Public Comment

Proposed Amendments

1993
VOLUME II

UNITED STATES POSTAL SERVICE
ROOM 3100
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2100

CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

* **Proposed Amendment 44, § 2B1.1(b)(4).** The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

Proposed Amendment 45, (§ 3A1.4). The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Food and Drug Division
Rockville, MD 20857

March 12, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Courlander:

On behalf of the Food and Drug Administration ("FDA"), I wish to submit the following comments on proposed amendments to the sentencing guidelines for United States courts, published in 57 Fed. Reg. 62832 (1992).

Proposed Amendment Five:

(a) The FDA opposes proposed amendment five, which would eliminate from Sections 2B1.1 (theft) and 2F1.1 (fraud and deceit) "more than minimal planning" as a specific offense characteristic providing for a two-level increase in sentence. The amendment would also eliminate from Section 2F1.1 "a scheme to defraud more than one victim" as a specific offense characteristic requiring a two-level increase in sentence. Instead, the amendment would modify the loss tables in Sections 2B1.1 and 2F1.1 to incorporate gradually an increase for "more than minimal planning" with a two-level increase for losses in excess of $40,000.

The "more than minimal planning" and "scheme to defraud more than one victim" specific offense characteristics have special significance in offenses involving the public health and safety, which often consist of coordinated or carefully planned schemes to defraud that result in substantial non-monetary harm to consumers and to health patients. Indeed, fraud offenses frequently include planned efforts to conceal the wrongful conduct from regulatory agencies and from the public. Therefore, the FDA believes that these characteristics should remain as specific offense characteristics rather than being considered only in terms of economic loss under Sections 2B1.1 and 2F1.1.

(b) Under the heading "Additional Issues for Comment," the Notice also invites comment on various alternatives to proposed amendment five. The FDA opposes eliminating the "more than minimal planning" and "scheme to defraud" specific offense characteristics from Section 2F1.1, or any of the proposals to

otherwise alter the definition of "more than minimal planning" in Section 1B1.1. However, the agency strongly supports increasing the base offense level of Section 2F1.1, and other guidelines that contain an enhancement for "more than minimal planning," in recognition of the pervasiveness and seriousness of fraudulent criminal conduct. The agency also supports setting forth more examples of the application of "more than minimal planning" in fraud and theft cases, specifically including examples of fraud involving the manufacture, distribution, or use of food, drug, device, or cosmetic products.

The FDA believes that the current base offense level six in Section 2F1.1 is disproportionately low in comparison to other guideline offenses. In addition, the agency believes that the guidelines do not sufficiently reflect the serious, non-monetary harm that frequently results from fraud-related offenses within the purview of the Federal Food, Drug, and Cosmetic Act. Accordingly, while the FDA supports the proposal to restructure the loss tables for fraud offenses to provide higher offense levels for losses at the lower end of the loss table, the agency believes that the guidelines' offense levels should be substantially increased for health-related fraud offenses that do not result in substantial economic harm. One way to partially address this concern would be to adopt the proposals set forth in proposed amendment six and issue for comment (no. seven), as set forth below.

Proposed Amendment Six:

The FDA strongly supports proposed amendment six, which would amend Application Note 10 of Section 2F1.1 to (a) provide guidance for an upward departure in cases in which the fraud caused substantial non-monetary harm and to (b) include an example of a fraudulent blood bank operation. Other "guidance" examples of health-related fraud offenses warranting an upward departure would exist in the case of a pharmaceutical manufacturer that conducted or reported fraudulent or false testing to determine the identity, strength, quality, or purity of a drug, or of a person or persons that created, sold or dispensed a counterfeit drug. In each example, the quality or safety of the drug may be seriously deficient based on the improper or inadequate manufacturing operations or processes. Such offenses might result in substantial harm to innocent health victims that is not adequately addressed by considering economic loss alone.

Issue For Comment (No. Seven):

For the reasons set forth in the preceding two paragraphs, the FDA strongly supports amending Sections 2B1.1, 2B1.2, and 2F1.1 to identify specific offense characteristics for circumstances in which the "loss" does not fully capture the harmfulness and seriousness of the conduct, thereby warranting an increased offense level. In particular, the agency suggests establishing respective specific offense characteristics to provide for (a) a two-level increase (or level 13) for circumstances in which some or all of the harm caused by the offense was non-monetary, (b) a four-level increase (or level 24) when the defendant knowingly or recklessly endangered the health or safety of one or more persons, (c) a four-level increase (or level 24) when the offense involved the knowing or reckless risk of serious bodily injury or death to one or more persons, and (d) a six-level increase (or level 26) when the offense results in death. Alternatively, the FDA supports amending the commentary to these sections to include the above examples as circumstances in which an upward departure may be warranted.

Issue For Comment (No. 65):

The FDA supports amending Section 2F1.1 to include the risk of loss as a factor in determining the guideline range for fraud and related offenses when the amount of the risk is greater than the actual or intended loss. The risk of loss should increase the guideline range to the same extent as actual or intended loss, irrespective of whether or not the risk was reasonably foreseeable. Currently, Section 2F1.1 provides that the intended loss shall be used if it is greater than the actual loss. Presumably, this is to hold defendants accountable for the loss intended by their wrongful acts. The agency believes that defendants should likewise be held fully accountable for the risk of loss associated with their intentional wrongful acts.

Additional FDA Comments:

The FDA recommends that the Statutory Index (Appendix A), which specifies the guideline section or sections ordinarily applicable to the statute of conviction, be amended. With respect to the Federal Food, Drug, and Cosmetic Act, the current appendix lists Sections 2F1.1 and 2N2.1 as being applicable to offenses under 21 U.S.C. §333(a)(2), but only Section 2N2.1 as being applicable to 21 U.S.C. §§331, 333(a)(1), and 333(b). The agency believes that Section 2F1.1 is also applicable to offenses under 21 U.S.C. §§331, 333(a)(1), and 333(b) (as amended August 26, 1992), and that this information should be included as a Consolidation and Simplification of Chapter Two Offense Guidelines amendment.

Thank you for this opportunity to comment on the proposed amendments to the sentencing guidelines. If the Sentencing Commission has any questions concerning these comments, please feel free to contact me (301-443-4370) or James S. Cohen, Associate Chief Counsel for Enforcement (301-443-7272).

Sincerely,

Margaret Jane Porter
Chief Counsel
Food and Drug Administration

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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

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

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

Date: February 16, 1993

To: United States Sentencing Commission
Public Information

From: David E. Miller, Deputy Chief
U. S. Probation Officer

Re: More than minimal planning

The Commission should remove this as a specific offense characteristic from guidelines in which it is presently incorporated. There is vast disparity in the application of this factor and it is often a bone of contention for the Court to resolve at sentencing.

The intent of the Commission to take this factor into consideration by building it in to loss table when the loss increases means the factor will be adequately considered.

I also think the Commission should adopt an amendment that creates a specific offense characteristic that provides that if the offense, <u>including all relevant conduct</u>, involved a single opportunistic act, a 2 level decrease may be given. It is important the guideline or commentary emphasize all relevant conduct is to be considered in making this determination, otherwise controversy over it and the act underlying the offense of conviction will be rampant.

Making these changes will reduce the amount of time taken by all parties in the dispute resolution process; will more fairly penalize those at higher offense levels, and; will allow a reduction for the true situational offender, thus allowing the straight probation option more often for such defendants.

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475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2100

CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

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As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

701 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2696
Telephone 202-508-5620

EDISON ELECTRIC INSTITUTE

PETER B. KELSEY
Vice President,
Law and Corporate Secretary

March 15, 1993

The Honorable William W. Wilkins, Jr., Chairman
Members of the U.S. Sentencing Commission
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins and Members of the Commission:

The Edison Electric Institute ("EEI") is grateful for the opportunity to present comments to the Commission on the proposed amendments to the sentencing guidelines.[1] EEI is the association of electric companies. Its members serve 99 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and service 76 percent of all ultimate customers in the nation. Its members are pervasively regulated at the federal and state level in all aspects of their business. These electric utilities range in size from ones employing less than 100 employees to ones employing more than 10,000 employees. Our member companies have a real and direct interest in the content of the proposed amendments to the individual guidelines given enforcement trends toward the prosecution of corporate managers and supervisors.

I. Amendment No. 23, Abuse of Position of Trust

The Commission invites comment on a proposed amendment to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).[2] The proposed amendment attempts to reformulate the definition of what constitutes a "special trust."

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[1] Sentencing Guidelines for United States Courts; Notice, 57 Fed. Reg. 62,832 (December 31, 1992)(hereinafter "Notice").

[2] Amendment No. 23, Notice at 62,842.

V. Amendment No. 45, Multiple Victims

The United States Postal Service requests that the Commission create in Chapter Three, Part A, a new victim-related general adjustment to take into account increased harm caused when there is more than one victim.[8] The proposed amendment is as follows:

> If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense by 2 levels for every 250 victims.

No. of victims	Increase in offense level
2 - 99	2
100-349	4
350-649	6
more than 650	8

The Postal Service specifically recommended that this departure be included as a victim-related adjustment applicable to all offenses involving multiple victims rather than limited to specific types of offenses.[9]

First of all, courts need to look to the statute and regulations that define the offense for which a defendant is being sentenced to determine whether "number of victims" is a relevant factor in sentencing. If the statute or regulations identify factors for the court to consider in setting the level of fine or imprisonment for an offense, and do not list "number of victims" as a relevant factor, it may not be appropriate for the court to consider. Furthermore, even if number of victims is a relevant factor, in many cases it will have been addressed by the prosecutor bringing multiple counts against the defendant. For the court to enhance the defendant's sentence based on "number of victims" in such cases would be to penalize the defendant twice for the same conduct.

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[8] Amendment No. 45, Notice at 62,853.

[9] Letter to the Honorable William W. Wilkins, Jr. from Chief Postal Inspector K.J. Hunter, dated November 27, 1992.

In addition, EEI is concerned that the proposed amendment would prove too vague and, thus, difficult for sentencing courts to apply. Specifically, the proposed amendment does not define under what circumstances an "affected" party would be deemed a victim or the degree to which a party would have to be "affected" in order to be deemed a victim. In this regard, EEI is particularly concerned about the impact of the proposed amendment on persons convicted of offenses involving the environment. In such cases, more than one individual may be affected by an offense, but this may not correlate to degree of actual harm experienced by any of those individuals, and the effects may be an indirect consequence of the conduct for which the defendant is being sentenced.

Moreover, unlike other adjustments in Chapter 3, Part A -- vulnerable victims, official victims, and restraint of victims -- the proposed amendment deals not with knowing conduct aimed at particular victims but with possible unforeseen impacts on unintended victims. While such an adjustment may be desirable when applied to specific offenses, particularly offenses intended to affect multiple victims, its application across a wide variety of offenses without such constraints would inject an unacceptable degree of uncertainty into the sentencing process.

Therefore, EEI recommends that the Commission reject the proposed amendment as being too broad and ill-defined. At a minimum, the Postal Service should be required to identify the types of offenses directly of concern to it in proposing the amendment, and the amendment should be limited to those types of violations. Also, even as to those types of violations, the Commission needs to provide guidance about who qualifies as a victim. Furthermore, courts should be instructed to consider whether "number of victims" is relevant under the statute and regulations being enforced and given the facts of the case, including the number of counts brought by the prosecutor and the defendant's state of mind in committing the offense.

Thank you for considering our views on these matters.

Very truly yours,

Peter B. Kelsey

Peter B. Kelsey

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March 10, 1993

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With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

PACDL

Pennsylvania Association of Criminal Defense Lawyers

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NACDL Affiliate

March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

✳ Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

March 12, 1993

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

Dear Commissioners:

This letter concerns Proposed Amendment 1, included in the Guideline amendments proposed for public comment by the Commission on December 31, 1992. The amendment would prohibit conduct of which the defendant has been acquitted from being considered as relevant conduct; an application note suggests that such "acquitted conduct" may, in an exceptional case, provide a basis for an upward departure.

I strongly urge the adoption of this amendment. It would eliminate one of the most indefensible features of the current guideline system, a feature that has yielded bizarre results and brought the guideline system into disrepute.

For purposes of determining conduct that counts as "relevant conduct," the Guidelines currently make no distinction between uncharged conduct and conduct for which the defendant has been charged, tried, and acquitted. Both categories of conduct are not only included as "relevant conduct," but they both are priced at the same level of severity.

An extraordinary example of the effect of the current practice is contained in a case recently decided by the Court of Appeals for the Second Circuit, United States v. Concepcion, ___ F.2d ___ (2d Cir. Dec. 28, 1992). One defendant, Nelson Frias, was charged with two weapons offenses and a narcotics conspiracy offense. A jury convicted him of the weapons offenses and acquitted him of the drug conspiracy offense. His guideline range based solely on the conduct of which he was convicted was 12 to 18 months. Because the acquitted conduct was considered relevant conduct, his guideline range was increased to a range of from 210 to 262 months, exactly the same range that would have applied if he had been convicted of the narcotics conspiracy. He was sentenced to 20 years, the maximum statutory sentence available for the two weapons offenses. His sentence is thirteen times higher than the sentence he would have received had he been sentenced in the guideline range applicable to the conduct of which he was convicted.

The Second Circuit felt compelled, by the Guidelines and existing case law, to rule the guideline calculation lawful. However, the Court also ruled that the circumstances permitted consideration of

a downward departure from the enhanced guideline range that resulted from the inclusion of acquitted conduct as relevant conduct.

Use of acquitted conduct to achieve the same guideline range that would result if a defendant were convicted is a serious flaw in a guideline system that endeavors to promote confidence in a rational system of sentencing. The Second Circuit's permission for a departure downward from the guideline range enhanced by the acquitted conduct is not an adequate substitute for the proposal in amendment 1 to eliminate acquitted conduct from relevant conduct while permitting, in exceptional cases, an upward departure from the guideline calculated without regard to the acquitted conduct.

Acquitted conduct was recognized as relevant to sentencing in the pre-Guidelines era on the theory that the jury's acquittal indicated only that the conduct had not been proven beyond a reasonable doubt, whereas the sentencing judge was entitled to find the conduct established by a preponderance of the evidence, the standard generally applicable to aggravating circumstances weighed at sentencing. But courts that had permitted such use of acquitted conduct did so only to permit a sentencing judge to "consider" acquitted conduct. See United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972). They did not contemplate that, under a guidelines regime, an acquittal would subject a defendant to the same severity of punishment as a conviction. It is the current inclusion of acquitted conduct as relevant conduct, priced at the same severity as convicted conduct, that achieves the Kafkaesque result illustrated by the case of Nelson Frias.

