a permit: dropping dummy bombs on an ocean bombing range in routine Navy training (CWA), Weinberger v Romero-Barcelo, 456 U.S. 305 (1982); adding chlorine and alum to a drinking water reservoir by

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water department employees to purify the water (CWA), Hudson River Fishermen's Ass'n. v City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1991), affd. 940 F. 2d 649 (2nd Cir. 1991); shooting lead shot on a skeet shooting range (RCRA), Connecticut Coastal Fisherman's Association v Remington Arms Company, Inc., Slip Op. Civ. No. B 87-250 (EBB) (D. Conn., Sept. 11, 1991).

The activities in these cases would not be widely regarded as criminal behavior and, unless aggravated by other factors, do not warrant significant incarceration. Yet they are treated virtually the same under the guidelines as activities which cause considerable ecosystem damage and would be widely regarded as criminal behavior and do warrant significant incarceration. The reason is not far to seek.

The environmental statutes are complex and far reaching. They are typically over-inclusive to assure that no pollution sources are overlooked. They can be violated in technical ways or in substantive ways. Violations can be de minimis or serious. Congress has recognized the inappropriateness of applying the same sanction to all violations by providing a broad range of remedies and sanctions: notices of violation; administrative cease and desist orders; administratively assessed penalties; civil injunctions; civil penalties; contractor debarment; and criminal sanctions. The administering agencies have recognized the inappropriateness of applying the same sanction to all violations by developing policies to guide enforcement officials in applying appropriate sanctions for different types and levels of violation. The courts have recognized the legitimacy of decisions by administering agencies in applying these different sanctions or in not enforcing at all against some types of regulatory violations, according the agencies the presumption of prosecutorial discretion, see Heckler v Chaney, 470 U.S. 821 (1985). In a civil enforcement context, courts have repeatedly held that the de minimis nature of a violation of these statutes cannot be argued as a legal defense, but can be considered by courts as an equitable defense, when it comes time for the court to assess a penalty or fashion another remedy. No such safeguards against draconian enforcement exist when it comes to criminal enforcement of the same statutes for the same offenses. The administering agencies don't make the decisions on whether to prosecute offenses criminally, those decisions are made by criminal prosecutors. Those prosecutors may lack the perspective that the agencies have to sort out serious from trivial violations. As a result, an offense which an administering agency might regard as not warranting civil action or as warranting only a small administrative penalty could nevertheless be prosecuted criminally. The harsh consequences of this for less serious offenses could be ameliorated by imposing lesser criminal sanctions, such as probation. The guidelines preclude this for almost all violations of these statutes.

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The proposed amendments are the first step toward making the sanctions imposed under the guidelines for environmental crimes more reflective of the nature of the underlying offenses. But they are only the first of many needed steps.

Very truly yours,

Jeffrey G. Miller
Professor of Law

JGM:acd

Frazer

Practitioners – Chim. Hist.

CRIMINAL HISTORY
AMENDMENTS PROPOSED IN FEDERAL REGISTER
FOR 1992 CYCLE

Lyle J. Yurko
Practitioners Advisory Group

Amendment

#24:

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.

Reject.

Defendant is charged with 6 robberies but committed only one and is offered a plea bargain to plead as charged but to receive the minimum sentence as if convicted of one. Defendant pleads to all six. Under the proposed amendment defendant gets three points for offenses he did not commit.

#25:

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."

Endorse.

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

Option #2:

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.

Endorse.

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

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

The two options are not mutually exclusive and both are endorsed.

#25:

Expunged convictions are currently not counted. Annulled, set aside, vacated, pardoned and reversed convictions are not counted 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.

Both proposals should be rejected. At some point the laws of the jurisdiction must control. Expunged convictions are simply not counted and do not have to be disclosed.

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." See also N.C.G.S. 15A-145(b). Regardless of the state's reason for expunging offenses, the change also creates a difficult matter of discovery and proof. The defendant need not disclose the expungement, and if the jurisdiction actually expunges the conviction, discovery of the matter would be in violation of the court order to expunge.

These proposals should be rejected.

#25B:

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

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.

