of credibility problems (posturing by law enforcement personnel will always triumph over a plea of entrapment by the criminal participant).

The proposed amendment for Note 2 of §3B1.1 should be scrapped. Holding a Defendant responsible as a supervisor of people he doesn't know and never spoke to (thus never knew he was supervising) results when a person can be supervised "indirectly." Intent should be the criteria for management and supervision!

C.U.R.E. also opposes Options #1 & #2 for No. 5 in Application Notes under §3B1.2 because possession of a firearm has nothing to do with a participant's role in the offense. Possession of a firearm is already punished stringently by other Guideline provisions.

#11. C.U.R.E. opposes proposed new §2S1.1(b)(2) and Application Note 5, unless a more specific definition for the word "sophisticated" is forthcoming. In its present form, almost any activity can and will be defined as "sophisticated" by each and every AUSA confronted with a Money Laundering offense (resulting in the Defendant having two levels added to his severity). Sophisticated activity should be that which is extraordinarily difficult to detect, so that run-of-the-mill activity applicable in most cases will not qualify. The definition of "sophisticated" in this section should be at least as well defined as the proposed Amendment #12(A).

#12(B) & (C). C.U.R.E. opposes these proposed amendments and all other amendments that raise sentences higher rather than keeping the level as is and adjusting the other levels in that particular table lower.

#13(C). C.U.R.E. would like to see this particular proposed change go farther because the present proposal does not take into account the discretion vested in AUSAs under Rule 20 FRCrP to prosecute separately cases of multiple drug dealing in more than one jurisdiction. If a drug dealer deals twice with police undercover agents in two jurisdictions and the AUSAs decide to prosecute twice for two separate arrests, the Defendant becomes liable as a "Career Offender," whereas, if only one arrest is made for the two separate violations, the Defendant is not a candidate for enhancement. The draconian sanction for "Career Offender" status should not hang on such procedural niceties for Defendants whose criminal activity happens to be "continuing," whether there is one arrest or two, one AUSA or two, one jurisdiction or two.

#13(D). C.U.R.E. opposes this change because a crime should be considered "violent" only where violence occurs. Burglary of dwellings are not ordinarily crimes of violence and should not be so defined. If violence does occur, that is the time for enhancement, not before! "The conduct of which the Defendant was convicted" should be "the focus of the inquiry" - in the same manner as proposed amendment #13(E)'s new Note 3. C.U.R.E. still opposes the use of a "controlled substance offense" as an equivalent to a "crime of violence" for enhancement purposes (i.e. §4B1.2).

#14. C.U.R.E. supports the proposed amendment to §5K2.0 allowing sentence departures in "exceptional cases," so as to give a judge some discretion in those cases that are truly out of the ordinary.

#16. Aging prisoners: C.U.R.E. has steadfastly called for a new look at the issue of geriatric offenders. There are thousands of aged and infirm federal prisoners, most of whom are housed at the U. S. Medical Center at Springfield, MO., FMCs Rochester and Carville and FCIs Ft. Worth, Butner and Petersburg. Title 18 U.S.C. §3582(c)(1)(A), as it is presently written, is totally inadequate to address the compelling reasons why many of those inmates should be released, simply because it is almost never utilized. This particular code section augments the old Title 18 U.S.C. §4205(g) for Old Law inmates, which is also almost never used. Teminally ill inmates, who should be allowed

to die with dignity are still denied release by an intransigent Bureau of Prisons, who together with the collusion of vindictive AUSAs, feel that it is their mission to only allow these inmates direct transfer to the morgue.

In the year 1993, approximately a dozen inmates died at FCI Ft. Worth. It is reported that over 50 inmates have died in one month at USP Springfield. The Commission is strongly urged to design appropriate criteria for the release of terminally ill inmates and formulate additional criteria for the release of those inmates who are a burden on the federal prison budget (and inevitably the American taxpayers) due to age and/or infirmity and who have long since paid their dues to society. Statistics show that these inmates cost twice as much to house than the general prison population and have little propensity to commit crimes. Those prisoners over 60 years of age should qualify for some relief.

#24. C.U.R.E. supports this proposed amendment that suggests where a Defendant establishes he was not reasonably capable of producing a negotiated amount of drugs or did not intend to produce that amount, the negotiated amount cannot be used for Guideline sentencing purposes.

#27. C.U.R.E. opposes this proposed amendment that provides a 4 level increase if violence or substance abuse offenses are done by members of a "gang." First, the term "gang" is poorly defined and could be used against any group of friends who conspire together and who never thought of themselves as a "gang." Second, a Defendant should not be held more liable for a crime that does not involve the gang, but where the Defendant happens to be a gang member. Third, substance abuse sentencing levels are high enough as it is without subjecting so-called gang members to higher penalties solely because of their social associations.

#28. C.U.R.E. opposes any proposed amendment that calls for higher penalties for offenses in "federal facilities" and/or "school zones" without a) a tight definition of what is to be included in the term "federal facility" (a federal prison, a VA hospital and any building with a federal office in it would all presumably qualify) and b) proof that the Defendant had the requisite knowledge that where he was was a federal facility and/or a school zone, so that intent to violate this provision is proven. As it is now, school zone enhancements apply to Defendants who don't even know that a school is there and schools have been held to include any place where any kind of student is taught.

#30. C.U.R.E. conditionally supports a proposed amendment, which would add additional distinctions for the Criminal History Category, but only if it makes reductions in overall sentences, not additions. C.U.R.E. supports distinctions for specific types of offenses and clean records, but withholds comment until a particular proposed amendment is published and comment invited.