Amendment 1 should be adopted and explicitly made available retroactively, see U.S.S.G. § 1B1.10. If the Commission is unwilling at this time to eliminate acquitted conduct from consideration as relevant conduct, as proposed in amendment 1, then the Commission should consider, as an alternate, permitting the sentencing judge to count the acquitted conduct at some reduced level of severity, perhaps between one-third and two-thirds (in the judge's discretion) of the level appropriate for convicted or uncharged conduct.

Amendment 1 probably will apply to only a small number of defendants. But its elimination will greatly enhance public confidence in the Commission.

Sincerely,

Jon O. Newman
United States Circuit Judge

University of Colorado at Boulder

School of Law

Campus Box 401
Boulder, Colorado 80309-0401
(303) 492-8047
FAX: (303) 492-1200

March 12, 1993

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Re: **Proposed Amendments 1 and 34**

Dear Mr. Courlander:

I thank the Sentencing Commission for the opportunity to offer written comments on the Proposed Amendments to the Federal Sentencing Guidelines, dated January 12, 1993. My comments are directed exclusively to Proposed Amendments 1 and 34, both of which concern the "relevant conduct" provision of U.S.S.G. § 1B1.3.

For the past two years I have made a close study of the policy issues surrounding various practices of real-offense sentencing, not only within the federal system, but in states across the country. The results of that work have recently been published as *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523-73 (February 1993). (A reprint is enclosed.) Because the analysis of *Sentencing Facts* is pertinent to your present deliberations, I wanted to make it available to you.[1]

Proposed Amendment 1. I applaud the Commission's proposed amendment to § 1B1.3(c) that **"Conduct of which the defendant has been acquitted after trial shall not be considered under this section."** A number of states bar the use of acquittal conduct at sentencing, even while retaining a real-offense orientation to sentencing in other respects. *See State v. Marley*, 364 S.E.2d 133, 138-39 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 783-85 (N.H. 1987); *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979). Still other states forbid the consideration of acquittal conduct as part of their general approach of conviction-offense sentencing. *See Sentencing Facts*, 45 Stan. L. Rev. at 535-41 (surveying the experience of three state guidelines systems). *See also id.* at 552 ("Among the recommendations in this article, the foremost is the restoration of the legal force of acquittals at sentencing through a prohibition of the consideration of facts embraced in charges for which the defendant has been acquitted").

---

[1] Also, since 1989 I have served with my father as Co-Reporter to the American Bar Association's effort to promulgate a third edition of its *Criminal Justice Standards for Sentencing Alternatives and Procedures*, which were adopted formally by the ABA on February 9, 1993. This letter, however, represents my own views and not necessarily those of the ABA.

In conjunction with the proposed amendment to § 1B1.3(c), I suggest a parallel amendment within Part K ("Departures") -- perhaps in the policy statement of § 5K2.0, perhaps in a new policy statement -- providing that **"Conduct of which the defendant has been acquitted after trial shall not be considered as grounds for departure from the guidelines."** I recognize that this suggestion conflicts with Proposed Amendment 1 insofar as the Commission would amend § 1B1.3, comment (n. 11) to provide that acquittal conduct *may* provide basis for departure in an exceptional case. The Commission proposal, to this extent, would permit the result in *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam), and similar cases. As outlined in *Sentencing Facts*, 45 Stan. L. Rev. at 531-33, 550-52, the policies supporting a bar on acquittal conduct at sentencing extend equally to departure and to guideline sentences. On this ground, I would delete the second sentence of proposed § 1B1.3 comment (n. 11).

Proposed Amendment 34. The Commission has invited comment on a further amendment to § 1B1.3 as submitted by the American Bar Association's Sentencing Guidelines Committee (the "SGC amendment"). The SGC amendment would **"restrict the court's consideration of conduct that is relevant to determining the applicable guideline range to (A) conduct that is admitted by the defendant in connection with a plea of guilty or nolo contendere and/or (B) conduct that constitutes the elements of the offense of which the defendant was convicted."** I wish to comment in favor of the SGC amendment, which should be adopted in addition to Proposed Amendment 1.

First, the SGC amendment would alter the basic operation of § 1B1.3, changing it from a modified "real-offense" provision into a modified "conviction-offense" provision. The policy choices relevant to such a decision are complex. In *Sentencing Facts*, 45 Stan. L. Rev. at 547-65, I have argued that the conviction-offense program is far preferable to the real-offense alternative. I do not reproduce that argument here. I will note, however, that state guidelines jurisdictions have been uniform in their endorsement of conviction-offense sentencing. *See* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rptr. 355, 356-57 (June 1992) (recommending that the federal commission adopt a conviction-offense scheme); *Sentencing Facts*, 45 Stan. L. Rev. at 535-41.

Finally, the SGC amendment is consistent with the newly adopted ABA Criminal Justice Standards, *Sentencing Alternatives and Procedures* (3d ed., approved February 9, 1993). The applicable Standard, § 18-3.6, provides as follows:

Standard 18-3.6. Offense of conviction as basis for sentence.

The legislature and the agency performing the intermediate function [e.g., the sentencing commission] should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

* *

In conclusion, Proposed Amendment 1 represents a significant improvement upon existing law, although its reach should be extended to departure sentences. Proposed Amendment 34 is also an important advance, and should be adopted in addition to Proposed Amendment 1.

Sincerely,

Kevin R. Reitz
Associate Professor of Law

VIA FEDERAL EXPRESS

cc: Members of the United States Sentencing Commission

PACDL

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Pennsylvania Association of Criminal Defense Lawyers

NACDL Affiliate

March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

* Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

Hon. William W. Wilkins, Jr.,
Chairman, U.S. Sentencing Commission
Suite 2-500, South Lobby
One Columbus Circle Northeast
Washington, D.C. 20002-8002

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendment 1

§ 1B1.3 (c) should definitely be adopted.

Application Note 11 contains an unnecessary and undesirable second sentence. Absent direction about what constitutes an "exceptional case" for purposes of §1B1.3(c), this sentence about "basis for an upward departure" injects another uncertainty where, finally, something in these Guidelines can be declared certain.

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KENNETH F. IRVINE, JR.

TELEPHONE
615-637-0661
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February 25, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

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

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: February 16, 1993

RE: Proposed Amendment #11

FROM: David E. Miller, Deputy Chief
U. S. Probation Officer

TO: U. S. Sentencing Commission
Public Information

✳ The synopsis of this proposed amendment indicates that a "snapshot" of the offender's involvement arguably provides a more reliable method of determining culpability. I strongly disagree with that theory and with the intent of this proposed amendment.

I contend that one adverse affect of this proposed amendment is to create an adaptation to the application and meaning of relevant conduct as defined in section 1B1.3. An exception to how 1B1.3 is applied is foreseen if this amendment is passed. This will create inconsistencies with the application of other guidelines, eg. 2B1.1 and 2F1.1 to name a few.

Drug distribution, almost by definition, is a continuous, ongoing crime. The overall philosophy of the guidelines appears to be to sanction, without double counting, all harms to the victim or victims of the criminal activity. The approach suggested by this amendment compromises that philosophy deeply.

Additionally, the proposal will create difficulty for the Court and probation officer in application and dispute resolution. Another element of factual determination is required and another issue for potential dispute is raised.

Executive Director and Administrator
Charles and Pauline Sullivan

NATIONAL OFFICE:
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National Capital Station
Washington, DC 20013-2310
202-842-1650, ex. 320

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

"A National Effort to Reduce Crime Through Criminal Justice Reform"

PUBLIC COMMENT OF CHARLES SULLIVAN TO THE UNITED STATES SENTENCING COMMISSION

CURE very strongly opposes "in an exceptional case, however, such conduct may provide a basis for an upward departure" (amendment to Commentary to 1B1.3).

CURE is dedicated to reducing crime through rehabilitation. One of the first steps in this process is the perception by the person convicted that "the system" is fair.

* When the potential is there in the Guidelines to use acquitted conduct to enhance a sentence, then I believe the system will be perceived as "rigged".

In fact, in my opinion, this proposed amendment goes against the very spirit of the confirmation hearings of the first commissioners that were conducted in 1985 by Sen. Charles Mathias, the Republican from Maryland.

I shall never forget Sen. Mathias asking the commission-appointees "to raise their hands" if they had ever spent time in jail. For those who had not, he encouraged them to visit the jails and prisons.

By this exercise, Sen. Mathias was encouraging a word that is almost non-existent today, "mercy". Sen. Mathias was indirectly telling the Commission that their attitude should be one of coming down of the side of reducing (not enhancing) the sentence whenever appropriate!

In the same way, I encourage you to support the 33 proposed amendments that would reduce drug sentences especially the one that would eliminate the weight of the carrier in LSD cases.

In this regard, I have attached a copy of a recent letter that we have received. I have removed the name since we are not certain if he wants his name to be known.

Dear CHARLES + PAULINE ....Monday March 1st 1993

Greetings from F.C.I. Danbury. I am currently serving a 128 month sentence without parole, for conspiracy to distribute LSD. I have no history of violence what so ever, nor any prior felony convictions. I have taken responsibility for my crime. I continue to demonstrate, diligently, my whole-hearted conviction to reform my life. I am biding my time wisely, attending Marist College (I made high honors last semester,..intend to do so again), and the Comprehensive Chemical Abuse Program, among other programs. In 21 months, I've done *all* this--128 months are entirely unnecessary and unfathomable. I *am* an asset to our society, and to the world.

An interesting turn of events has unfolded, and it warrants your *immediate attention!* I have enclosed information that documents and explains the "quirk in the law" that justifies these absurd sentences for LSD offenses, by including the irrelevant weight of carrier mediums. You will also find an excerpt, from the Federal Register, containing 1993 amendments to the Federal Sentencing Guidelines, as proposed by the U.S. Sentencing Commission. See amendment #50--*synopsis of proposed amendment and proposed amendment*--which reads: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper, for example) is not to be counted." This amendment seeks to rectify a truly gross misappropriation of justice.

This means that prison stays (which are costly to the American taxpayers and public at large, as well as the individuals and their families, in both tangible and intangible ways) could be dutifully shortened, for myself and 2000 other human beings serving 10, 15, and 20 year sentences (with out parole), for the sheer weight of *irrelevant* carrier mediums....This would not be mocking the fact that LSD is illegal, it would simply serve to produce *just sentences*, in which the "time would fit the crime".

I earnestly request that you write the U.S. Sentencing Commission, and voice your support for crucial amendment #50! IT IS ESPECIALLY IMPORTANT FOR YOU TO URGE THAT IT BE RETROACTIVE!! This needs to be done by March 15th, since public hearings are scheduled in Washington D.C., on March 22nd. (See Federal Registar excerpt).

I hope and pray that you will find the time and understanding to act on this issue,..it's not only for my benefit, but thousands just like me, encompassing all our families and loved ones, as well as all those that will continue to be federally prosecuted for LSD offenses. Please, justice and equity *must* transcend rhetoric!

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING
ANDREA K. GEORGE
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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendments 8, 9, 11, 39, 48, and 60

The mere existence of all these options suggests that changes concerning greater latitude for minimal criminal participation (and therefore less harsh sentences) and, possibly, a distinction among offenders involved with "less dangerous" types of controlled substance are widely thought to be desirable.

Hearing the discussion of the members of the Working Group is essential to be able to cast a well-informed vote on any of these. At least one, however, seems unnecessary, and that is **Amendment 60.** One can only infer that "ghost" co-defendants have been invoked so as to justify comparative role status in some single-defendant cases.

Amendments 9 and 39 are more extensive in their reach than **Amendment 8**, but they are more complicated. If the Working Group concludes that emphasis on the role of firearms is required, then **Amendment 9** is on target.

Adoption of **Amendment 8** and possibly **Amendment 48** would show movement in the apparently desirable direction. We could work with cases under the refined definitions of "mitigated role" defendants and those whose offenses do not concern heroin and cocaine, and see if the goal for more "individualized" sentences might be achieved.

Finally, I find **Amendment 11** arbitrary. I think it was meant to be, but I prefer *status quo*.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

Hon. William W. Wilkins, Jr.,
Chairman, U.S. Sentencing Commission
Suite 2-500, South Lobby
One Columbus Circle Northeast
Washington, D.C. 20002-8002

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

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751 West Santa Ana Boulevard
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March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

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If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendments 29 and 30

Amendment 29 presents this direct question to the Sentencing Commission: do you want to be more popular with the federal judiciary? Then, adopt the proposed third paragraph for § 5H1.1. Do you wish, instead, to declare a national policy for sentencing offenders and punishing offenses on an objective basis? Then turn down this amendment.

Unpopular though it is, I decline to endorse the JCUS Committee's suggestion. Every judge's sense of justice is different and will predictably vary given even the same case. Every judge notes these "5H" factors anyway but may or may not let them sway her/him. When the factors mount up to that judge's threshhold, then that judge is already departing anyway. While I tend to agree with Judge Becker that perhaps judges erroneously feel that they are restrained from departing when they might wish, this amendment does not provide a "remedy."

Amendment 30 should likewise be rejected.

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February 25, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

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EDISON ELECTRIC INSTITUTE

PETER B. KELSEY
Vice President,
Law and Corporate Secretary

March 15, 1993

The Honorable William W. Wilkins, Jr., Chairman
Members of the U.S. Sentencing Commission
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins and Members of the Commission:

The Edison Electric Institute ("EEI") is grateful for the opportunity to present comments to the Commission on the proposed amendments to the sentencing guidelines.[1] EEI is the association of electric companies. Its members serve 99 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and service 76 percent of all ultimate customers in the nation. Its members are pervasively regulated at the federal and state level in all aspects of their business. These electric utilities range in size from ones employing less than 100 employees to ones employing more than 10,000 employees. Our member companies have a real and direct interest in the content of the proposed amendments to the individual guidelines given enforcement trends toward the prosecution of corporate managers and supervisors.

I. Amendment No. 23, Abuse of Position of Trust

The Commission invites comment on a proposed amendment to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).[2] The proposed amendment attempts to reformulate the definition of what constitutes a "special trust."

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[1] Sentencing Guidelines for United States Courts; Notice, 57 Fed. Reg. 62,832 (December 31, 1992)(hereinafter "Notice").

[2] Amendment No. 23, Notice at 62,842.