#26A:

These amendment options provide structure to the adequacy departure 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 interest recognized in Option 2 makes it the proposal that should be endorsed.

26B:

Amends 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.

Endorse.

These factors are appropriate to consider so long as wanton upward departures are restricted under previous amendments.

26C:

Prohibits downward departure for career offenders on adequacy grounds.

Reject.

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 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.

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.

Endorse Option 1 to prevent 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.

27B:

Predicate crimes of violence must have statutory maximums of greater than two years rather than simply greater than one year.

Endorse.

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 should favor total exclusion of such trivial offenses for career qualifiers.

Exclusion by definition is problematic and indeed has proven quite difficult.

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 most 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.

Modifying this predicate insures 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.

The Commission should note that the only appropriate question here is recidivism and not the seriousness of the instant offense which is treated elsewhere in the guidelines or by departure.

27C:

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. Also amendment conforms to other provisions.

Endorse.

27D:

Comment on narrowing crimes of violence definitional.

Those of us who tried to restrict crimes of violence by definition have found this to be quite difficult.

27E & F:

Offenses may be joined for trial if they are of the same or similar character or are based on the same set or transaction or ... connected together or constituting part of a common scheme or plan.

If offenses were joinable at the time of trial but were not joined for trial or consolidated for sentencing and both resulted in judgments prior to the commission of the instant offense, they each would count as a separate predicate offense for career status, even though this defendant hardly represents the traditional recidivist.

Broadening the definition of related offenses to include offenses which were joinable will prevent a single spree of crimes from causing the warehousing of a defendant who is not so serious an offender that warehousing is appropriate.

Likewise, sequencing (requiring that an offender predicate offenses be separated by conviction and sentence) also comports with standards traditionally associated with recidivist statutes. Again, a single spree should not always subject a defendant to warehousing.

The joinability and sequencing requirements are necessary narrowing principles which should apply to career status so that only true recidivists receive maximum punishment. Such punishment should only be reserved for those whose behavior requires that society be protected from them for an extended time period.

28A: Category O

Because 61% of the offenders in the sample studied in the Commission's Report (FY 90) were classified as Category I offenders and because some have suggested that Category I is overbroad in including certain offenders in this category, the Group studied creating a Category O. Currently Category I includes:

A. Persons with no prior contact with justice system, i.e., no arrests.

B. Persons with 0 points but with some arrests.

C. Persons with 0 points but some convictions which currently would not be counted.

D. Persons with one point.

The Group study found that the "no arrest" sub-category had a higher percentage of offenders in the white collar area. All Category I offenders have lower incidences of victim injury and weapon use, but again the lowest are offenders with no arrests. While "no arrest" offenders commit singular acts of crime and act alone more often than other Category I offenders, the seriousness of the "no arrest" sub-group is slightly less than other Category I offenders.

"No arrest" offenders were female, non-black, married, and better educated.

The report concludes that the "no arrest" offenders were sufficiently different" on a variety of variables.

The Group attempted to answer only the question of what sub-groups to include in Category 0 and did not comment on what punishment ranges should apply to this category.

These sub-groups were identified for possible inclusion in Category 0:

Class I No arrest or other contact.

Class II No convictions.

Class III Convictions not counted or persons with serious instant convictions.

The report noted that it would be difficult to justify enhanced punishment based on arrest criteria although proof of guilt even though no conviction might be a basis for differentiation.

OPTIONS

Option 1. No change - no prior would continue to be sentenced as harshly as person with priors.

Option 2. Modify to punish less severely one or more of the sub-categories.

CRITIQUE

The statistical justifications for separating out "no arrest" offenders from others who score 0 appears to be too tenuous to support justifying less severe sentences solely on a "no arrest" basis. The constitutional and fairness problems with such a proposal are monumental. Separating out "no arrest"

offenders might institutionalize differences in local arrest practices which may be racially and sexually discriminatory.

Creating a Category 0 which somehow would exclude offenders based on criteria that was not counted for other criminal history score purposes would likewise upset the internal logic and consistency of the guidelines and again the statistical differentiation supporting such treatment is too tenuous to justify disparate treatment.