#31. C.U.R.E. supports the modification of §1B1.1(b), so that the amendment designated for retroactive application is applied together with any other amendments that would reduce incarceration time for the Defendant. It makes no sense to apply an amendment retroactively and provide relief for the Defendant, if taken together with a new revised Guideline Manual, the relief becomes ephemeral because the new Manual and retroactive amendment results in an increase or no change in the Defendant's sentence. Any relief from retroactive application should be real relief!

#32. C.U.R.E. urges a one level decrease for a Defendant who goes to trial, but avoids actions that unreasonably delay or burden the proceedings. However, this amendment should eliminate the words "undue burden on the government," otherwise a non-cooperating Defendant, who has been forced to go to trial because of nothing else to gain, will always be opposed by the AUSA who has to try the case.

#33(A). C.U.R.E. strongly urges the acceptance of FAMM's proposed amendment to eliminate differences between cocaine and crack offenses. The ludicrous disparity, which unfairly discriminates against the mostly black users of crack, should be changed to a 1:1 ratio. Otherwise, the Commission has every reason to formulate higher sentences for "skunk" weed as opposed to common Mexican brown marijuana and higher sentences for China white heroin as opposed to Mexican brown and any other silly distinction between different grades of purity of different drugs.

#33(B). C.U.R.E. strongly urges the acceptance of 100 grams of marijuana as a ratio for each plant, no matter how many plants are seized (the one kilo per plant equivalency now being used for large seizures has no support from any marijuana experts used by the Government, no less any defense expert). Male plants should be excluded (nobody smokes male plants knowingly) and plants that are immature and not harvestable should be excluded as well.

#34(A) & (B). C.U.R.E. opposes any increase in sentence in multiple victim cases, unless the Defendant knew there would be more than one victim and so intended it.

Once again, C.U.R.E. thanks the Commission for the opportunity to provide input to the rulemaking process that affects the already or soon-to-be incarcerated.

DATED, the 21st day of January, 1994.

009

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WRITER'S DIRECT DIAL

February 3, 1994

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:

I am writing in response to the Unites States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing guidelines published in the December 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). Part of my law practice in Washington, D.C. is in the area of white collar crime. I also have the opportunity to serve on the Practitioners' Advisory Group to the Sentencing Commission. The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I urge adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. The suggested modifications are intended to help ensure this result.

The commission's proposed amendment constitute a much needed reform. The current Guidelines encourage prosecutors to seek money laundering convictions in non-narcotics related money laundering cases because the resulting sentences under the money laundering sentencing guidelines are much harsher than for the underlying offense, and asset forfeiture (which is not taken into consideration under the current Guidelines) is available. As the October 14, 1992, report to the Commission Staff Director from the Commission's Money Laundering Working group clearly demonstrates,

there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S. §§ 1956 or 1957 to the indictment. Moreover, the results of the Working Group's study of fiscal year 1991 sentences showed that 40 percent of the underlying crimes in money laundering cases were not related to drug trafficking but were characterized as "white collar," and that the offense level for the money laundering conduct exceeded that for the underlying conduct 96 percent of the time in non-drug cases.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are proscribed by §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. § 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 or § 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

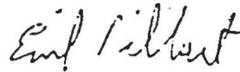
While I support the Commission's objective, I strongly urge the Commission to make the following modifications to the proposed amendment to achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not only in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed §2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1,1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F2.2). To do this, proposed § 2S1.1(a)(3) should be changed to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

The proposed amendment with the suggested modifications would result in a significant improvement to the money laundering guidelines as they presently exist.

Sincerely,



Earl J. Silbert

EJS:gz

c:\letters\sentence.ltr
February 3, 1994

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Attorney at Law

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February 7, 1994

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

Attention: Public Information

Re: <u>MARIJUANA AMENDMENT</u>

Dear Chairman:

I am writing to express support for a change in the Sentencing Guidelines for the manufacture of marijuana. It is my understanding that the guidelines were established to provide uniform and impartial sentencing. For marijuana, however, the guidelines impose an additional penality for cultivation which is over and above that given for the possession of even large quantities of harvested marijuana. This has caused an inconsistency in sentencing that should be rectified in the interest of justice.

The U. S. Sentencing Commission has recognized that the equivalency of 100 grams of marijuana per plant used in offenses involving fewer than fifty plants is related to the actual yield of marijuana plants grown under a variety of conditions. Congress, however, has arbitrarily assigned a one kilogram weight per plant for over forty-nine plants regardless of the actual weight of the marijuana plant. A person with 100 marijuana plants, only several inches in height, receives the same mandatory five-year sentence as a person who possesses 100 kilograms of dried marijuana for distribution, even if it has been smuggled into the country. This disparity is obviously counter to any equity in sentencing.

The current guideline of one kilogram per plant should be changed to 100 grams per plant for the following reasons:

-a ten-fold increase in weight per plant from plausible yield is arbitrary and excessively punitive;

-a marijuana cultivator is no more culpable than a person who possesses marijuana on a regular basis for sale or distribution;

-even with an adjusted weight of 100 grams per plant, the guidelines would ensure that growers with large numbers of plants would be sentenced to longer terms.

I would also request that the U. S. Sentencing Commission strongly consider marking this change retroactive. This would not only help provide needed prison space for hardened or violent criminals, but would ensure complete and impartial parity, which is the premise of our democratic government.

Your consideration and recommendation of this important change in the Sentencing Guidelines would be greatly appreciated.