EEI believes that the proposed application note focuses too narrowly on a person's status in the employment context. In relevant part, the proposed note provides that:

> "Special trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than an employee whose responsibilities are primarily ministerial in nature.

EEI recommends that the reference to "professional or managerial discretion" be eliminated from the proposed amendment. This reference is likely to confuse a sentencing court because it focuses on employment-related abuses of trust and does not mention non-employment abuses of trust. There are numerous situations where a personal "special trust" is violated (for example, sexual abuse of a child by a relative or clergyperson). But such situations are not reflected in the proposed amendment.

Furthermore, the proposed amendment suggests that persons in professional or managerial positions in companies generally are in positions of trust that would warrant a sentence enhancement, provided that their positions "contributed in some significant way to facilitating the commission or concealment of the offense." This seems too casual a linkage between a person's status in a company and enhancement of that person's sentence. At a minimum, there should be some intent by an individual to use a position of special trust to further commission or concealment of an offense before this forms the basis for enhancing their sentence.

The proposed application note also should be clarified to ensure that the provision does not automatically imbue corporate managers with an aura of "special trust." For example, a corporate manager who is responsible for compliance with a particular area of the law should not be in a position of special trust with respect to violations of other areas of the law. The proposed amendment should require that the individual be in a position of special trust directly relevant to the underlying offense before this sentence enhancement is applicable.

Also, the trust should be one owed to the victim of the offense for which a sentence is being imposed, and should be reasonably relied on by the victim in the context of the offense. Corporate managers should not be liable for a perceived

special duty owed to the general public by them or their corporation. The special trust should arise directly between the individual and the victim of the crime before it can lead to sentence enhancement.

For all of these reasons, EEI would recommend the following as an alternative to Amendment No. 23:

> "Special trust" refers to violation of a duty of trust between the defendant and the victim or victims of an offense for which a sentence is being imposed. The duty of trust may arise from a fiduciary relationship or a position of substantial discretionary judgment that is legitimately given considerable deference by the victim. (In an employment context, such positions ordinarily are subject to significantly less supervision than those held by employees whose responsibilities are primarily ministerial in nature.) For this enhancement to apply, the violation of the duty of trust must have contributed in some significant way to facilitating the commission or concealment of the offense and not merely provided an opportunity that could have been afforded to other persons. Also, the defendant must have intended or known that the victim would rely on the duty of trust, and the victim must in fact have reasonably relied on that duty, in a way that contributed to the commission or concealment of the offense.

II. Issue For Comment No. 24 and Amendments Nos. 31 and 47, Substantial Assistance to Authorities

The Notice also contains an issue for comment and two proposed amendments regarding the elimination from § 5K1.1 of the requirement that the government make a motion requesting a departure from the guidelines before allowing a court to reduce a sentence as a result of substantial assistance by the defendant in the investigation or prosecution of another person.[3] EEI answers the question for comment in the affirmative and supports Amendments Nos. 31 and 47, which would allow the court to consider a departure from the guidelines for substantial assistance provided by a defendant at its own discretion, and urges the

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[3] Issue For Comment No. 24 and Amendments Nos. 31 and 47, Notice at 62,842, 62,848, and 62,853, respectively.

Commission to adopt the same amendment to § 8C4.1 of the Guidelines, which is the same provision as it applies to organizations.

There is a significant potential for unfairness when the prosecutor is given complete control over substantial assistance departures. Furthermore, the substantial assistance departure is currently the only ground for departure from the guidelines that requires a government motion before the court may consider it. Even if the amendment is adopted and a court is allowed to consider the issue at its own discretion, the government will still be the principal source of evidence regarding whether "substantial assistance" was in fact provided by the defendant. But prosecutors should not have sole discretion whether to raise the issue of substantial assistance for a court's attention, especially given that a prosecutor's exercise of this discretion generally is unreviewable. In order for this section to achieve its goal of encouraging defendants to aid law enforcement authorities in the prosecution of offenses, defendants must perceive that the section will be fairly applied. This requires courts to be able to consider the issue of substantial assistance of their own accord and in response to motions by defendants as well as in response to motions by prosecutors.

On a related subject, the limitations suggested by Issue for Comment No. 24 (i.e., must be a first offender and no violence must be associated with the offense) are unnecessary. Courts should be allowed to consider substantial assistance by defendants in all cases where such assistance has been rendered. First offender status and non-violent nature of the crime should be left as facts to be taken into account at the discretion of the court. They should not be used as a basis for universally limiting consideration of substantial assistance.

As noted above, § 8C4.1 of the Guidelines contains language that applies to the sentencing of organizations analogous to that contained in § 5K1.1, and it contains the identical governmental motion requirement. The purpose of the sections is the same. Therefore, an amendment to one should prompt an amendment to the other, as there is no policy justification for doing otherwise. Thus, EEI urges the Commission to strike the government motion requirement from both § 5K1.1 and § 8C4.1 of the guidelines.

III. Issue For Comment No. 30, Departures

Amendment No. 30 requests comment as to whether the language in Chapter One, Part A4(b) may be read to be overly restrictive of a court's ability to depart

from the guidelines.[4] EEI supports the suggestion made by the Committee on Criminal Law of the Judicial Conference of the United States that the language contained in Part A4(b) should be changed to the extent that it discourages departures by encouraging courts of appeals to find that sentences that depart from the guidelines are "unreasonable."[5]

While the language of Part A4(b) concedes that the initial guidelines will be the subject of refinement over time, and that the departure policy was adopted because "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision[,]" the language that follows nevertheless suggests that departures from the guidelines are improper.[6] The courts must be allowed to exercise reasonable judgment with respect to application of the guidelines, and must not be required to adhere inflexibly to specified types of departures and departure levels. At a minimum, EEI recommends that Part A4(b) be amended to strike the last sentence of the fourth paragraph and the last sentence of the fifth paragraph.

IV. Issue For Comment No. 32, First Time Offenders

The Commission has requested comment as to whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense.[7] EEI believes that there should be a specific provision for departures in the sentencing of first offenders of non-violent offenses. Judges need this departure to prevent the possibility of offenders receiving punishment that does not fit the crime. This departure should be accomplished through providing an additional ground for departure in Chapter Five, Part K.

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[4] Issue For Comment No. 30, Notice at 62,848.

[5] Letter of Vincent L. Broderick, Chairman, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable William W. Wilkins, Jr., dated November 30, 1992.

[6] Federal Sentencing Guidelines Manual (1992 Ed.) at 6.

[7] Issue For Comment No. 32, Notice at 62,848.

V. Amendment No. 45, Multiple Victims

The United States Postal Service requests that the Commission create in Chapter Three, Part A, a new victim-related general adjustment to take into account increased harm caused when there is more than one victim.[8] The proposed amendment is as follows:

> If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense by 2 levels for every 250 victims.
>
> | No. of victims | Increase in offense level |
> |---|---|
> | 2 - 99 | 2 |
> | 100-349 | 4 |
> | 350-649 | 6 |
> | more than 650 | 8 |

The Postal Service specifically recommended that this departure be included as a victim-related adjustment applicable to all offenses involving multiple victims rather than limited to specific types of offenses.[9]

First of all, courts need to look to the statute and regulations that define the offense for which a defendant is being sentenced to determine whether "number of victims" is a relevant factor in sentencing. If the statute or regulations identify factors for the court to consider in setting the level of fine or imprisonment for an offense, and do not list "number of victims" as a relevant factor, it may not be appropriate for the court to consider. Furthermore, even if number of victims is a relevant factor, in many cases it will have been addressed by the prosecutor bringing multiple counts against the defendant. For the court to enhance the defendant's sentence based on "number of victims" in such cases would be to penalize the defendant twice for the same conduct.

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[8] Amendment No. 45, Notice at 62,853.

[9] Letter to the Honorable William W. Wilkins, Jr. from Chief Postal Inspector K.J. Hunter, dated November 27, 1992.

In addition, EEI is concerned that the proposed amendment would prove too vague and, thus, difficult for sentencing courts to apply. Specifically, the proposed amendment does not define under what circumstances an "affected" party would be deemed a victim or the degree to which a party would have to be "affected" in order to be deemed a victim. In this regard, EEI is particularly concerned about the impact of the proposed amendment on persons convicted of offenses involving the environment. In such cases, more than one individual may be affected by an offense, but this may not correlate to degree of actual harm experienced by any of those individuals, and the effects may be an indirect consequence of the conduct for which the defendant is being sentenced.

Moreover, unlike other adjustments in Chapter 3, Part A -- vulnerable victims, official victims, and restraint of victims -- the proposed amendment deals not with knowing conduct aimed at particular victims but with possible unforeseen impacts on unintended victims. While such an adjustment may be desirable when applied to specific offenses, particularly offenses intended to affect multiple victims, its application across a wide variety of offenses without such constraints would inject an unacceptable degree of uncertainty into the sentencing process.

Therefore, EEI recommends that the Commission reject the proposed amendment as being too broad and ill-defined. At a minimum, the Postal Service should be required to identify the types of offenses directly of concern to it in proposing the amendment, and the amendment should be limited to those types of violations. Also, even as to those types of violations, the Commission needs to provide guidance about who qualifies as a victim. Furthermore, courts should be instructed to consider whether "number of victims" is relevant under the statute and regulations being enforced and given the facts of the case, including the number of counts brought by the prosecutor and the defendant's state of mind in committing the offense.

Thank you for considering our views on these matters.

Very truly yours,

Peter B. Kelsey

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

March 12, 1993

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

Dear Commissioners:

This letter concerns Proposed Amendments 24, 31, and 47, included in the Guideline amendments proposed for public comment by the Commission on December 31, 1992. The amendments would modify the current provision of section 5K1.1 requiring a Government motion as a condition for a sentencing judge's consideration of a downward departure for a defendant's cooperation.

I strongly support the elimination of the Government motion requirement, as recommended in Amendments 31 and 47, and, only as a fall-back alternative, favor the modification proposed in Amendment 24.

The Governmment motion requirement is required by Congress for cooperation departures from statutory mandatory minimum sentences, but is not congressionally required for cooperation departures from guideline sentences not subject to mandatory minimum sentencing provisions. See 18 U.S.C. § 3553(e). The clear implication is that Congress did not expect a Government cooperation motion to be a requirement for cooperation departures from sentences not subject to mandatory minimum provisions. This implication is reenforced by the explicit provisions of 28 U.S.C. § 994(n) requiring the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Prior to the Guidelines, sentencing judges retained full authority to reduce a sentence below what would otherwise be imposed to reflect a defendant's cooperation. Prior to the adoption of section 5K1.1, the Government had no power to prevent a sentencing judge's consideration of such a reduction. The Government motion requirement in section 5K1.1 is a sharp and unwarranted break from past practice that has several unfortunate consequences.

First, it appears to run counter to the congressional preference to permit courts to reward a defendant's cooperation, regardless of the prosecutor's wishes, in all cases except those subject to mandatory minimum provisions. Second, it shifts enormous power to the prosecutor to pressure a defendant into what may be perjurious cooperation allegations as the price of obtaining the prosecutor's consent to a

cooperation departure. Third, the Commission's current insistance on vesting this unprecedented power in the hands of the Executive Branch seriously calls into question whether the Commission is abiding by its statutory mandate of functioning "as an independent commission in the [J]udicial [B]ranch of the United States." 28 U.S.C. § 991(a).

Sincerely,

Jon O. Newman
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

Hon. William W. Wilkins, Jr.,
Chairman, U.S. Sentencing Commission
Suite 2-500, South Lobby
One Columbus Circle Northeast
Washington, D.C. 20002-8002

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I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

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*Also Admitted in Kentucky

March 8, 1993

Mr. Mike Courlander
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines

Dear Mr. Courlander,

This letter is to provide my input on several of the proposed changes and amendments to the sentencing guidelines. I hope that these are of some use to you as these changes are contemplated. I am limiting my comments to three proposals, but on a broader scale would suggest that the Commission give favorable consideration to all changes which result in a more equitable situation.

Prior to expressing my views I wanted to give some background on myself. I am an attorney in Cincinnati, Ohio. The majority of my practice involves federal criminal sentencings and post-conviction motions related to sentencing. I handle cases in federal court across the country. Because of my work I have become familiar with the contents of the guidelines. It is with this understanding that I provide the following comments.

The proposal that would permit a District Court Judge to make a downward departure, without the United States Attorney making the request, if the Judge believes the Defendant has provided substantial assistance is one which should be approved. The current scenario permits the United States Attorney to plea bargain with the Defendant and decide after the Defendant provides information whether to make a request for a downward departure. Absent unconstitutional motivation on the part of the U.S. Attorney, there is nothing a Defendant or Judge can do, if the U.S. Attorney does not request a downward departure. This system smacks of unfairness. The U.S. Attorney, gains the information and then can decide not to give the Defendant any credit for it. The Defendant may have already put himself at grave personal risk and additionally is not able to retrieve what he has provided to the U.S. Attorney. Permitting the Judge to have control on this situation would level the playing field and result in a more just situation.

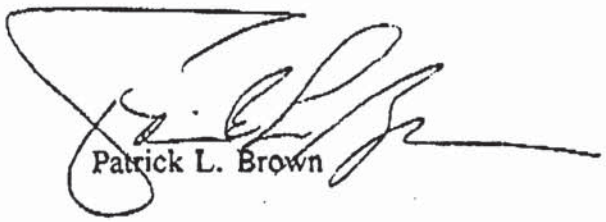
The proposal reducing the top guideline from 43 to 32 is another one which should be approved. The length of sentences in drug cases has simply gotten out of hand. As a society we can not continue to pay the costs of warehousing individuals for twenty and thirty years, especially when they are first time offenders. The comparison is made repeatedly

between violent offenders and drug offenders and the relative disparity is sentences received. The proposed amendment would help alleviate this disparity and more importantly result in sentences, especially for first time drug offenders, which are more in keeping with a system of fairness and justice.

The third proposal I am writing about relates to eliminating the weight of the carrier in LSD cases when calculating the weight of the drugs involved. It is difficult for me to understand the rationale behind adding to the weight of the actual drug the weight of the carrier paper. This would easily result in a situation of a supplier or manufacturer who has not separated the drug into doses and thereby not placed it on carrier paper being treated the same as the street seller because of the added weight of the paper the drug is placed on. Simply, a person should be held accountable for the drugs involved, not the material it is carried on.