There is a continuing problem with basing guidelines action on factors which occur outside of the guidelines setting.

The guidelines system was instituted because of a recognition that other systems tended to foster disparate treatment which often was based on constitutionally impermissible criteria such as race, sex or religion.

Most criminal history events occurred in such systems. Although criminal history should be taken into account in the guidelines system, over-reliance on criminal history factors to justify different sentencing results has the dangerous possibility of building into the guidelines system factors which the guidelines were designed to exclude from consideration.

The creation of a Category 0 is something which the Practitioners Advisory Group supports, but the proposal which we endorse is that Category 0 be made up of individuals who have 0 criminal history points and that such be based on criterion consistent with all other criminal history categories.

28B: Category VII

Eight percent of guidelines cases during the Commission's report study period were classified as Category VI and in raw numbers that was about 1,500 defendants.

Currently some courts are treating offenders with criminal history scores of greater than 13 as ground for upward departure. These courts have fashioned a reasonableness standard to review sentencing choices for defendants for which such a departure was selected. Only the 7th Circuit required the District Court to extrapolate a new category.

The Group next assumed a Category VII would be created and then chose to distribute Category VI offenders in new VI and VII in one of two ways:

A. VI - 13-15 points VII - 16 or 16+

B. VI - 13-19 points VII - 20 or 20+

A statistical profile was then created using these two proposals. Offense type, victim injury and weapon use were not factors in either proposal. Role in offense and offense level factors appear to shift the more serious offenders to Category VII if the second proposal is used. Other factors were examined.

There was very little statistical difference between the two proposals selected, and no statistical justification for creating one rather than the other.

OPTIONS

The Group considered the following issues:

A. Should VII be added, or should departure be the sole method of sentencing harshly for serious offenders?

The general similarity of Category VI offenders argue against further division.

Offenders with unusually high points may need longer incarceration. A structured departure for such offenders may be recommended in the commentary.

To rely on departure may be to invite disparity, but criminal history points may not truly reflect seriousness.

B. What should the point spread be if VII is added?

Three points is consistent with the differentiation of other categories, but the higher the point total, the less significant three points becomes. Making the point spread greater can separate out only the most serious offenders for VII.

C. What new ranges?

Group thought this to be a policy issue.

D. How to trigger departure?

"Inadequacy" or structure at every three points. The second proposal may reduce disparity, but may not achieve desired result of severe punishment for most serious offender.

E. Would career offenders be placed in VII or VI?

Because of statutory mandate, problem arises in leaving such offenders in Category VI.

CRITIQUE

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.

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

January 29, 1992

MEMORANDUM

TO: All Commissioners
Staff Attending 2nd & 8th Circuits Sentencing Institute

FROM: John Steer
General Counsel

RE: Memorandum from Judge Duffy via Judge Broderick

The attached is for your information. Judge Duffy's criticism of the guidelines appears to reflect, in part, a fairly common misunderstanding of the scope of Relevant Conduct. Proposed amendment No. 1 would further clarify Commission intent regarding the appropriate use of the "reasonably foreseeable" standard under the guideline.

Attachment

John, Let's discuss this on Wednesday - 2/11/92
BW

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES COURTHOUSE
101 EAST POST ROAD
WHITE PLAINS, NEW YORK 10601-5086

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Vincent L. Broderick
Chairman

8-887-6137 (FTS)
(914) 682-6137 (COMM)

FACSIMILE

8-887-6140 (FTS)
(914) 682-6140 (COMM)

January 23, 1992

Attn: John R. Steer, Esq.
General Counsel
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

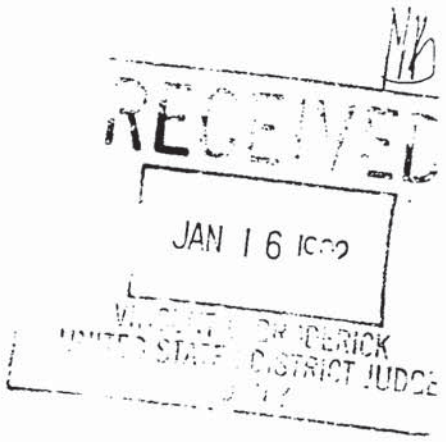
Dear John:

The enclosed memo from Judge Duffy was sent to me in response to a request for input by Second Circuit Judges in connection with the forthcoming sentencing institute.