Sincerely,

NORMAN ELLIOTT KENT, P.A.

NEK:pb

FORM LETTER - MULTIPLE COPIES RECEIVED

011

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February 2, 1994

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:

I am a federal criminal defense practitioner in Washington, D.C, and Co-Chairperson of the Money Laundering Subcommittee of the American Bar Association's Criminal Justice Section, White Collar Crime Committee. I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I strongly recommend adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. The suggested modifications are intended to help ensure this result.

The Commission's proposed amendment constitutes a much needed reform. The current Guidelines encourage prosecutors to seek money laundering convictions in non-narcotics related money laundering cases because the resulting sentences under the money laundering sentencing guidelines are much harsher than for the underlying offense, and asset forfeiture (which is not taken into consideration under the current Guidelines) is available. As the October 14, 1992, report to the Commission Staff Director from the Commission's Money Laundering Working Group clearly demonstrates, there are cases around the country in which the

government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. Moreover, the results of the Working Group's study of fiscal year 1991 sentences showed that 40 percent of the underlying crimes in money laundering cases were not related to drug trafficking but were characterized as "white collar," and that the offense level for the money laundering conduct exceeded that for the underlying conduct 96 percent of the time in non-drug cases.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are proscribed by §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. § 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 or § 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I support the Commission's objective, I strongly urge the Commission to make the following modifications to the proposed amendment to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed §2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore,

I would suggest changing proposed § 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,

Amy G. Rudnick

AGR:tm
cc: James Becker
Nancy Luque

518295

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February 7, 1994

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

Re: James Edward Dodd, BOP # 45433-004

Dear Sentencing Commission:

I am writing to you with regard to the pending amendments to the Guidelines and Statutes hearing with regard to older, infirm defendants who do not pose a risk to public safety. I represented James Dodd, a 67-year old gentleman who has extremely severe heart problems and other medical problems. He underwent open heart surgery for valve replacement prior to his arrest. He is now on medication to avoid infection and rejection of the valve, which requires very careful monitoring of his condition. I have attempted to make sure that he receives proper medical attention while in custody. Unfortunately, the Bureau of Prisons is not equipped to provide the high level of specialized care required by an individual such as Mr. Dodd. I enclose a copy of a letter of analysis by his private cardiologist.

I recognize that defendants need to be prosecuted on the basis of their offense conduct. However, the law cannot be blind to the unusual suffering which prison sentences impose on older and infirm defendants. I urge consideration of some alternative to strict incarceration of individuals sentenced on Guideline sentences. Perhaps extended confinement outside of regular prison would be a possible option for monitoring an individual such as Mr. Dodd. Your consideration of some more flexibility in the handling of these unusual cases is appropriate.

Very truly yours,

MEL BLACK

MSB:ga
cc: Ruth Dodd
James Dodd

Eisman & Eisman, P.A.

EUGENE H. EISMAN, M.D.
INTERNAL MEDICINE - CARDIOLOGY

DIANE B. EISMAN
FAMILY PRACTIC

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NORTH MIAMI, FLORIDA 33181

TELEPHONE 895-5990

January 31, 1994

re: James Dodd

Melvin Black
Attorney at Law
Suite 202
2937 SW 27 Ave
Miami, FL 33133-3703

Dear Mr. Black:

Enclosed you will find an analysis from a piece of software that lists drug interactions. Sounding interacts with every drug on the list. In each case the patient tends to a state of greater risk of bleeding.

In the case of cimetidine, doxycycline, and ranitidine this is probably not too important - especially if the patient is getting frequent prothrombin times. Some of the other drugs, however, also induce gastric and duodenal ulcer with their associated risk of bleeding. For example, I would be very concerned about a patient taking dolobid, or a salicylate and sounding together.

Only on rare occasions do physicians use none steroidal antiinflamatory agents and sounding together. It is very risky, and the patient must be followed very closely. I am concerned about the kind of care Mr. Dodd is receiving.

Sincerely,

Eugene H. Eisman, M.D.

The current list contains ....
[1] COUMADIN (ANTICOAGULANTS, ORAL)
[2] DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)
[3] DOXYCYCLINE (TETRACYCLINES)
[4] CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)
ASPIRIN
RANITIDINE
[7] CIMETIDINE
[8] PREDNISONE (CORTICOSTEROIDS)

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Interaction for:
COUMADIN (ANTICOAGULANTS, ORAL)
DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)

Adverse effect (Probable Mechanism):
Increased bleeding risk (inhibition of platelets, other mechanisms)[110],[120],[127]

Comments and Recommendations:
Monitor prothrombin time and for occult blood in stool and urine; iclofenac, ibuprofen, and naproxen may not increase hypoprothrombinemic esponse

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nteraction for:
COUMADIN (ANTICOAGULANTS, ORAL)
DOXYCYCLINE (TETRACYCLINES)

se effect (Probable Mechanism):
Increased anticoagulant effect (mechanism not established)[139]

Comments and Recommendations:
Monitor prothrombin time

-----------------------------------------------
Interaction for:
COUMADIN (ANTICOAGULANTS, ORAL)
CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)

Adverse effect (Probable Mechanism):
1)Possible increased bleeding risk with aspirin (inhibition of platelet function)[96] 2)Increased hypoprothrombinemic effect with more than 2 grams/day of aspirin (reduction of plasma prothrombin)[96]

Comments and Recommendations:
1)2)Monitor prothrombin time and for occult blood in stool; effect of other nonsteroidal agents on platelets is more rapidly reversible; several case reports of bleeding or elevated prothrombin time with topical salicylates