I thank you for the opportunity to comment on these specific proposed amendments, and the amendments in general. I hope that the amendments will receive favorable consideration. Additionally, I would welcome the opportunity to provide testimony or additional information at any scheduled hearings on these proposed amendments. If I can be of further assistance please do not hesitate to contact me at (513) 651-9636.

Very Truly Yours,



Patrick L. Brown

PLB\wpf
cc: Congressman David S. Mann

Richard D. Besser
13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370 FAX (315) 853-4371

March 4, 1993

Attn: Public Information
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Gentlemen:

I am writing to voice my opinion on the amendments to the sentencing guidelines that are currently under consideration by your Commission.

While I believe that the entire concept of mandatory minimums is abhorrent and unconstitutional, there are three amendments that I believe rise above the others in importance:

1. Eliminate the carrier in determining sentencing in LSD cases.

2. Reduction in the top guideline level from 43-32.

3. Allow Federal Judges to depart from guidelines if he believes the defendant has provided substantial assistance without the approval of the prosecutor.

I am sure you are aware of the inequities in sentencing that result from application of the current guidelines in LSD cases. If not I would offer the following:

One gram of pure LSD (no carrier)=63-78 months, guideline level 26
One gram of LSD on 100 grams of paper=188-235 months, guideline level 36

Reduction of the highest sentence for a first time offender to 121-151 months is a modest reduction at best. Where else in our legal system does a first time offender for a nonviolent crime receive a 10

Richard D. Besser
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year plus sentence, without parole? People who commit armed robbery are let off with less severe sentences. Should the Federal Courts apply sentences that are more severe for nonviolent crimes than the state courts do for violent crimes? I think not.

As to allowing judges to have latitude in sentencing, I would postulate that the justice system was designed to have prosecutors prosecute and judges and juries determine guilt and impose sentences. In Federal drug cases discretion is taken from the judges and given to the prosecutor who's motives are typically self-serving. It appears that in their zealousness to apply justice even-handedly they created a system that recognizes no extenuating circumstances and have denied judges the ability to perform their judicial responsibilities.

It appears to me that your Commission could do a lot to correct these and other inequities in sentencing, to say nothing of what you would do for prison over-crowding and the drain on the Country's resources, both financial and human, by passing these amendments.

As someone who has been personally impacted by these guidelines I would be more than happy to offer additional testimony.

Sincerely,

/ R.D. Besser

R.D.Besser

cc: Families Against Mandatory Minimums

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TELEPHONE
615-637-0661
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615 524-4623

February 25, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

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

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: February 16, 1993

RE: 24. Issue for Comment.

FROM: David E. Miller, Deputy Chief
U. S. Probation Officer

TO: U. S. Sentencing Commission
Public Information

Often the Government is reluctant to discuss the issue of cooperation with the probation officer beyond an indication that they may file a motion for downward departure to reflect a person's substantial assistance. In this District, the inclusion of this potential as a provision of the plea agreement is all but standard language.

I question how the Court will be able to determine the extent and level of a defendant's cooperation if the Government is not inclined to file a motion. Will the defendant move the Court for such consideration in all cases? The Court will have to hear and litigate all of these motions. The defendant will attempt to prove a mitigating sentencing factor that can only be substantiated by the Government (what, if any benefit it derived from the substantial assistance).

Why does the Commission introduce "first offenders" involved in "non-violent" crimes into the mix since those variables are not mentioned in 18 USC 3553 or Rule 35?

Are we not discussing semantics here. The Court can depart if it finds a factor not adequately considered and that factor should result in a sentence different than the one set out in the guidelines. The Court's departure will stick if it is not appealed or if it can provide ample justification on the record.

Does the avenue to departure really matter? Perhaps you should create a policy statement in Chapter 5, Part K suggesting the Court may depart in cases involving first time offenders involved in non-violent crimes. Care must be taken to clearly define both "first offender" and "non-violent crimes". In the end, this course may easier.

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615 524-4623

February 18, 1993

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Information

Re: Proposed Guideline Amendments for Public Comment
Amendment Proposal Nos. 24, 31, and 47

Ladies and Gentlemen:

As a former United States Attorney and current criminal defense practitioner, I wholeheartedly endorse the proposed guideline amendments which would restore sentence reduction authority to the judicial branch.

There is currently no uniformity among the various United States Attorneys' offices with regard to the determination of substantial assistance. Some offices require that the assistance received from a defendant result in an actual conviction of another individual. Such an interpretation can be totally unfair, as it requires both the investigative agency and the prosecutor to agree to the subsequent prosecution--a result which often is determined by factors totally separate and apart from the level of cooperation attributed to the cooperating defendant.

Other U. S. Attorneys' offices appear to have no set policy, and an individual may risk life and limb to obtain the benefits of substantial assistance, only to find that his particular efforts are deemed unworthy.

We need to return to a criminal justice system where prosecutors prosecute and judges judge. An Article III federal judge is the individual who should determine the merit of substantial assistance performed by a defendant. Otherwise,

prosecutors and agents may require an unrealistic level of achievement from a defendant. I therefore heartily endorse this concept and hope that the Commission does approve such an amendment.

Sincerely yours,

W. THOMAS DILLARD

WTD:srw

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
U. S. DISTRICT JUDGE
U. S. COURT HOUSE
DES MOINES, IOWA 50309

February 9, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Information

This letter sets forth some comments I have concerning proposed guideline amendments. I may supplement these comments with a later letter after I have had an opportunity to examine the proposed guidelines amendments in greater detail.

By and large, the proposed amendments look good to me. I strongly favor proposed amendments 1, 9, 10, 11, 12, 23 and 25.

In respect to 13, issue for comment, I believe that section 2D1.1 should be amended to reduce the amount of drugs for which the defendant should be held responsible to the amount that the negotiated payment would fetch on the actual market.

In respect to 24, issue for comment, I believe that the court should have downward departure power for substantial assistance, without a government motion, when the defendant is a first offender and the offense involves no violence. Indeed, I would prefer an even broader power.

In respect to 40, issue for comment, I believe the Commission should ask Congress to eliminate the 100 to 1 ratio for powder and crack cocaine. The Draconian sentences required for crack offenders are unconscionable.

In respect to 66, issue for comment, I strongly oppose a 4 level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang because I believe that such a guideline would be difficult to apply, would border on guilt by association, and would tend to infringe on constitutional rights of free expression and association. It would work far more mischief than good, I fear.

Sincerely,

Harold D. Vietor

Harold D. Vietor

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DIRECT DIAL NO.

March 9, 1993

Mr. Michael Corlander
Public Information Specialist
United States Sentencing Commission
1 Columbus Circle, NE, Suite 2-500 South Lobby
Washington, DC 20002-8002

RE: Comment to Proposed Sentencing Guideline Amendments/ Tax Provisions

Dear Mr. Corlander:

This letter is written in response to the Commission's solicitation for public comment regarding proposed amendments to the United States Sentencing Guidelines.

Our practice primarily consists of criminal and civil tax litigation. We would like to comment on the proposal to redefine tax loss and specifically the provision which would provide for a "rebuttable presumption" that the tax loss will be equal to the specified percentage (i.e., 28% or 34%) of unreported gross income or improperly claimed deductions.

We believe the proposal is a good change and should be favorably considered by the Commission. Under the existing guidelines, tax loss is generally determined merely by applying the specified percentage (e.g., 28%) against the omitted items of gross income. Legitimate deductions which were not claimed on the return may not be taken into account. Accordingly, under the guidelines, there may be situations where there is little or no criminal tax deficiency, but a very large "tax loss."

For example, assume a taxpayer omitted income of $200,000 from his or her return with the intent to evade the tax on such income. Also assume that the taxpayer had other deductions of $100,000 which were not claimed on the return. Under the existing guidelines, the tax loss is 28% of the $200,000, or $56,000. The actual deficiency, assuming a 28% bracket, would be approximately one-half that amount, or $28,000.

Since the underlying premise of the guidelines is to sentence based upon tax loss, it seems appropriate to attempt to determine, within practical limitations, what the tax loss is. An individual who has evaded $56,000 of tax should be sentenced differently than an individual who evaded $28,000 of tax.

We believe the "rebuttable presumption" approach contained in the proposal strikes the proper balance. Once the Government has demonstrated the omission of gross income, the tax defendant has the obligation to come forward with evidence showing a reduction in the tax deficiency. While it is true that allowing consideration of offsetting deductions complicates the determination of tax loss, it is a complication which is nevertheless required to be addressed by the Internal Revenue Service for civil tax purposes and should be addressed in determining the appropriate sentence under the guidelines.

We would appreciate your placing this comment in the public record of the Commission's proceedings.

Sincerely yours,

Bruce I. Hochman

BRUCE I. HOCHMAN

STEVEN TOSCHER

ST/jmr

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

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

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: February 16, 1993

RE: Amendment #21. Additional Issue for Comment.

FROM: David E. Miller, Deputy Chief
U. S. Probation Officer

TO: U. S. Sentencing Commission
Public Information

* The Commission invites comment on whether the tax table should be amended to offset the potential impact of other amendments that increased the potential for sentences of probation for low level tax offenders.

I do not think tax offenders should be treated differently than other property offenders and the Court should have available the same sentencing options for these similar offenders.

UNITED STATES POSTAL SERVICE
ROOM 3100
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2100

CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

Proposed Amendment 44, § 2B1.1(b)(4). The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

Proposed Amendment 45, (§ 3A1.4). The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

McCORMICK & CHRISTOPH, P.C.
ATTORNEYS AT LAW
1406 PEARL STREET, SUITE 200
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TELEPHONE (303) 443-2281
FAX (303) 443-2862

G. PAUL McCORMICK
JAMES R. CHRISTOPH

February 12, 1993

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Attn: Public Information

Dear Sir or Madame:

I am responding to your request for feedback concerning the proposed amendments to the Federal Sentencing Guidelines. In particular, I am responding to Amendment No. 50 which proposes that the weight of the carrier in LSD cases be excluded from sentencing guideline consideration. I am strongly in favor of this proposed amendment. As a former prosecutor, public defender, and now private practitioner, I can assure you that nowhere is there a larger discrepancy between state and federal law than in LSD cases. Let me give you an example. I recently worked on a case where the defendant was involved in distributing 250 "hits" of LSD. Because the weight of the paper exceeded 10 grams, the defendant was facing approximately 15 years in prison. Under the same scenario in almost all state courts, if not granted probation, he would have been facing somewhere between two and five years in prison.

The other reason I support this amendment is that the current guidelines punish street-level users and sellers of LSD 100 times more severely than the manufacturers and producers of LSD. Usually when street-level persons possess LSD it is affixed to paper or cardboard or put in sugar cubes. Manufacturers, on the other hand, often possess pure liquid LSD. On a per-dosage basis, LSD affixed to blotter paper is 100 to 1,000 times heavier than the liquid concentrate. The manufacturer of LSD who possess 250 dosage units in the form of liquid LSD is only facing approximately 2 years under the guidelines. I would suggest that a sentencing scheme that punishes street-level possessors much more severely than drug manufacturers is backwards. Removing the weight of the carrier from the sentencing guidelines would remedy this gross disparity.

I enthusiastically encourage you to amend the guidelines as proposed in Amendment No. 50. Thank you for your consideration.

Sincerely,

G. Paul McCormick

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
U. S. DISTRICT JUDGE
U. S. COURT HOUSE
DES MOINES, IOWA 50309

February 9, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Information

This letter sets forth some comments I have concerning proposed guideline amendments. I may supplement these comments with a later letter after I have had an opportunity to examine the proposed guidelines amendments in greater detail.

By and large, the proposed amendments look good to me. I strongly favor proposed amendments 1, 9, 10, 11, 12, 23 and 25.

In respect to 13, issue for comment, I believe that section 2D1.1 should be amended to reduce the amount of drugs for which the defendant should be held responsible to the amount that the negotiated payment would fetch on the actual market.

In respect to 24, issue for comment, I believe that the court should have downward departure power for substantial assistance, without a government motion, when the defendant is a first offender and the offense involves no violence. Indeed, I would prefer an even broader power.

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Sincerely,

Harold D. Vietor

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January 26, 1993

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

Dear Judge Wilkins:

Bill Osteen, Jr., has discussed with me his letter to you regarding the Section 4B1.1 career offender enhancement. I would like to second his proposal that the Government give notice that such an enhancement may be applied.

This would facilitate frank discussion between attorneys and their clients and between attorneys and U.S. Attorneys seeking to resolve cases.

As Bill notes, the Government has better and easier access to a defendant's record and this disclosure would not be an undue burden.

Sentences fashioned under the Guidelines are sufficiently stunning without the surprise application of this enhancement. Anything the Commission might do to alleviate this situation would be helpful to all parties concerned.

Very truly yours,

HARRISON, NORTH, COOKE & LANDRETH

A. Wayland Cooke

AWC:cak

U.S. Department of Justice

Drug Enforcement Administration

Washington, D.C. 20537

APR 1 [illegible]

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Washington, D.C. 20002-8002

Dear Judge Wilkins:

We have reviewed paragraph number 10 of the proposed amendments to the Sentencing Guidelines. That paragraph would amend the guidelines so as to exclude the amount of any uningestible, unmarketable portions of drug mixtures.

As the head of the Office of Forensic Sciences of the Drug Enforcement Administration (DEA), I wish to express a particular concern that we have about the ability of DEA laboratories to conduct procedures which may be expected as a result of this amendment. Please note that this letter concerns only the ability of DEA to separate the relevant parts of controlled substance mixtures from the excluded part, pursuant to the proposed amendment. We have expressed certain other concerns about this proposed amendment to the Criminal Division of the Department of Justice, and we understand that they will communicate them to you.

It is often not possible for DEA chemists to extract all of the controlled substance(s) from a "mixture" such as a suitcase or a statue that has been saturated with or bonded to the controlled substance. Our chemists must work within reasonable safety and health standards which do not permit them to utilize methods of extraction that may be utilized by those trafficking in illegal controlled substances. Such extractions will often necessitate, for example, the use of such large amounts of solvents as to pose a substantial health risk to the chemist.