With warm regards,

Vincent L. Broderick

VLB/jf
Encl.



MEMORANDUM

TO: JUDGE JON O. NEWMAN and
JUDGE VINCENT L. BRODERICK

FROM: JUDGE KEVIN THOMAS DUFFY

DATE: January 13, 1992

RE: Sentencing Institute

==========

When I was a young lawyer, there was much discussion about the nature of multiple and single conspiracies and their classification as either wheel or chain-type conspiracies.[1] I will focus on chain-type conspiracies here.

A chain-type conspiracy constitutes a single, as opposed to multiple, conspiracy and generally involves drug trafficking.[2] A good example is heroin trafficking. As everyone knows, heroin is imported into this country in multi-kilo quantities. It is first handled by a group of importers which forms one link in the chain conspiracy. The importers generally turn the heroin over to area distributors. The contact between the importers and the different area distributors forms a second link in the chain. The area distributors, in turn, ship the heroin out to certain city distributors. The relationship between the area distributors and the city distributors forms the next link in the conspiracy.

Continuing down the chain, the city distributors then sell to neighborhood distributors. This relationship generally forms the next link in the chain of conspirators. The neighborhood distributors sell to street pushers, forming another link. Finally, the street pushers distribute the heroin to addicts and addict-pushers, this latter group forming the last link in the chain-type conspiracy. Thus, it is possible to follow heroin through a general conspiracy, starting with the importation of the drug into this country and ending with the insertion of the drug into the addict's veins.

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[1] See, e.g., U.S. v. Kotteakos, 328 U.S. 750 (1946); U.S. v. Stromberg, 268 F.2d 256 (2d Cir. 1959).

[2] See, e.g., U.S. v. Tramunti, 513 F.2d 1087 (2d Cir. 1975); U.S. v. Badalamenti, et al., 794 F.2d 821 (2d Cir. 1986).

With this background on the law of conspiracy, I will now address how the sentencing guidelines apply to drug conspiracies. The following hypothetical will serve as a guide. Assume that John Doe agrees with Richard Roe to deal two dime bags of heroin to a street pusher. Assume further that John Doe knows that all heroin is imported into this country in multi-kilo amounts. Assume that John Doe has a clean record and that he merely serves as a "mule" in the transaction. Also assume that John Doe pleads guilty.

In the first scenario, Richard Roe keeps his mouth shut and John Doe is sentenced, the weight of the heroin being the lowest possible amount. In this situation, John Doe could get probation. In the second scenario, Richard Roe decides to turn states evidence. He becomes a cooperating witness and his information leads to the prosecution of a major chain-type conspiracy involving as many as 40 individuals. Here, John Doe is sentenced for all the heroin in the conspiracy which he could have reasonably foreseen. In this situation, he can look forward to spending up to 40 years in prison.

It is my understanding that we have sentencing guidelines to ensure that we do not impose disparate sentences. However, the "disparity" in sentences recognized at the hearings which led to the creation of the sentencing commission referred to an alleged disparity in sentences imposed by different judges or in sentences given different defendants. The situation I have depicted does not involve different defendants or different judges.

Have the guidelines defeated their purpose?

cc: Steven Flanders,
Circuit Executive

#18

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
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JACK R. SAYLOR
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605/342-4240

February 21, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20005

RE: Proposed Amendments

Dear Sir/Madam:

Attached are our comments on selected proposed amendments to the sentencing guidelines. Please call if you have any questions or comments.

Sincerely,

Jack R. Saylor

Jack R. Saylor
Chief Probation/Pretrial Officer

/jrs
Enclosure
cc: Honorable Vincent L. Broderick, c/o Research Division, Federal Judicial Center.