-----------------------------------------------
Interaction for:
MADIN (ANTICOAGULANTS, ORAL)
ASPIRIN

Adverse effect (Probable Mechanism):

1)Possible increased bleeding risk (inhibition of platelet function)[96]
2)Increased hypoprothrombinemic effect with more than 2 grams/day of aspirin (decreased plasma prothrombin)[96]

Comments and Recommendations:
1,2)Avoid concurrent use, if possible; monitor prothrombin time and for occult blood in stool; effect of other nonsteroidals on platelets is more rapidly reversible

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Interaction for:
COUMADIN (ANTICOAGULANTS, ORAL)
RANITIDINE

Adverse effect (Probable Mechanism):
Possible increased anticoagulant effect (decreased metabolism)[133]

Comments and Recommendations:
Probably rare; may occur with high ranitidine dosage; monitor prothrombin time

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Interaction for:
COUMADIN (ANTICOAGULANTS, ORAL)
CIMETIDINE

Adverse effect (Probable Mechanism):
Increased anticoagulant effect (decreased metabolism)[104],[677]

Comments and Recommendations:
Monitor prothrombin time; no interaction with phenprocoumon;[105] nizatidine, ranitidine, and famotidine do not interact

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Interaction for:
DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)
CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)

Adverse effect (Probable Mechanism):
Possible increased salicylate toxicity from topical use (mechanism not established)[646]

Comments and Recommendations:
Monitor salicylate concentration

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Interaction for:
DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)
ASPIRIN

Adverse effect (Probable Mechanism):
Possible increased nonsteroidal toxicity or toxicity of both drugs (decreased metabolism and displacement from binding)[486]

Comments and Recommendations:
Avoid concurrent use; interaction with diclofenac may not be clinically significant

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Interaction for:
DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)
CIMETIDINE

Adverse effect (Probable Mechanism):
Possible piroxicam toxicity (decreased metabolism)[840]

Comments and Recommendations:
Based on study in healthy men; clinical significance not established; other NSAIDs probably do not interact

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Interaction for:
CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)
CIMETIDINE

Adverse effect (Probable Mechanism):
Possible salicylate toxicity (decreased metabolism)[278]

Comments and Recommendations:
Monitor salicylate concentration

-------------------------------------------------

Interaction for:
CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)
PREDNISONE (CORTICOSTEROIDS)

Adverse effect (Probable Mechanism):
Decreased salicylate effect (mechanism not established)[305]

Comments and Recommendations:
Monitor salicylate concentration; also occurs with intra-articular steroids

End of Interactions.

014

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February 17, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Dear Mr. Courlander:

For the past twelve years I have been a federal criminal defense practitioner in Miami, Florida. Before entering private practice I was Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of Florida. I also served as a Special Attorney with U.S. Justice Deptartment, Organized Crime and Racketeering Section and as an Assistant United States Attorney for the District of New Jersey.

I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I strongly recommend adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

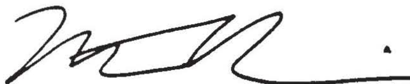
I know that you have received many letters from members of the Bar detailing the problems and abuses that have occurred with the current money laundering guidelines. I will not take your time by rehashing those problems other than to say that they are substantial. I believe that relating money laundering offense levels more closely to the offense level of the underlying offense from which the funds were derived will produce much more uniform and fair sentences. The following modifications will help ensure this result:

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, I would suggest changing proposed § 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,



MARTIN R. RASKIN

MRR/mr

015

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February 23, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Dear Mr. Courlander:

I am a federal practitioner in Dallas, Texas. I am also admitted to practice in Washington, D.C. I do quite a bit of federal criminal defense work. Before that, I served almost 15 years with the U. S. Department of Justice, both in Washington, D.C. and here in Dallas, where I served as the Criminal Chief and later the First Assistant of that office. I am writing in response to the Commission's request for public comment on proposed amendments to the Guidelines governing money laundering offenses. I strongly recommend adoption of amendment 11, with suggested modifications.

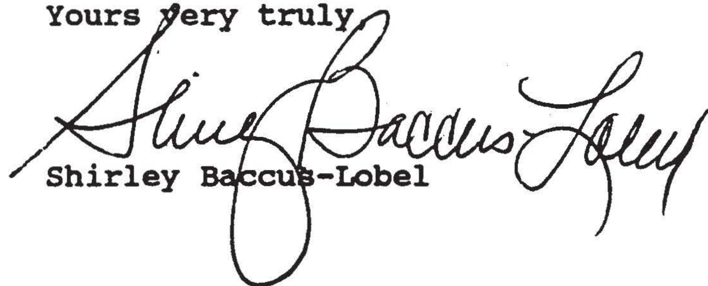
The amendment is much needed and long overdue. The current money laundering guidelines encourage prosecutors to seek money laundering offenses in cases for which they are most inappropriate in order to achieve the plea bargaining leverage afforded by the Guidelines. In non-narcotics cases, the money laundering sentence is much harsher than the penalty for the underlying offense. Of particular note, the results of the Commission's money laundering working group demonstrated that in non-drug trafficking cases, 40 percent of the underlying crimes in money laundering cases were white collar rather than drug trafficking and that the offense level for such money laundering conduct exceeded that for the underlying conduct 96 percent of the time in non-drug cases. The proposed amendment recognizes that Sections 1956 and 1957 are broad and can be applied to relatively simple fraud cases. Moreover, those sections can also apply to relatively ordinary transactions which are not usually thought of as money laundering. I have personally experienced cases in which I am confident that violations under Sections 1956 and 1957 were added to the indictment for the plea bargaining leverage presented.