Our chemists will be able to identify the nature of the controlled substance(s) present, and will often be able to make reasonably accurate extrapolations or estimates of the likely amount of the controlled substance(s) in the particular item. I am informed by our Office of Chief Counsel that such evidence is often considered sufficient for purposes of sentencing. See, e.g., United States v. Uwaeme, 975 F.2d 1016 (4th Cir. 1992); United States v. Clonts, 966 F.2d 1366 (10th Cir. 1992); United States v. Hilton, 894 F.2d 485 (1st Cir. 1990). However,

I am concerned that the implication of this proposed amendment is that such separation of all of the controlled substance(s) from the excluded part will usually or always be possible. Therefore, it is our request that you acknowledge this problem in the commentary to the amended paragraph, and explicitly refer to the possible necessity to rely upon reasonably supportable estimates of the amount of the controlled substance(s) present in such "uningestible, unmarketable mixtures."

Thank you very much for your consideration of our comments on this matter. Please do not hesitate to contact us if we can provide any further information.

Sincerely,

Aaron P. Hatcher III
Deputy Assistant Administrator
Office of Forensic Sciences

FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF CALIFORNIA
17TH FLOOR FEDERAL BUILDING - BOX 36106
450 GOLDEN GATE AVENUE
SAN FRANCISCO 94102

BARRY J. PORTMAN
Federal Public Defender

Telephone (415) 556-7712

March 15, 1993

BY FAX

The United States Sentencing Commission
One Columbus Circle, N. E.
Suite 2-500
Washington, D.C. 20002-8002

ATTN: Public Information

Dear Commissioners:

I am writing to implore you to correct the terribly unfair, and indeed cruel, LSD guidelines that require the weight of the carrier medium to be weighed in the determination of the offense level for LSD offenses. The weight of the paper, cardboard or sugar cube obviously has nothing to do with the culpability of the defendant or, more importantly, the weight of the LSD involved in the crime.

I have witnessed the harsh results of this ridiculous offense level methodology first-hand. One of my clients, a single mother of two adolescent children, is currently serving a 24 year sentence. She has no prior record. She is not a drug kingpin and has never hurt anybody, to my knowledge. Yet, under the Draconian LSD guidelines, her children will be about 30 years old before she sees them outside of prison walls. I have enclosed a copy of the Eighth Circuit's decision affirming her conviction and sentence. I urge your particular attention to the dissent's discussion of the sentence for just one illustration of how ridiculous the bases for LSD sentencing can be.

Wouldn't a simple rule to just include the amount of pure LSD make sense?

Sincerely,

BARRY J. PORTMAN
Federal Public Defender

BRIAN P. BERSON
Assistant Federal Public Defender

BPB:pt
Enclosure

LAW OFFICES
OF
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A PROFESSIONAL CORPORATION
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119 NORTH ROBINSON, SUITE 320
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March 15, 1993

VIA FAX (202) 273-4529

United States Sentencing Commission
1 Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
ATTN: Public Information

To: Honorable Sentencing Commission:

I am an active criminal defense lawyer and am writing to comment on two of the most serious areas of abuse that I have personally witnessed in my law practice.

AMENDMENT NO. 20 - (pg. 25) - Money Laundering (Chapter Two, Part S) - Consolidate Sections 2S1.1 and 2S1.2 in Sections 2S1.4 and 2S1.4; Ties offense level closer to seriousness of offenses.

In the area of white collar crime this area of the guidelines is the one most frequently abused by prosecutors. In plea bargaining negotiations, we are frequently told "if you don't plead to the mail fraud, then we will charge him with money laundering". It is very unfair when someone can get 6 to 10 months for a mail fraud scheme, and then 40-something months for depositing the check that was the object of the mail fraud. In the first place it does not make good sense, and in the second place it is a very unfair advantage for the Government. Further, it does not in any way mete out fair punishment.

It is very simply an arrow that should be removed from the Government's quiver.

AMENDMENT NO. 40 - (pg. 63) - 100 to 1 Ratio of Crack vs. Powder Cocaine; There is in fact little scientific support for the 100 to 1 Ratio, and unquestionably black persons are impacted by this very unfair requirement. I proved in the case of United States v. Hutchinson, in the United States District Court for the Western District of Oklahoma, Case No. CR-92-31-T, that of all

crack cases since the guidelines (November 1, 1987) in the Western District, 94.39% of the defendants were black.

The enormous disparity in sentences, and the unduly harsh requirements of the guidelines have resulted in the life imprisonment of many persons who deserve a substantially shorter sentence. This should be done immediately, and retroactively.

Thank you for the opportunity to comment on the guidelines.

Respectfully yours,

J. W. Coyle, III

JWC/sm
L-JW.SC

MAPLEMOOR

March 12, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 2002-8002

Dear Honorable Commissioners:

I read with interest the February 3, 1993, issue of THE CRIMINAL LAW REPORTER published by the Bureau of National Affairs.

It is my opinion that the federal sentencing guidelines indeed are worthy of refinement. In general, the courts have assumed too much in accepting prosecutors' statements of related circumstances as they relate to sentencing. In my observation, these "related circumstances" are often no more than allegations which have not been investigated. Therefore, resulting sentences have been more harsh than warranted.

The specific purpose in writing this letter is to support the proposed amendment to subsection (c) of Section D 1.1. There should be no question as to whether or not only the actual weight of the LSD itself should be counted. It is the actual drug activity itself, after all, that harms society. To penalize citizens for their selection of a carrier medium is absurd. The practical effect of the existing sentencing guideline is to further overcrowd our prison system and to actually inflict unwarranted injustices upon guilty persons and their innocent families.

I offer you this comment not without sympathy for the overall Drug War or for those who fight it. My first front line experiences with the control of illegal substances was in the late 1960's as a U. S. Military officer. For quite some time I shouldered the responsibility for drug control enforcement in a large Army Tank Unit. The ruthless greed and violence are things that can never be described adequately.

Much later in my civilian career, I served as the Executive Director of Drug Free America. Despite some monumental efforts by those involved, that National not-for-profit organization was forced to close its doors, as were many others engaged in similar efforts, because public support simply could not find consensus in how to defeat the problems which drugs inflict on our civilization.

However, there were some concerns that were voiced consistently by many constituencies. Among them was the fear of over-punishing the relatively low volume players (intermediaries to sellers and users).

MapleMoor Corporation, 1360 Beverly Road, Suite 305, McLean, VA 22101 703-821-3544 Fax 703-448-1236

While an argument certainly can be made for attempting to cripple the drug supply system by discouraging the participation of intermediaries and users by holding over them the system's enforceable threat of awful, costly penalties for their participation no one ever argued seriously that such penalties would do much more than simply force the major players to change their marketing and distribution methods; a delaying tactic to permit the "system" to find other, more effective "solutions." The real rub comes in the fact the problem is not strictly a business one. It is not simply a matter of economically discouraging an established sales and distribution system. It is a matter too of balancing the rights of individuals within the context of very fundamental philosophies underlying our entire legal system.

The foregoing is not a suggestion that the rights of individuals always outweigh those of society as a whole. However, when we include as a component of the definition of a criminal act the physical weight of the container of an illegal substance, we fabricate an irrelevant, alternative meaning for the word "severity" which is inconsistent with the harm or potential harm of the act. For any sentencing guidelines framework to work in a truly just system, the very definition of the crime must be accurate, and consistent based upon sound reasoning. The proposed amendment of subsection (c) of section 2D1.1 will ensure that penalties under the Sentencing Guidelines will be consistently applied relative only to the actual weight of the illegal substance itself. In my opinion, the Sentencing Guidelines must be amended as proposed. I strongly urge the Commission to accept that proposal.

Sincerely,

William V. Burke

William V. Burke
President

Post-it * brand fax transmittal memo 7671	* of pages * 1
To PUBLIC OPINIONS	From V. CONROY
Co. U.S. SENTENCING COMM.	Co.
Dept.	Phone # 314-781-8160
Fax # 202-273-4529	Fax #

March 12, 1992

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners:

This letter concerns the series of proposed amendments to the sentencing guidelines. I am writing to advocate the passage of proposed Amendment 50, which will eliminate the weight of the carrier in LSD cases, allowing the actual weight of the drug, not the carrier weight, in determining the offenders sentence.

I believe Amendment 50 will correct the current inequity in the sentencing of LSD offenders. I believe that LSD offenders are being and have been sentenced far in excess of what justice requires due to the inclusion of the carrier medium.

I also advocate passage of proposed amendment 56, which would allow for the correction of the previous guidelines, which were enacted with good intent, but in practice have proven to be at at odds with Congress's mandate to the Sentencing Commission to promote uniformity of sentencing.

Thank you for your consideration regarding this matter.

Sincerely,

Virginia L. Conroy
2187 Clifton
St. Louis, MO 63139

PACDL

POST OFFICE BOX 189
LIMA, PA 19037
(215) 566-8250
FAX (215) 566-8592

Pennsylvania Association of Criminal Defense Lawyers

NACDL Affiliate

March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

* Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

KAREN S. WILKES
ATTORNEY AT LAW
201 BROAD STREET, SUITE 404

P.O. BOX 6274
ROME, GEORGIA
30162-6274

TELEPHONE:
(404) 291-0336

March 11, 1993

ATTN: Public Information
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners:

As a young trial attorney and taxpaying citizen, I send you a resounding vote of confidence for the proposed amendments to the Sentencing Guidelines.

Although I question the wisdom and legality of the Guidelines, I commend the Commission's efforts to bring back some degree of common sense and fairness to the sentencing process. As we have all seen, the current system has led to a most deplorable paradox: the ringleaders and most notorious criminals actually serve less prison time because they have more information to "assist" the government. This is not justice.

The drastic sentences that are now imposed for drug offenses are equally deplorable. Non violent drug offenders are needlessly crowding our prisons and costing us billions of dollars. So, I particularly encourage you to support the proposed amendments to the drug quantity table in Section 2D1.1.

Finally, I urge you to reconsider the definition and penalty enhancements for "career offenders." The current definition is much too inclusive to result in such harsh penalties. Two different types of crimes committed within 15 years is hardly a "career" in crime, and hardly justifies adding ten or more years to a sentence.

This became painfully clear to me in a recent case where one of my clients was sentenced under the Guidelines for conspiracy to distribute 5 kilograms of cocaine. No cocaine was seized; no witness bought cocaine from my client or sold cocaine to my client. The only cocaine allegedly received by my client was the result of a mistaken

delivery of a kilogram instead of an ounce. For this, my client was sentenced to 360 months.

No one deserves this sentence, regardless of his past, and I urge you to make every effort to put an end to this type of disproportionate punishment. You should pass the proposed changes to the drug quantity table, and you should apply them retroactively. Nothing less will repair injustices like this one.

Please keep my words, and the plight of my client, in mind as you consider the proposed amendments. Also, listen carefully to the representatives of Families Against Mandatory Minimums (FAMM). They have horror stories just like mine.

I will watch closely as you debate the proposals, and I pray that justice will be done.

A friend of Liberty,

Karen S. Wilkes

KSW/kvd

KLINGER, ROBINSON, MCCUSKEY & FORD
ATTORNEYS AT LAW
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*ALSO ADMITTED IN ARIZONA

March 10, 1993

United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500
Washington, DC 20002-8002

ATTENTION: PUBLIC INFORMATION

Dear Sirs:

It is my understanding that there is currently a proposal to take the carrier weight out of LSD sentencing before the Sentencing Commission with respect to the United States Sentencing Guidelines.

I have seen in connection with my representation of people charged with LSD-related offenses the impact that adding the carrier weight in has. In one particular case that I am aware of, it increased the number of grams from slightly in excess of 11 to over 300. As you can tell, the impact such an increase would have would be substantial.

I think to remove the requirement of the carrier weight would bring LSD offenders more in line with offenders in other drug-related cases as contemplated by the Federal Sentencing Guidelines.

I want to thank the Sentencing Commission for its review of this matter.

Very truly,

KLINGER, ROBINSON, McCUSKEY & FORD

Gary L. Robinson

GLR:jsak

March 10, 1993

Attn: Public Information
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Dear Commissioners:

I am writing to you today to express my interest and support of the 33 proposed amendments that would reduce drug sentences. My interest is personal as well as a concerned taxpayer.

My son was sentenced to 30 years under the Criminal Career law. At the time when the arrests were taken, my son was at work. The codefendants that were arrested all pleaded guilty. Not one of them received the time my son did. The person that the DEA was investigating had prior felonies also, but he didn't receive such harsh sentencing.

I spent everyday at the trial and was astonished as to how the judicial system has failed. The judge apologized for having her hands tied by the sentencing guidelines. This is disgraceful for a judge to be striped of their expertise.

This just makes me wonder what type of respect can our youths expect of our government, when I see the government has no respect for human life.

I worked hard to raise my sons properly. I'm a caring, responsible, and level thinking individual. I just can't imagine my sons life being destroyed by a law that can be revised.

I believe there are other alternatives to this issue. I'm not saying don't punish an individual, I'm saying, let the time fit the crime. I very rarely hear of the government setting up treatment programs, or prevention programs for this nationwide problem on drugs. I believe the drug game is a sickness like anything else, such as a tooth ache. It must be treated.

I would greatly like to believe in my government, but its extremely difficult.

I'm not only concerned for my son, I'm also concerned for first time offenders who are given outrageous sentences.

Let's get these issues resolved and use these tax paying dollars for treatment, prevention, and educate our people.

Respectfully,

Brenda Smith
4508 15th Street, N.W.
Washington, D.C. 20011

/bs

cc: President Clinton-White House

FIRST NATIONAL BANK
CAPITAL CITY GROUP

P.O. Box 900 Tallahassee, Florida 32302-0900
(904) 224-1171

March 10, 1993

Attn: Public Information
U. S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D. C. 20002-8002

Dear Members:

✳ We support proposed amendments to reduce drug sentences as endorsed by Families Against Mandatory Minimums. Please give their representatives every consideration. They know the problems we families face.

Our 39 year old son was convicted in a drug conspiracy case because a government-arranged "sting" group discussed locations at his homesite. He received a 10 year sentence! He is a non-violent first time offender. The real victim is his son, our totally blameless 3 1/2 year old grandson. We are helping our daughter-in-law raise this innocent child. We hope for relief on appeal. We have NOT received the justice in which we were raised to believe. PLEASE help our family and others like us help ourselves.

Thank you for your attention.