RESPONSES TO PROPOSED AMENDMENTS TO FEDERAL SENTENCING GUIDELINES

I: Amendments Responsive to Judicial Conference Recommendations

Introduction: Option preferences, comments, and other requested responses are offered in the order presented in the "Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines," prepared by the Federal Judicial Center.

Amendment 29

Options 1,2, and 3 preferred.

Comments:
1. Options 4-6 might, but 1-3 do not.
2. Consistent w/Congressional intent, certain "white-collar" offenders who have historically received "lenient" sentences in the past, should not be eligible for straight probation or even probation with a fine and/or restitution. Some other, more punitive, sanction(s) should be required. The challenge, of course, is arriving at an acceptable definition for the term "white-collar".
3. Yes. Sentencing alternatives similar to those suggested should be available. This could be accomplished by creating zones on the Sentencing Table where these options would be available as conditions of probation.

Amendment 33

Part (A): Agree.
Part (B): "
Part (C): Perhaps in the case of a youthful defendant and/or in other extreme cases where there is convincing evidence that the defendant's early experiences were so devastating that a mental state approaching "diminished capacity" exists, a downward departure may be appropriate. Consistent with a fundamental principle of the Guidelines, the Commission should promulgate a departure policy statement in this area and then let the Courts "carve out a heartland".
Part (D): In these days of severe prison overcrowding, fiscal restraint, and community confinement options, downward departure should definitely be permitted for the profile described.

Amendment 26

Part (A): Option 2 preferred; however, illuminating the "nature of prior offenses" will increase the investigative burden of the Probation Officer and could delay sentencing in some cases.
Part (B): This appears to be a good amendment, but once again, it will increase the Probation Officers' investigative burden; determining "degree" and "type" of risk is time consuming.
Part (C): Agree.

Amendment 23

Option 3 preferred. Enactment of Option 3 could also resolve the problem of the split among the Circuits relative to the scope of acceptance of responsibility, i.e., a defendant would be able to choose if he/she wants to accept responsibility for the relevant conduct, and thereby, receive the additional one-level reduction. They would receive benefit of pleading without being "forced" to accept responsibility for all the relevant conduct.

Amendment 1, Part (A)

Agree with amendment.

Amendment 1, Part (B)

Agree with amendment.

II: Additional Amendments of Special Interest
(Comments offered relative to **selected** amendments only)

Amendment 16, Part (A) & (B)

Agree with amendments.

Amendment 17, Part (A)

Agree with amendment; however, including law enforcement officers as "participants in the offense" must be monitored closely.

Amendment 17, Part (B)

Agree with amendment.

Amendment 18, Part (A)

Comments:
1. Agree with amendment if the conduct characterized as "individuals who typically participate" can be adequately defined.

Amendment 18, Part (B)

Disagree. The current guideline appears adequate.

Amendment 19, Part (A)

Disagree. This issue is better addressed through the proposed amendment to the 1B1.3, Relevant Conduct, and is already addressed to some extent in the Drug Table.

Amendment 20

Agree with amendment. Option 3 with a minimum offense level of 16, and a cross reference to §2D1.1, appears most appropriate.

Amendment 4, Part (A)

Agree with amendment. The circumstances addressed in this amendment have been at issue in cases sentenced in this district.

Duffy - Relevant Conduct [redacted]

Judge Brett

[redacted]

Thomas R. Brett
Judge

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

#8

February 11, 1992

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

Dear Chairman Judge Wilkins:

Thank you for your prompt response of February 7, 1992, to my letter of January 30, 1992. Three amendments I suggest to the Sentencing Guidelines, if repeal across the board is not possible, are as follows:

(1) Within the trial court's discretion, any first felony offense having a value of less than $100,000.00 may be eligible for probation if the facts and circumstances, including restitution, justify such a sentence;

(2) The old Fed.R.Crim.P. 35 permitting a court to alter a sentence within 120 days should be reinstituted; and

(3) A 5K1.1 reduction or departure by the court, due to defendant's cooperation, should be within the court's discretion for good cause stated and <u>not</u> be limited to the prosecutor's recommendation.

Sincerely yours,

THOMAS R. BRETT