Based on the foregoing observations and my personal experience, I certainly support the Commission's objective but I urge as well that certain modifications to the proposed amendment be made. With these modifications, the Commission's stated goal ("relating the offense levels more closely to the offense level for the underlying offense") will be better achieved. First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed Section 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristic under proposed Section 2S1.1(b). To achieve this result, I would suggest deleting from the instruction in Section 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed Section 2S1.1(a)(3) the same as the base offense level for fraud and deceit (Section 2F1.1). Therefore, I would suggest changing proposed Section 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in Section 2F1.1.

Thank you for your consideration and your effort to make the Sentencing Guidelines more uniform and fair.

Yours very truly,



Shirley Baccus-Lobel

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February 28, 1994

Michael Courlander
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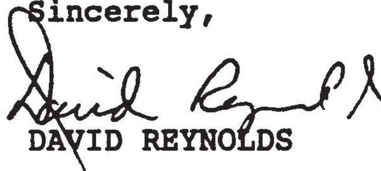
Re: Marijuana Amendment

Dear Mr. Courlander:

The current Federal Sentencing Guidelines assign 40 marijuana plants a weight of 4kg., but treat 50 marijuana plants as weighing 50kg., without regard to the actual weight or gender of any of the plants. If it did not send so many small-time growers to prison for such long terms, it would be as silly as calling ketchup a vegetable.

I support the Marijuana Amendment which treats all plants as weighing 100 grams, regardless of the number of plants. Normally I would not recommend retroactive treatment for changes in sentencing laws because of the difficulty in administration. However, the injustices perpetrated under the current guidelines must be corrected. Reform should be retroactive.

Sincerely,



DAVID REYNOLDS

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February 27, 1994

Michael Courlander,
Public Information Specialist
U.S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: **MARIJUANA AMENDMENT**

Dear Mr. Courlander:

I am writing to express my support for the "Marijuana Amendment" which would establish a 100 gram per plant equivalency for 50 or more plants. I believe that an amendment to the Guidelines is necessary so that punishment of offenders is based upon the actual weight of the plants cultivated, rather than upon an arbitrarily assigned weight equivalent.

I am an attorney in a small firm with a general practice including the defense of persons charged with criminal offenses in both state and federal courts. Over the last few years, I have represented many offenders whose sentences have been calculated under the new Guidelines. While I applaud the Commission's attempt to equalize sentencing across the country, I believe that the Commission's guidelines for marijuana cultivators fly in the face of that attempt.

In Indiana, marijuana is defined by statute as including any part of the cannabis plant, growing or not, <u>except</u> the mature stalks. Possession is punished by reference to the total weight of the plant matter and without reference to the number of growing plants. This seems to be a less arbitrary mechanism than the Guidelines' practice of assessing punishment based upon the number of plants. Under the Guidelines' mechanism, an individual with more than 50 small plants could be punished more harshly than an individual with 40 large plants even if the latter possessed more of the drug being controlled.

For these reasons, I urge the Commission to adopt the Marijuana Amendment and to make that amendment retroactive so that it may be applied in a manner so as to equalize sentences already imposed upon offenders.

Very truly yours,

Jessie A. Cook

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March 7, 1994

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500 South Lobby
Washington, D.C. 20001

Dear Sirs/Mesdames,

For the past six years I have served as an expert on the subject of marijuana cultivation, intent and yield in both federal and state courts. Before that I studied the plant, cannabis, for over fifteen years. As a result of my study and research I have come to the conclusion that federal sentencing in marijuana cultivation cases is inappropriate and unjust. In addition it does not accomplish any of the purposes for which it has been promulgated.

I will discuss several aspects of the sentencing laws. First I will address botanical aspects of marijuana and its cultivation. Secondly, I will briefly cover some of the effects of present policies. Third, I will propose a reasonable set of sentencing policy alternatives. The fourth section covers long-term prospects for the marijuana laws.

BOTANICAL ASPECTS OF MARIJUANA CULTIVATION AS THEY RELATE TO SENTENCING

The Guidelines were created to develop a more uniform method of sentencing for offenses of equal magnitude. The Guidelines, as they pertain to marijuana cultivation do not accomplish this goal. Instead, they create a system of arbitrary and capricious punishment, not justice.

In order to have a clear understanding of the effects of the sentencing regulations as they affect marijuana growers it is helpful to have an understanding of marijuana's botany as it relates to yield, cultivation techniques, patterns of personal use and sales and intent.

Botanically, marijuana is considered a short day or long light plant. That means that its flowering cycle is triggered when the plant receives between 8-12 hours of uninterrupted darkness each evening. Two plants of the same variety, one a seedling and one a large, older plant will both flower at the same time if given the same long night regimen. One implication of this is that plants grown outdoors will flower at a given time during the season no matter what size they are.

Once the plants begin to flower, they stop new growth of branches and stem. Instead, all of the new growth consists of flowers in the male, which then dies, or the flowers of the unpollinated female. If the female remains unpollinated it continues to grow new

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March 7, 1994

flowers which spread along the branches and develop into thick masses commonly called buds or colas. Should the female flowers be pollinated, which occurs through wind pollination in nature, the plant stops growing new flowers and instead devotes its energy to developing seeds.

Marijuana is a dioecious plant, there are separate male and female plants. Males make up half the population. The male is removed from the garden to prevent pollination of the females as soon as its sex is detected. The plant is discarded. If a garden is seized one day, the plant count might be much higher than the next day after males are removed.