Sincerely yours,

Newell & Richard Lee

Newell M. and Richard M. Lee
413 East Park Avenue
Tallahassee, Florida 32301
(904) 222-1155

cc: Families Against Mandatory Minimums (202) 457-5790, Julie Stewart
Bill Clinton, United States President
Bob Graham, Florida Senator
Connie Mack, Florida Senator
Pete Peterson, Florida Representative
Clyde Taylor and Judge Griffin Bell, Attorneys

Re: George Martin Croy - 09645-017
Case No. 92-00300405 LAC
U. S. District Court for the Northern District of Florida, Pensacola Division

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

Hon. William W. Wilkins, Jr.,
Chairman, U.S. Sentencing Commission
Suite 2-500, South Lobby
One Columbus Circle Northeast
Washington, D.C. 20002-8002

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

Executive Director and Administrator
Charles and Pauline Sullivan

NATIONAL OFFICE:
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National Capital Station
Washington, DC 20013-2310
202-842-1650, ex. 320

CURE-NH
William J. Manseau, D.Min.
Chairperson
6 Daniel Webster Highway S.
Nashua, NH 03060
Phone: 603-888-3559

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

"A National Effort to Reduce Crime Through Criminal Justice Reform"

March 10, 1993

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Information

To Whom It May Concern:

I wish to express my full support for proposed amendment #50 to the Federal Sentencing Guidelines for 1993 which reads as follows: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium, e.g. blotter paper, is not to be counted."

I urge you to specify that it be fully retroactive and that you submit it to the Congress on or before May 1, 1993. There are approximately 2,000 individuals incarcerated in the federal system to date, the majority of which are first-time, non-violent offenders, who have already been unjustly sentenced to outrageous amounts of time in LSD offenses for the sheer weight of carrier mediums.

Also, I wish to state my support for the Edwards Bill, The Sentencing Uniformity Act of 1993. Please work to repeal the mandatory minimum sentencing law and restore sentencing justice to all.

Thank you.

Sincerely,

William J. Manseau, D.Min.
Chairperson, CURE-NH

WJM/

3/10/93

Dear Sirs,

I wish to express my full support for proposed Ammendment Number 50 to the Federal Sentencing Guidelines for 1993 which reads as follows: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper for example) is not to be counted".

I urge you to specify that it be fully retro active and that you submit it to Congress on(or before) May 1st 1993.

This Ammendment could affect the fates of approx-imately 2000 induviduals currently incarcerated within the Federal Penetentiary System. These induviduals need to be resentenced justly and proportionately for their crimes as many are first offendors and the cost to us, the American taxpayers, is roughly $25000^{00} per inmate, per year to incarcerate them. This is NOT an acceptable expenditure of our tax dollars!

In addition to this, I also fully support the Edwards Bill (The Sentencing Uniformity Act of 1993) as well.

Please work to repeal the Mandatory Minimum Sentencing Law and restore Sentiencing Justice for All Americans.

I thank you for your attention and concern in this matter.

Sincerely,
Ernie Voegtlin

GraybaR
ELECTRIC COMPANY, INC.
P.O. BOX 1670
WEST PALM BEACH, FLORIDA 33402
Attn: E. Voegtlin

BROWN & MOREHART

ATTORNEYS AT LAW

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*Also Admitted in Kentucky

March 8, 1993

Mr. Mike Courlander
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines

Dear Mr. Courlander,

This letter is to provide my input on several of the proposed changes and amendments to the sentencing guidelines. I hope that these are of some use to you as these changes are contemplated. I am limiting my comments to three proposals, but on a broader scale would suggest that the Commission give favorable consideration to all changes which result in a more equitable situation.

Prior to expressing my views I wanted to give some background on myself. I am an attorney in Cincinnati, Ohio. The majority of my practice involves federal criminal sentencings and post-conviction motions related to sentencing. I handle cases in federal court across the country. Because of my work I have become familiar with the contents of the guidelines. It is with this understanding that I provide the following comments.

The proposal that would permit a District Court Judge to make a downward departure, without the United States Attorney making the request, if the Judge believes the Defendant has provided substantial assistance is one which should be approved. The current scenario permits the United States Attorney to plea bargain with the Defendant and decide after the Defendant provides information whether to make a request for a downward departure. Absent unconstitutional motivation on the part of the U.S. Attorney, there is nothing a Defendant or Judge can do, if the U.S. Attorney does not request a downward departure. This system smacks of unfairness. The U.S. Attorney, gains the information and then can decide not to give the Defendant any credit for it. The Defendant may have already put himself at grave personal risk and additionally is not able to retrieve what he has provided to the U.S. Attorney. Permitting the Judge to have control on this situation would level the playing field and result in a more just situation.

The proposal reducing the top guideline from 43 to 32 is another one which should be approved. The length of sentences in drug cases has simply gotten out of hand. As a society we can not continue to pay the costs of warehousing individuals for twenty and thirty years, especially when they are first time offenders. The comparison is made repeatedly

between violent offenders and drug offenders and the relative disparity is sentences received. The proposed amendment would help alleviate this disparity and more importantly result in sentences, especially for first time drug offenders, which are more in keeping with a system of fairness and justice.

The third proposal I am writing about relates to eliminating the weight of the carrier in LSD cases when calculating the weight of the drugs involved. It is difficult for me to understand the rationale behind adding to the weight of the actual drug the weight of the carrier paper. This would easily result in a situation of a supplier or manufacturer who has not separated the drug into doses and thereby not placed it on carrier paper being treated the same as the street seller because of the added weight of the paper the drug is placed on. Simply, a person should be held accountable for the drugs involved, not the material it is carried on.

I thank you for the opportunity to comment on these specific proposed amendments, and the amendments in general. I hope that the amendments will receive favorable consideration. Additionally, I would welcome the opportunity to provide testimony or additional information at any scheduled hearings on these proposed amendments. If I can be of further assistance please do not hesitate to contact me at (513) 651-9636.

Very Truly Yours,

Patrick L. Brown

PLB\wpf
cc: Congressman David S. Mann

The Law Offices of

Richard T. Marshall, P.C.

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March 8, 1993

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Attention: Public Information

Re: Proposed Amendments to the Federal Sentencing Guidelines

To the Members of the Commission:

I urge you to act decisively in amending subsection (c) of §2D1.1 of the Guidelines by adding the proposed paragraph requiring that in determining the weight of LSD the actual weight of the LSD itself be used, and not that of the carrier medium.

My only son, Stanley, is presently rounding out his fifth year of a 20-year sentence, as a first offender, caught up in a sting operation, and involving a minor amount of LSD. At his sentencing, adding the weight of the blotter paper to the imposition of a mandatory minimum sentence resulted in a bizarre and inhumane sentence for an individual who poses no threat to society. Stanley is now 35 and cannot expect to see freedom until the age of 48.

Stanley expressed himself far better than I could, in a written statement on mandatory minimums and the use of the weight of the carrier medium in determining LSD sentences, and he has requested me to submit the enclosed article, *Hard Time for Heavy Paper,* as written testimony for the hearing scheduled for March 22nd. In addition, I respectfully request you to accept this letter as written testimony.

Yours sincerely

RICHARD T. MARSHALL

xc: MR. STANLEY J. MARSHALL
07832-026-UW
9595 West Quincy Avenue
Littleton, CO 80123

RTM:m
ENCL.
STAN\SENTCOMM.LTR

HARD TIME FOR HEAVY PAPER . . . . . *by Stanley Marshall*

The United States is the world's leading jailer. We imprison more persons per capita than Russia, Iraq and Haiti. Out of every 100,000 American citizens, 455 are imprisoned. South Africa is a distant second, with 311. The 19th Century notion that penitentiaries were secure facilities designed for rehabilitation of offenders is today nothing more than a historical footnote. Today it is universally conceded that America's prisons are a return to the dungeons of yore -- places for warehousing human beings, like so much nuclear waste; to get them out of sight and out of mind.

Why does America differ from England, France, Germany, Canada, Australia..and all the other democratic countries in maintaining a monumental prison population? The reason is obvious: the War on Drugs. In Federal prisons, 56% of the inmates are drug offenders. By 1995, that figure will be 70% Nearly ten years ago President Reagan declared America's second War on Drugs, and Congress enacted the Sentencing Reform Act of 1984. What this act did was to set Mandatory Minimums for federal judges to apply as punishment terms for drug offenders. Judges were not permitted to set lesser sentences than the absolute lower limits set out in the Sentencing Reform Act, no matter what the extenuating circumstances.

The Act also provided for sentencing guidelines. The effect of these rigid guidelines has been, over the years, to further pigeonhole the convicted offender into numerous series of sentencing ranges, depending upon the nature of the offense, and not of the offender. The guidelines include enhancements that increase penalties, and some departures that reduce sentences. Despite these guidelines, no federal judge may sentence any offender to less than what is prescribed by the mandatory minimum. One of the very few downward departures is the one granted to an offender who assists prosecutors and federal agents in a sting operation or set-up of another prospective offender. If the offender testifies that the offense was the brain child of the prospective offender, the first offender gets a further downward departure from his sentence, and the prospective offender is due for a substantial upward enhancement of his sentence. To say these guidelines encourage a doubling of the prison population would seem appropriate. Incidentally, they certainly seem to encourage a proliferation of bad tips, which result in defective search warrants, under which the homes of innocents have been raided. In some of these raids agents have shot and killed law-abiding homeowners. The United States is facing damages of millions of dollars in lawsuits arising out of these mistakes. Under the guidelines, however, furnishing such information, no matter how inaccurate it may be, is about the only way to get a sentence reduced. On the other hand, there are far more ways a sentence can be enhanced.

Compounding this state of affairs is the wide range of federal conspiracy statutes. Minor participants, including those even marginally or peripherally connected to a drug transaction, are subject to a range of punishments comparable to those meted out to the persons who financed, orchestrated and profited from the crime. Of course, the kingpin is thus in an excellent position to bargain with his prosecutors for downward

departures, because he can testify against all his underlings, including some who may not even have been aware of their roles at the time of the offense. Thus, under the Sentencing Reform Act and the sentencing guidelines, it is not unusual to witness the bizarre result of drug lords receiving relatively lesser punishment than minor offenders. The concept of a mandatory minimum sentencing scheme was not new in 1984. It had been enacted back in 1970, but was quickly repealed. Ironically, George Bush, at that time a congressman from Texas, was one of the voices calling for repeal. Of course, that was before the Willie Horton era, when it became politically expedient to maintain the appearance of being tough on crime at any cost in the midst of the War on Drugs.

Federal judges are almost unanimous in their opposition to Mandatory Minimums. A number have taken senior status, when faced with the grossly unjust sentences they were being forced to impose. A few judges have ignored the mandatory minimums, running the risk of being reversed on appeal. What outrages the judges is the fact that the Mandatory Minimums have relegated learned judges into rubber stamp roles. They no longer judge. They apply a formula from a chart. They are prohibited from taking into account any human, economic or societal factors, in sentencing. They are no better than computer terminals.

The Sentencing Reform Act of 1984 also abolished parole for drug offenders. Nobody gets one third or more off their time anymore. The only remaining good behavior incentive is a maximum of 54 days of "good time" each year, which is 14.79% of the time assessed. That means that an inmate sentenced for a single minor drug transaction to 10 years will have to serve at least 85% of his sentence, and can hope for a maximum good time reduction of 17 months and 21 days, after being locked up for eight years, six months and nine days. It is amazing that our federal prisoners are as well behaved as they are, considering this almost total lack of good behavior incentive.

I am a drug offender. I'm serving four years for selling LSD, and an extra 16 years because of the paper it was on, because Congress unintentionally failed to distinguish blotter paper, upon which LSD is marketed, from common adulterants used in the marketing of heroin and cocaine. Heroin and cocaine are cut with powdered milk or similar substances, thus enhancing the profits of the drug dealers, who sell those drugs by *weight*. LSD is sold on the basis of the *number of doses*. Congress apparently was unaware of this when it permitted the use of language which could be interpreted as including the weight of the paper, or capsule, or sugar cube, along with the LSD. The result, in the case of LSD, where the weight of the paper, which is not an adulterant, but merely a carrier medium, adds no value and is hundreds or thousands of times the weight of the drug, was characterized as bizarre, by the five members of the Seventh Circuit Court of Appeals who dissented from the affirmance of my conviction.

When I was sentenced we had tried to explain this distinction to the trial judge, but he found that I had been guilty of selling 100 grams of an illegal drug. This was even after a government witness, a chemist, had testified that there was only 67% of one

gram of LSD involved in the transaction. At my appeal, we argued that it was irrational to impose upon me the same sentence for 10,000 hits of LSD that I would have received for selling two million doses of heroin, or $5 million worth of cocaine. In a dissenting opinion, one of the appellate judges wrote, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."

A case similar to mine was argued before the Supreme Court. It was explained to the Justices that because the weight of the carrier medium was included, someone who sold three doses of LSD on sugar cubes would receive the 10-year mandatory minimum, while a kingpin who distributed 19,999 doses of LSD in its pure crystalline form would not be required to serve any mandatory minimum sentence at all. Despite this argument, seven members of the Court upheld the sentence, based on a "positivistic" or literal view of the wording of the law. In his dissent, Justice John Paul Stevens said, "The consequences of the majority's construction [of the statute] are so bizarre that I cannot believe they were intended by Congress." Congress clearly stated that its aim was to punish those who sell large quantities of drugs more severely than those who sell small quantities. Weighing the carrier medium for the purposes of enhancing punishment clearly thwarts the purpose of Congress.

Since the Supreme Court has chosen to apply a narrow interpretation of the wording of the law, I am condemned to serving 17 years, five months, at the very least. I have been locked up five years so far. Reason demands that Congress refine its definition of "a mixture or substance" to more precisely indicate an adulterant and not a carrier medium. Along with others in my situation and their families, I look forward to a review by Congress of this tragic oversight.

The sentencing guidelines are due for revision this year. We have a new president. We have a new Congress. We have new members on the judiciary committees in both houses, including two women, for the first time, on the Senate Judiciary Committee. It's time for a new, pragmatic look at a problem which has evoked only knee jerk reactions in the past dozen years.

Our federal prisons are now operating at 147% of their rated maximum capacities. At the present rate of convictions, we'll have to build fifty new 2000-bed facilities in the next decade. It costs over $20,000 per year to keep one inmate in federal prison. Convictions are on the rise and sentences are longer and longer. This year's budget for the Bureau of Prisons is $2,134,297,000. Can we really afford to build more prisons? We can only hope for a return to rational laws and realistic and compassionate sentencing, keeping in mind that people who break the law are still people.

The Law Offices of

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March 9, 1993

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Attention: Public Information

Re: Proposed Amendments to the Federal Sentencing Guidelines

To the Members of the Commission:

This letter is to supplement the letter I sent you yesterday, urging you to act decisively in amending subsection (c) of §2D1.1 of the Guidelines by adding the proposed paragraph requiring that in determining the weight of LSD the actual weight of the LSD itself be used, and not that of the carrier medium.