Marijuana users prefer to smoke sinsemilla because it produces more weight of useable material and is easier to prepare for use than seeded flowers. The seeds cannot be used for intoxicating purposes and are commonly thrown away.

The size and yield of the plant is dependent on several factors.

1.) Variety.

Since there is no central source for seed, varieties have not been standardized as they have for commercial vegetable and flower crops. Growers either use seed that they have found in marijuana they bought for use, in the same way that a person might start a plant from an avocado pit, or find a source of seeds or cuttings. When they need new plants, they then use seeds which they have produced. Because of this each grower eventually has his/her own distinct variety. There are literally thousands of varieties and each has its own potential yield and prime conditions, climate and weather, gardening technique, water conditions, and date of planting.

2.) Cultivation Technique

No matter what the potential of a particular plant's genetics, cultivation processes determine the actual yield of a particular plant.

A.) Plants which are grown close together stunt side growth so that each has smaller buds with less branching than it would grow given more space. Unreleased DEA studies on spacing and yield confirm this. In these experiments, plants were placed on 6 foot centers (about 36 square feet) and yielded just one pound of bud per plant. A typical indoor garden may be the same size as the single plant grown by the DEA, six by six feet, a total of 36 square feet.

Rather than trying to grow large plants, growers often use a method dubbed, "sea of green". Plants are started four or more per square foot and are never intended to grow out of that space.This

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garden may have plants growing at the density of four plants per square foot, a total of 144 plants. Each plant would have a maximum yield under ideal conditions with a high yielding variety of only about one half ounce. The maximum yield of the garden would be four and a half pounds. If the grower were reproducing plants using cuttings, a small tray of them, with a size of less than two square feet, could contain 36 plants.

B.) Plant growth and yield is determined in part by the amount of water the plant receives. Less water results in smaller growth. This is especially important in gardens which receive no irrigation. In parts of the country, there is no water for long periods during the growing cycle. This results in very small plants. Indoors, plants are often over watered, resulting in poor growth.

C.) Plants receiving low light or too intense a light have lower yields than plants receiving optimum light. Because of the necessarily surreptitious nature of growing operations and the need for them to remain hidden, plants are often grown in less than ideal conditions. They are often hidden under the shade of trees or in other areas where they do not receive direct sunlight. Plants receiving these conditions will grow much smaller than plants receiving direct sunlight. In areas of the country where the sun is very intense, plants will be stunted from over-radiation. Indoors, growers often try to grow plants using inadequate lighting, resulting in very low yields.

D.) Outdoors, late planting results in smaller plants, because the plants of a single variety flower at the same time no matter the size. Surreptitious growers often plant late so that there is less time for the plants to be detected and so that stay small, making detection less likely. Indoors, growers using the "sea of green" force the plants to flower when they are only 18 inches high. At maturity, the plants are only two to three feet tall, with no branching and a yield of only one half ounce.

3.) Conditions

A.) Soil fertility and fertilizing regimen plays a part in growth of plants. Plants receiving inadequate nutrients have smaller yields than those obtaining adequate amounts. No two farmers use exactly the same techniques, so each will have different results.

B.) Temperatures which are too high or too low retard both growth and yield. This affects all outdoor crops. Indoors, gardeners often find it difficult to control temperatures because of the heat generated by high intensity of the lights needed for indoor cultivation.

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C.) Very high or low humidity lowers the growth rate and yield of the plant by slowing photosynthesis. This leads to lower yields.

D.) Rain may destroy a crop if it occurs close to harvest time because the ripening buds are susceptible to mold under conditions of high humidity and moisture. Once attacked the bud can be destroyed by the spreading fungus overnight.

E.) Insects such as aphids, whiteflies, mites and thrips attack marijuana gardens indoors and out. These insects suck away the plant's vigor, resulting in less growth and yield and even death of the plant.

F.) Animals such as field mice, rats, rabbits, deer and raccoons regularly attack marijuana grown outdoors. They can destroy an entire plant in a few minutes and can attack any time during the season.

All of these factors make it clear that plant counts are an unreasonable method of determining sentencing of people convicted of marijuana offenses. A plant normally yields from 10 grams to about 100 grams.

Dr. Elsohly, at the University of Mississippi in Oxford conducted experiments on weight and spacing. Originally the Drug Enforcement Administration tried to keep the results confidential because they were so damaging to testimony given by DEA officers who testified in state trials that the plants produce between one and two pounds of buds. Dr. Elsohly's report clearly shows that spacing affects yield tremendously.

As enlightening as his experiment was, Dr Elsohely tested only one variety, growing for a single length of time and he has not tested for other environmental factors such as shading, water stress, weather, improper irrigation and nutrient problems. That is, the problems faced by all gardeners.The plants he grew were given ideal nutrients, plenty of sun and a uniform planting date. The goal of the experiment was to produce the largest plant possible.

EFFECTS OF PRESENT POLICIES

The effects of the present policies which result in severe penalties and high risk have been a disruptive source on cultivation and domestic supply. Over the years growers have become aware of the harsh penalt ies and have either stopped cultivating or downsized their operations so that they face lower sentences if caught. This has led to a shortage of domestic marijuana and the price has climbed. As a result many people who would prefer to use domestic have switched to lower price imports.

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For instance, in Portland, OR, a center of indoor cultivation, domestic buds sell for $300 an ounce and Mexican buds, slightly less potent, retail for as little as $125 an ounce. The situation is similar in other areas. Rather than unorganized cultivators a more organized criminal element is getting involved in supplying the market.

Since somebody will always be around to meet demand, no matter what risks they may face, making the laws or penalties harsher presents a niche for the more desperate and reckless person as the supply side is vacated by people who do not think possible gain is worth the risk. This is not a good trade-off.

SENTENCING POLICY ALTERNATIVES

It is inherently unfair to sentence a grower for yields that s/he wasnot expecting nor able to produce. As it stands now, a person with a small garden which has a potential yield of about two kilograms can be sentenced to 63 months or more, while an individual with a garden with many fewer, but much larger plants might receive only 10 months.

Rather than fixing an arbitrary weight to each plant, which is not based on a realistic assessment of the individual situation, the guidelines in the case of cultivators should be amended to reflect either the potential yield or the yield at seizure. In this way, the system will be more equitable. Although it would take more work by the courts, it would lead to a system of justice based on rational consideration.

The law has been particularly hard on indoor growers who use the "sea of green method" and fall under the mandatory minimum sentencing laws. Under these provision a minimum sentence of five years is required for the cultivation of 100 plants or more, and ten years for 1000 plants. The Sentencing Commission should recommend that the law be changed to reflect the actual yields of the plants in the same way that weight is considered for other marijuana offenses.

If the Sentencing Commission desires to allocate a specific weight to each plant, the weight of 100 grams per plant, which is applicable up to 49 plants at present in sentencing procedures should be extended to all plants, and the Sentencing Commission should recommend that the law should be changed to reflect this.

If a plant count is to be used, consideration should be made for plants not likely to be harvested. Clones and seedlings have a variable success rate and consideration should be made for clones not likely to grow to maturity. Perhaps the best way to do this would be to exclude all plants under six inches tall from the plant count. Male plants are ordinarily removed from the garden, so that should

TO: United States Sentencing Commission
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March 7, 1994

be taken into account in figuring the plant count in gardens which have not been "sexed".

The Guidelines should also be amended so that the court can consider downward departures based on mitigating circumstances for marijuana crimes of Level 24 and under. Penalties other than incarceration should be considered for first time offenders in these cases. This would free the courts of many small and relatively minor cases as well as limiting the possibility of these offenders mingling with hardened criminals.

It would be a step in the right direction if penalties for all marijuana offenses were lowered, especially considering that violent crimes and crimes against property are treated lighter in sentencing than some marijuana offenses. Certainly possessing, growing or selling marijuana is not as serious threat to society than a crime with a clear victim who complains.

Obviously, neither the people who are buying nor selling feel victimized. In order to apprehend these people police must employ snitches and invade privacy, two things considered un-American until a few years ago. The Constitution is bent by assaults by the prosecution on the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

LONG TERM PROSPECTS FOR THE MARIJUANA LAWS

the campaign to wipe out marijuana is doomed to failure for reasons which are not applicable to other drugs. Heroin, opiates and other drugs which induce a physical dependence seem to the user to limit free choice. They are dependent on the drug just as we need food, several times a day. Cocaine users over a period of time become dysfunctional. Marijuana however, does not induce a physical dependency and rarely induces a dysfunctional situation. Instead, most marijuana users enjoy its recreational use. They do not feel that it has caused them much harm except possibly for legal hassles.

If you asked most heroin or cocaine addicts whether they regret their use, most would answer affirmatively. The same is not true of marijuana. Most people who use it feel it has been a positive thing in their lives. You can lock a person up and throw away the key, but s/he will still tell you that your law is wrong and that the law should be changed.

No matter how harsh the laws are you cannot hide the truth that people enjoy using marijuana and will risk liberty to indulge in it. The current policy does the exact opposite of its intentions. By making marijuana hard to get through interdiction or destruction of plants, the price goes up because of reduced supply. This induces more people into the trade and at the same time causes a certain

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March 7, 1994

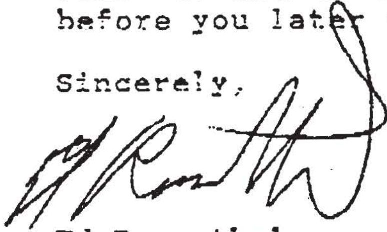
group of people who are experimenting with drugs to choose less expensive substances such as cocaine, crack or heroin. Certainly members of the committee would consider it more serious to the persons health and well being if a family member was using heroin or cocaine than if they lit up an occasional joint.

With the civil regulation of marijuana, use of hard drugs such as heroin and cocaine would plummet. This has been proven in Holland. Which has developed a successful hard drug-soft drug policy. Members of the committee who say we cannot take the risk should look at the dismal failure of the current regulatory system, which has been in effect since 1937, 57 years, most of our lives.

In 1937 there were estimated to be 50,000 marijuana users. Now estimates for regular users run between 25,000,000 - 50,000,000 people. That is an increase of 50,000 - 100.000%. Criminal regulation of marijuana, no matter how harsh or inappropriate the penalties will not work because a large minority of our citizenry know that marijuana use is not very risky to health and is very enjoyable.

I hope you will take the information I have provided into account during your consideration of the Sentencing Guidelines. I look forward to answering any questions you may have when I speak before you later in March.