On December 17, 1992, *USA Today* published an article entitled, *Quirk in law weighs heavily on sentences*, which states the case most succinctly and most effectively. It is interesting to note, also, that, according to *USA Today*, this weight-of-the-carrier quirk was recognized by Congress in 1989, when remedial language was included in the 1989 crime bill.

I enclose a copy of page 11A of the December 17, 1992 issue of *USA Today*, including this item, and others pertaining to LSD, and I respectfully request that you include the same in the Commission's record of written testimony on this proposed amendment to the Guidelines.

Yours sincerely

RICHARD T. MARSHALL

xc: MR. STANLEY J. MARSHALL
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GRATEFUL DEAD FOLLOWERS

Attack on Deadheads is no hallucination

Band's followers handed stiff LSD sentences

By Dennis Cauchon
USA TODAY

David Chevrette was a young, free-spirited hippie.

His only possessions were his clothes, a dog and a 1970 Volkswagen bus painted with peace signs. For fun, he followed the Grateful Dead rock group on concert tours.

Then, the 20-year-old got busted for selling LSD in 1990 to a guy he met on the beach.

Now, he's doing 10 years without parole in federal prison — a longer sentence than those given in federal court to rapists, armed robbers and some big drug dealers.

Chevrette is a victim of a concerted crackdown on Grateful Dead fans — called Deadheads — and a quirk in federal drug law.

That quirk — involving whether to weigh the paper or sugar cube the LSD is stored on — has resulted in what Sen. Joseph Biden, D-Del., calls an "unintended inequity."

In short: LSD sentences are out of proportion — by a factor of 50 or more — with other drug sentences.

Chevrette's term for $1,500 worth of LSD is more severe than if he'd smuggled $100,000 worth of heroin.

The quirk — buried deep and unnoticed in a large drug law — has been turned into a bludgeon in the battle against Deadheads.

Today, 1,800 to 2,000 Deadheads are in prison, up from fewer than 100 four years ago. Most are young middle-class whites or old hippies. Many are serving mandatory no-parole prison terms of 10 or 20 years.

"We've opened a vein here," says Gene Haislip, head of LSD enforcement at the Drug Enforcement Administration. "We're going to mine it until this whole thing turns around."

The DEA has tripled spending, personnel and arrests for LSD since January 1990. "We've seen a marked pattern of LSD distribution at Grateful Dead concerts," says Haislip. "That has something to do with why so many (Deadheads) are arrested."

The Grateful Dead — top-grossing concert act last year ($34 million) — has been around since the 1960s.

Some people are weekend fans, such as Vice President-elect Gore and his wife, Tipper, who took their daughter to a June Dead show.

Others are more devoted. They wear tie-dyed shirts and catch five or 10 shows a year.

The most dedicated fans follow the band from show to show, creating a traveling village of 3,000 to 5,000 sometimes called "Deadland."

The values are pure '60s: peace, love, vegetarianism, communal living and partying. To many, mind expansion is also part of the Deadhead experience — and that means LSD.

"Yes, LSD is my sacrament," says Franklin Martz, a Haight-Ashbury-born hippie who saw his first Grateful Dead show in 1967. He's now serving a 40-year LSD sentence.

This brazen advocacy of LSD angers many parents and police.

A USA TODAY review of more than 30 Deadhead cases found they routinely have their musical tastes, dress and lifestyle used against them in the criminal justice system:

▶ **More police searches.** A University of New Hampshire police officer acknowledged to the student newspaper that he pulled over cars with Grateful Dead bumper stickers.

▶ **Bond denial.** Deadhead Janet Godwin's license plate was presented at her North Carolina bond hearing to prove she was a flight risk. The plate read RAMBROSE[illegible]er the Grateful Dead song *Ra[illegible] Rose.*

▶ **Negative portraya[illegible] and news media.** Police told the media that Michael Thrasher's 1,984 doses of LSD had a satanic symbol — an upside down pentagram. No mention was made of the word "LOVE" stamped across the LSD paper.

The jury learned that Thrasher, 19, a college student from Portland, Ore., was in a band named Ethel & Jake's Psychedelic Jug Band, Jamboree and Wino Wrestling Team. "A big issue at my trial was my 'alternative lifestyle,'" Thrasher says.

▶ **Sentencing prejudice.** Deadhead Todd Davidson, 20, sentenced to 20 years without parole, was described in his pre-sentence report in Florida as a member of the "cult that follows the Grateful Dead."

▶ **Prison labels.** Richard Cash is classified as "gang-affiliated" in the Colorado prison system because he's a Deadhead. That label — usually reserved for Crips, Bloods and members of Aryan Nation — is used to determine where a prisoner is placed in order to curb gang violence. But Cash, a pacifist, complains: "I'm exposed to harsher conditions all because I'm a Deadhead."

Nadine Strossen of the American Civil Liberties Union says: "People shouldn't be singled out because their lifestyles or musical tastes are unpopular with the majority."

Deadheads get few breaks behind the scenes, too.

North Carolina lawyer Charles Brewer entered into what he thought were routine plea talks for a client. He was surprised to find prosecutors unwilling to deal. "They were powerfully impacted by the fact that she was a Deadhead," he says.

Deadheads often are subject to what's known as "jurisdiction shopping" — prosecuting a case where it gets the greatest punishment.

Thrasher was arrested and prosecuted entirely by local authorities.

But the case was switched from state to federal court to get a longer sentence. In state court, he would have gotten 16 months; in federal court, he got 10 years without parole.

Davidson, now 22, is scheduled to be released from prison on March 19, 2010. He'll be 40.

"I'd go back on tour in a heartbeat," Davidson says. "It was a big happy family." At least until the real world intruded.

"It's funny," says Deadhead Christopher Jones, who just finished an LSD sentence in Virginia. "Everyone is like 'We gotta be careful,' but everyone is doi[illegible]e same old thing. You've still [illegible] walking around shows yellin[illegible]d Doses!' "

By Steve Slocum, AP

DOING TIME: Michael Thrasher, 19, in Sheridan, Ore., prison, where he is serving 10 years for possession of $2,000 worth of LSD — his first offense.

Quirk in law weighs heavily on sentences

People imprisoned on federal LSD charges are treated more harshly than other drug offenders because of a quirk in the law.

The 1986 law sets sentences by a drug's weight for charges of possession, sale or conspiracy. But LSD, unlike other drugs such as cocaine or heroin, isn't sold by weight. It's sold by the dose, or "hit."

A dose of pure LSD is so tiny that it's not practical to sell. A penny weighs the same as 50,000 LSD doses. To make LSD usable, producers put the drug onto something big enough to sell.

An LSD crystal is dropped into water or alcohol, and the solution is sprayed onto a "carrier," usually paper or gel. The carrier could also be dental floss, a sugar cube or a glass of juice. The carrier's weight has no relation to the drug's potency or price.

Should the carrier be weighed during sentencing?

The issue wasn't discussed during debate of the bill. There's no indication anyone even knew it mattered.

The Justice Department could have interpreted the law's wording to weigh only the drug. Then LSD penalties would be comparable with other drug sentences.

But the Reagan Justice Department said the carrier's weight should be counted. In 1991, the Supreme Court agreed, saying it was within Congress' power to make inequitable sentences.

Result: LSD sentences are set by packaging weight, not drug weight. Sentence for 100 hits, worth $100:

▶ pure LSD, 10 months.
▶ on paper, five years.
▶ on sugar cubes, 16 years.

When Sen. Joesph Biden Jr., D-Del., chairman of the Judiciary Committee, learned of the problem, he put a correction in the 1989 crime bill. The crime bill passed the Senate, but the House took no action. Nothing has happened in Congress on the matter since.

Comparing times for crimes

How the prescribed prison sentence for a first-time offender with $1,500 worth of LSD compares with sentences[1] for other federal crimes:

Crime	Minimum	Maximum
LSD possession	10.1	13.9
Attempted murder with harm	6.5	8.1
Rape	5.8	7.2
Armed robbery (gun)	4.7	5.9
Kidnapping	4.2	5.2
Theft of $80 million or more	4.2	5.2
Extortion	2.2	2.7
Burglary (carrying gun)	2.0	2.5
Taking a bribe	.5	1.0
Blackmail	.3	.8

1 – No parole is available on any sentence
Source: U.S. Sentencing Guidelines Manual; Drug Enforcement Administration

The ABCs of LSD effects

LSD became popular in the 1960s and is used by an estimated 2.8 million people annually.

A Primer of Drug Action, a classic college psychopharmacology textbook, says of LSD:

▶ Its main effect is perceptual: sounds and sights become more vivid. Laughter and sorrow are easily evoked, sometimes simultaneously.

▶ Psychotic episodes that would normally have been suppressed sometimes occur.

▶ The drug loses half its potency in three hours, but effects last 10 to 12.

▶ Occasional use of LSD for experimental purposes does not induce physical damage.

▶ No overdoses have been reported, but flashbacks, accidents and suicides have.

March 7, 1993

Attn: Public Information
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Committee Members:

I would like to express my concern about a serious injustice in the American judicial system that you all can help correct. A close friend of mine is currently sentenced to 10 years in a federal facility for procession of L.S.D. His sentence was determined from the total weight of the drug and the carrier medium (paper) on which it was transported.

Proposal #50 would clarify the existing law concerning how L.S.D. would be measured by adding the following paragraph, "In determining the weight of L.S.D., use the actual weight of the L.S.D. itself. The weight of any carrier medium (blotter paper, for example) is not to be counted." Had this specific paragraph been in effect when my friend was sentenced, the outcome would have been drastically different.

As L.S.D. is a dose specific drug which is unique from other drugs such as cocaine (which can be cut with a benign substance to increase the quantity of the drug while lowering its potency), it is transported on many mediums. The L.S.D. carrier medium has been confused with these "cuts". 100 doses of L.S.D. whether on blotter paper or sugar cubes should be considered equal in terms of sentencing. Under the current judicial guidelines the following inequity exits:

Amount of Drug		Sentence
100 doses of pure LSD (approx. 5 milligrams)	=	10 months
100 doses transported on blotter paper	=	5 years
100 doses transported on sugar cubes	=	16 years

I urge to all to look favorably on and support Proposal #50 and see it as a clarification of statutory intent so that it will assist those who are currently and inappropriately sentenced.

Thank you for your time, attention and consideration.

Respectfully,

Rachelle Rose

Rachelle Rose

BENEVA CHRISTIAN CHURCH
(DISCIPLES OF CHRIST)

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EDD AND MARY PAT SPENCER
CO-MINISTERS

March 5, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Attn: Public Information

Dear Madam or Sir:

Subject: Amendments 50 and 56

Please know that I feel very strongly that a people are serving unusually long prison sentences based on the weight of the paper that L.S.D. is on, not the drug weight alone.

Two of our young adult members of Beneva Christian Church received ten years minimum mandatory sentences without parole for less than $1,000 worth (street value) of L.S.D. Knowing that it was a crime that they committed, I feel it is an equal crime that they serve such a long sentence; especially in light of the fact that people who are big time drug dealers or who commit crimes of rape, abuse, and murder spend less than ten years in our federal prisons. Please note the following ***"Comparing times for crimes"*** found in the December 17, 1992 edition of USA TODAY.

Comparing times for crimes

How the prescribed prison sentence for a first-time offender with $1,500 worth of LSD compares with sentences* for other federal crimes:

Crime	Minimum	Maximum
LSD possession	10.1	[illegible]
Attempted murder with harm	6.5	8.1
Rape	5.8	7.2
Armed robbery (gun)	4.7	5.3
Kidnaping	4.2	5.2
Theft of $50 million or more	4.2	5.2
Extortion	2.2	2.7
Burglary (carrying gun)	2.0	2.5
Taking a bribe	.5	.6
Blackmail	.3	.8

1 = No parole is available on any sentence.
Source: U.S. Sentencing Guidelines Manual; Drug Enforcement Administration

I am in favor of weighing the drug, not the paper. Also, I am in favor of Amendment 56, which would allow changes in sentences. Thank you for your time and attention to this matter.

Sincerely,

Mary Pat Spencer

Mary Pat Spencer
Co-minister
Beneva Christian Church (Disciples of Christ)

Richard D. Besser
13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370 FAX (315) 853-4371

March 4, 1993

Attn: Public Information
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Gentlemen:

I am writing to voice my opinion on the amendments to the sentencing guidelines that are currently under consideration by your Commission.

While I believe that the entire concept of mandatory minimums is abhorrent and unconstitutional, there are three amendments that I believe rise above the others in importance:

1. Eliminate the carrier in determining sentencing in LSD cases.

2. Reduction in the top guideline level from 43-32.

3. Allow Federal Judges to depart from guidelines if he believes the defendant has provided substantial assistance without the approval of the prosecutor.

I am sure you are aware of the inequities in sentencing that result from application of the current guidelines in LSD cases. If not I would offer the following:

One gram of pure LSD (no carrier)=63-78 months, guideline level 26
One gram of LSD on 100 grams of paper=188-235 months, guideline level 36

Reduction of the highest sentence for a first time offender to 121-151 months is a modest reduction at best. Where else in our legal system does a first time offender for a nonviolent crime receive a 10

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year plus sentence, without parole? People who commit armed robbery are let off with less severe sentences. Should the Federal Courts apply sentences that are more severe for nonviolent crimes than the state courts do for violent crimes? I think not.

As to allowing judges to have latitude in sentencing, I would postulate that the justice system was designed to have prosecutors prosecute and judges and juries determine guilt and impose sentences. In Federal drug cases discretion is taken from the judges and given to the prosecutor who's motives are typically self-serving. It appears that in their zealousness to apply justice even-handedly they created a system that recognizes no extenuating circumstances and have denied judges the ability to perform their judicial responsibilities.

It appears to me that your Commission could do a lot to correct these and other inequities in sentencing, to say nothing of what you would do for prison over-crowding and the drain on the Country's resources, both financial and human, by passing these amendments.

As someone who has been personally impacted by these guidelines I would be more than happy to offer additional testimony.

Sincerely,

R.D.Besser

cc: Families Against Mandatory Minimums

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendments 8, 9, 11, 39, 48, and 60

The mere existence of all these options suggests that changes concerning greater latitude for minimal criminal participation (and therefore less harsh sentences) and, possibly, a distinction among offenders involved with "less dangerous" types of controlled substance are widely thought to be desirable.

Hearing the discussion of the members of the Working Group is essential to be able to cast a well-informed vote on any of these. At least one, however, seems unnecessary, and that is **Amendment 60**. One can only infer that "ghost" co-defendants have been invoked so as to justify comparative role status in some single-defendant cases.

Amendments 9 and 39 are more extensive in their reach than **Amendment 8**, but they are more complicated. If the Working Group concludes that emphasis on the role of firearms is required, then **Amendment 9** is on target.

Adoption of **Amendment 8** and possibly **Amendment 48** would show movement in the apparently desirable direction. We could work with cases under the refined definitions of "mitigated role" defendants and those whose offenses do not concern heroin and cocaine, and see if the goal for more "individualized" sentences might be achieved.

Finally, I find **Amendment 11** arbitrary. I think it was meant to be, but I prefer *status quo*.

Henry N. Blansfield, M.D.
1 Cedarcrest Drive
Danbury, CT 06811
(203) 744-6222
Fax (203) 744-6336

February 26, 1993

United States Sentencing Commission
1 Columbus Circle, N.E., suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public information

As a physician currently engaged in providing services to psychoactive drug users in our society and concerned with reducing harm to them, I strongly support amendments to sentencing guidelines that would drastically lessen their length. I am opposed to mandatory lengths of incarceration based upon the type of illicit drug involved in felonious drug selling and its weight. There must be a return to consideration of an arrested individual's prior record and willingness to accept rehabilitation and treatment if a compulsive drug user. Most of all, leniency would seem indicated if the nature of the crime, namely selling, has not directly harmed another. Reforms in the length of sentences need to be retroactive to allow redress for those already imprisoned by previous unfair and inhumane mandatory rules of sentencing.

Working as a clinician in the drug/alcohol field for twenty years has led me to believe that chemical dependence is a disease resulting from alterations in neuron receptor - transmitter mechanisms. Paradoxically society criminalizes the use of certain agents acting on the central nervous system while permitting the legal acquisition and consumption of others that have been repeatedly shown to have morbid deleterious heath effects, i.e. alcohol and tobacco. This, in itself, is the epitome of hypocrisy.

There is increasing awareness of the adverse impact of present drug laws on society, particularly the urban minority young male population. Racism and the drug war have been addressed by Clarence Lusane in his book "Pipe Dream Blues". A study of the impact of current drug policy, from a crime and corrections standpoint, has been carried out by the Monroe County Bar Association (Rochester, New York and environs) and detailed in a report called "Justice in Jeopardy". This report can be obtained from :

James C. Gocker, Esq.
130 East Main St.
Rochester, NY 14604
(716) 232- 4448

I enclose a copy of a New York Times article dealing with alternative sentencing, a policy whose time has come. Such approaches need to be strongly considered not only because they are dictated by the evidence pointing to the failure of present drug policy involving crime and corrections to succeed in alleviating or reducing the problem, but also because alternatives may be much less costly. The crime and corrections industry will, of course, lobby strongly against any change in the 70% dollar allocation they are now receiving.

Sincerely yours,

Henry N. Blansfield, M.D.

NY Times 1/20/93

Dealing With Drug Dealers: Rehabilitation, Not Jail

Hynes Tries Alternative Approach Intended to Stop a Problem by Curing an Addiction

By FRANCIS X. CLINES

In 15 years of selling cocaine and heroin in the doorways and abandoned buildings of Brooklyn's pervasive Borough Park narcotics mart, Guillermo Rios developed an entrepreneurial sense of a good deal, even as he indulged his own deep addiction.

Mr. Rios, who once managed seven tidy street outlets, had to hurriedly put his deal-maker's sense to good use 20 months ago when he was caught, fix in hand, selling drugs to undercover detectives. At the arraignment, District Attorney Charles J. Hynes of Brooklyn offered him a deal he never expected:

Either complete an experimental long-term rehabilitation program and be treated like an addict with all the struggle of self-reform, or face mandatory prison time as just another common criminal with all the attendant lost freedom and wasted life.

Limited Experiment

It was a deal that Mr. Rios and more than 200 other addicted drug dealers in Brooklyn have taken gladly but warily over the last two years in an unusual program that is attracting attention from other law-enforcement officials who are intent not so much on declaring a truce in the war on drugs as in attempting a little creative triage.

The Brooklyn program is a limited experiment, but it is showing enough progress at retaining phlegmatic addicts in long-term treatment in lieu of prison that the state has decided to extend it to the other city prosecutors' offices this

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Joyce Dopkeen/The New York Times

"What I am learning is to finally begin valuing my life," said Guillermo Rios, left, who chose an experimental rehabilitation program after being caught selling drugs. He talked with Ed Hill of Daytop Village in Swan Lake, N.Y.

Dealers' Deal: Rehabilitation, Not Jail

Continued From Page B1

year. Mr. Rios, who is finishing his first year in rigorous rehabilitation, said, "I had already been in jail and that just made me a little crazier."

He remains free, as ever, to walk away from the deal. But if he does, a special pursuit team will try to track him down and put him back on the narcotics court treadmill toward the overwhelming likelihood of serving long years in prison, with no second chance at mercy from Mr. Hynes.

The program is intended to deal with the legions of drug dealers who basically underwrite their own addiction with the money they make selling. Second offenders like Mr. Rios face very tough laws providing mandatory prison time and no easy plea bargains. Prison reformers say such second-felony laws are unrealistically harsh, but Mr. Hynes is exploiting the harshness, in effect, in his new carrot-and-stick program.

Half the states have comparable drug crackdown laws mandating prison time for repeat offenders and these have been instrumental in the mushrooming of prison populations and expenses across the nation through a high turnover in drug arrests. This growth has not necessarily focused on the more violent criminals who are at the heart of the public's alarm and the politicians' enactment of harsh remedies.

Up to 2 Years

With prisons becoming glutted, some criminal-justice officials are looking for cheaper, more productive alternatives. Few new programs besides Mr. Hynes's Drug Treatment Alternative to Prison offer such a powerful combination of seduction and penalty to try to change addicts who have been carefully screened and not merely to detain them behind bars until they come out to deal again.

Under the program, arrested dealers who spend up to two years completing private drug-rehabilitation programs like Daytop Village and Samaritan Village are rewarded by having the drug charges for which they were arrested dropped; the arrested dealer is free to pursue a new drug-free life with one less felony blot.

But those who yield to the temptation to walk out on the rehabilitation program's rough self-examination, job training and other responsibilities immediately face the full force of New York State's predicate felony law, which mandates prison time for second-time drug offenders, with little leeway afforded sentencing judges.

For public officials, the cost of treatment versus incarceration of nonviolent drug offenders is increasingly important. The Brooklyn program costs about $17,000 a year for each dealer in treatment, less than half the cost of imprisonment, about $40,000. But the real choice in public policy is not that simple, and alternative approaches to prison can prove risky for responsible officials.

'A Terrifying Experience'

An assistant district attorney, Susan A. Powers, recalled the initial anxiety that the program, rooted in Mr. Hynes's unusual use of his case-disposal powers, might prove to be a gamble that failed, with addicts scandalously fleeing in droves. "It was a terrifying experience," she said. "But the results so far have been rather amazing." Ms. Powers pointed out that 70 percent of the addicts admitted to the program have stayed, versus a rate of about 13 percent nationally in voluntary drug-treatment programs.

"Retention is the key to success, studies show, even if you're forced to enter a program," she said. "They can change you if they can keep you,"

> 'This is the hardest thing an addict's going to do,' a director says.

providing the programs are as long term and experience proven as Daytop and Samaritan.

"This is actually a lot harder for them than jail," said Ed Hill, director of the privately run Daytop Village center in Swan Lake, in the Catskills, where Mr. Rios, ever a manager, has risen in 11 months to be the chief administrator for running the woodshop and its staff.

"This is the hardest thing an addict's going to do because it represents true and total change," Mr. Hill said. "No more the swaggering tough guy with the .45 pistol in his belt or the 9-millimeter in his boot. We're talking complete overhaul."

He stressed that society was right to want its streets cleaned of the plague of addict-dealers like Mr. Rios but that the real issue, finally faced fully by this program, was whether to try to change them or to merely guarantee a deeper problem with prison-toughened criminals.

Mr. Rios, a trim, watchful man with more than half his 29 years of life already invested in drugs, said pragmatism was as effective as idealism in Mr. Hynes's program. He conceded that he had jumped at the program mainly to avoid prison and had thought he could ease through and feign dedication when needed, as with other more casual programs that he had gone through inside prison and out.

Mr. Hill, a Daytop graduate from Brooklyn's street-drug pathology of two decades ago, smiled, noting that avid peer-pressure is only one tool intended to root out routine fakery. Mr. Rios said he eventually found change and growth in himself necessary to stay in the program.

"Here, instead of doing 7 to 15 in prison, I'm not even doing time," he said gratefully. "I'm learning a lot about myself, what a threat I am to me and to others. What I am learning is to finally begin valuing my life."

Of the 30 percent in dropouts from the program, Mr. Hynes's pursuit squad, put together especially for this program, has arrested 95 percent to resume the court process. Of 64 returned to court, 51 received felony prison terms and 11 cases were pending as of the latest tally in November. Only two received misdemeanor treatment — a tribute to the original selection of firm second-felony drug cases by the District Attorney to guarantee the harsh stick needed to complement the program's inviting carrot.

Long-range effects are yet to be measured since only the first 14 graduates have returned to their communities. "I had my hand on the doorknob several times, ready to walk," said Angelo K., a 30-year-old graduate who completed the program's residential and re-entry programs, learning to be a diesel mechanic in the process. Through the program he has obtained a job in his old neighborhood, Sunset Park, still as drug-infested as when he began dealing as a 14-year-old.

'Finally Be an Adult'

"It was like I was frozen in my childhood back then," Angelo said. "The program resumed my life. I feel like I lived the rest of childhood in a year and sped forward to finally be an adult. Basically, they taught me we're not bad people," he said of the Samaritan Village program and his fellow addicts aiming for change.

Despite the program's modest enrollment, its surprising retention rate among the notoriously unreliable addict community is encouraging enough to attract praise from the office of Gov. Mario M. Cuomo and a decision to expand it to the other city prosecutors. A $700,000 state allocation of Federal anti-drug money will help finance 300 new residential treatment slots beyond the 200 in the Brooklyn program.

"The future of this approach is very dependent on the available treatment slots," Ms. Powers stressed. "There are only something like 15,000 full-scale residential slots available nationally — amazingly small — and maybe two-thirds of them are in New York and California. If the Clinton Administration is serious with its talk about changing the 70-30 approach of law-enforcement-to-treatment to something more of a 50-50 breakdown, then this program and others like it have a future."

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

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

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: February 16, 1993

RE: Proposed Amendment #11

FROM: David E. Miller, Deputy Chief
U. S. Probation Officer

TO: U. S. Sentencing Commission
Public Information

✳ The synopsis of this proposed amendment indicates that a "snapshot" of the offender's involvement arguably provides a more reliable method of determining culpability. I strongly disagree with that theory and with the intent of this proposed amendment.

I contend that one adverse affect of this proposed amendment is to create an adaptation to the application and meaning of relevant conduct as defined in section 1B1.3. An exception to how 1B1.3 is applied is foreseen if this amendment is passed. This will create inconsistencies with the application of other guidelines, eg. 2B1.1 and 2F1.1 to name a few.

Drug distribution, almost by definition, is a continuous, ongoing crime. The overall philosophy of the guidelines appears to be to sanction, without double counting, all harms to the victim or victims of the criminal activity. The approach suggested by this amendment compromises that philosophy deeply.

Additionally, the proposal will create difficulty for the Court and probation officer in application and dispute resolution. Another element of factual determination is required and another issue for potential dispute is raised.

THOMAS P. JONES
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February 22, 1993

U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

To the U.S. Sentencing Commission:

I would like to express my support for the proposed amendments to the Sentencing Guidelines. I would especially like to voice my support for the following four amendments:

Proposal II, option 1: restructures 2D1.1 so that the offense level is based on the largest amount of a controlled substance in a single transaction.

Proposal 39: reduces the offense levels associated with higher drug quantities by two levels.

Proposal 50: bases the offense level in 2D1.1 on the amount of actual L.S.D. involved without including the weight of any carrier medium.

Proposal 56: pertains to 1B1.10, expanding the court's ability to apply changes in the Sentencing Guidelines retroactively.

These proposals would all help to insure fairer judgment in dealing with small-time drug offenders. It is only fair and reasonable to make any changes retroactive, providing convicted offenders the same reduced sentences being granted to new offenders. Thank you for your efforts at making the guidelines more equitable, so that the punishment will truly reflect the crime.

Sincerely,

Thomas P. Jones

Thomas P. Jones
Attorney at Law

TPJ/bm

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G. PAUL McCORMICK
JAMES R. CHRISTOPH

February 12, 1993

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Attn: Public Information

Dear Sir or Madame:

I am responding to your request for feedback concerning the proposed amendments to the Federal Sentencing Guidelines. In particular, I am responding to Amendment No. 50 which proposes that the weight of the carrier in LSD cases be excluded from sentencing guideline consideration. I am strongly in favor of this proposed amendment. As a former prosecutor, public defender, and now private practitioner, I can assure you that nowhere is there a larger discrepancy between state and federal law than in LSD cases. Let me give you an example. I recently worked on a case where the defendant was involved in distributing 250 "hits" of LSD. Because the weight of the paper exceeded 10 grams, the defendant was facing approximately 15 years in prison. Under the same scenario in almost all state courts, if not granted probation, he would have been facing somewhere between two and five years in prison.

The other reason I support this amendment is that the current guidelines punish street-level users and sellers of LSD 100 times more severely than the manufacturers and producers of LSD. Usually when street-level persons possess LSD it is affixed to paper or cardboard or put in sugar cubes. Manufacturers, on the other hand, often possess pure liquid LSD. On a per-dosage basis, LSD affixed to blotter paper is 100 to 1,000 times heavier than the liquid concentrate. The manufacturer of LSD who possess 250 dosage units in the form of liquid LSD is only facing approximately 2 years under the guidelines. I would suggest that a sentencing scheme that punishes street-level possessors much more severely than drug manufacturers is backwards. Removing the weight of the carrier from the sentencing guidelines would remedy this gross disparity.

I enthusiastically encourage you to amend the guidelines as proposed in Amendment No. 50. Thank you for your consideration.

Sincerely,

G. Paul McCormick