Sincerely,



Ed Rosenthal

019

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February 28, 1994

**Reply to:** Kansas City

Mr. William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D. C. 20002-8002

Re: **§2D1.1(c) -- Drug Quantity Table**

Dear Chairman Wilkins:

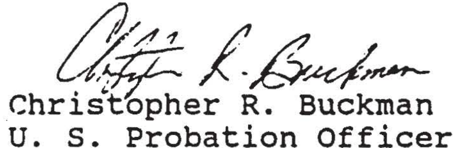
Reference is made to Guidelines Manual §2D1.1(c), Drug Quantity Table, and Appendix C, Amendment 487.

The definition of "cocaine base" as defined in §2D1.1(c) seems to be vague and misleading. I would recommend that the explanation about forms of cocaine base other than crack, as clarified in Amendment 487, be included in the definition of crack. In other words, I am suggesting the following statement:

> "Cocaine base," for purposes of this guideline, means "Crack." "Crack" is the street name for a form of cocaine base usually prepared by processing cocaine hydrochloride and sodium bicarbonate and usually appearing in a lumpy, rock like form. Forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine."

I believe that including the clarifying statement about cocaine base with the definition of crack will help alleviate confusion.

Respectfully,



Christopher R. Buckman
U. S. Probation Officer

CRB:br
cc: Probation Officer's Advisory Group
426 U. S. Courthouse
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Attention: Mr. Jay F. Meyer
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March 2, 1994

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:

I am a federal criminal defense practitioner in Miami, Florida. I am also Chairman of the ABA Criminal Justice Section Defense Function Committee; Chairman of the Florida Regional Subcommittee of the ABA White Collar Crime Committee; and a Vice-chair of the White Collar Crime Committee. I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 21, 1993, edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I strongly recommend adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds and constitutes a much needed reform.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are prosecuted under §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 or § 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Park A, Paragraph 3.

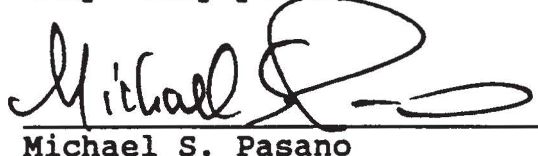
While I support the Commission's objective, I strongly urge the Commission to make the following modifications to the proposed amendment to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, I would suggest changing proposed § 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,



Michael S. Pasano

MSP:mdv

February 24, 1994

U.S. Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
South Lobby
Washington, D.C. 200002-8002
Attn: Public Information

Dear Public Information Specialist:

In regards to proposed amendment #18, which will disallow courts from using acquitted conduct at sentencing, except for a limited purpose of an upward departure, and only after a preponderance of evidence finding, I would like to tell this story.

My friend since approximately 1950, Gerald Winters, was convicted in the U.S.D.C. for the District of New Jersey, before Honorable Maryanne Trump Barry, for a RICO Conspiracy, RICO Enterprise, and related substantive offenses. He received both a New Law sentence of 235 months, and an Old Law sentence totalling 15 years. These sentences were ordered to run consecutively.

My friend, 'Jerry', was acquitted of several of the charges in the indictment, but at sentencing, the court made a preponderance of evidence finding using acquitted conduct to place him in the New Law. By doing this, an additional sentence of 235 months was added to his Old Law sentence.

As a long-time friend of the Winters family, a continuously employed taxpayer, and a registered voter, I strongly disagree with the courts present authority to use acquitted conduct to place my friend Jerry in the New Law. In fact, I disagree and protest that acquitted conduct can be used against anyone, post-trial (where the jury finds innocence).

Jerry's verdict was shocking; and the verdict was even more so. It was shocking that the court was able to use acquitted conduct to sentence my friend as a New Law offender, especially since the jury acquitted all other co-defendants of the RICO conspiracy. By a preponderance of evidence finding, the court found that my friend conspired with other co-defendants who themselves were found not-guilty of the RICO conspiracy. For this, he received an additional sentence of 235 months under the U.S.S.G.

Daily the news reports are full of criminals nation wide receiving only the mildest sentences. But my friend received a heavy punishment, and then additional years on top of that. Even from a conservative view point, it's hard to believe such a practice is acceptable in an American court room.

I strongly recommend that the Sentencing Commission pass proposed amendment #18. Make it retroactive: help correct some of the injustices handed out to some defendants. Faith in our judicial system disintegrates with errors and uneven sentencing. Please help to change this.

Respectfully submitted,

Carol M. Biechlin

022

February 24, 1994

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

Dear Public Information Specialist:

Concerning Proposed Amendment #18 to the U.S.S.C., which disallows the courts to use acquitted conduct at sentencing, except by a preponderance of evidence finding, and then only to use it for an upward departure.

Please forward this Amendment to Congress in May 1994 for their approval. I urge you to recommend that this Amendment be applied retroactively to help alleviate unjust sentences based on acquitted conduct.

As a concerned citizen I would like to add my voice to positive support of this matter.

Sincerely,

Carol M. Biechlin

023

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

To whom it may concern,

I am writing in regards to the current debate dealing with the disparity between crack and powder cocaine sentencing. Based on the evidence that was presented at the hearing held by your commission on Nov 9,1993, I firmly agree with the many professional individuals who stated that the present sentencing practice is unfair and simply doesn't make sense. Most notable, I agree with the statement of Mr. Steven Belenko of the New York Criminal Justice Agency, who stated that the response to crack cocaine has not been based on empirical evidence, but is merely the result of law enforcement and media hysteria.

In closing, I would like to say that I do encourage and thus support any change that would totally eliminate this current sentencing disparity. I also believe that this change should be applied retroactive to provide relief to anyone who is currently sentenced based on this current disparity.

Thank you,
A concern citizen,
Eldara Williams

024

February 28, 1994

Judge William Wilkins, Jr.
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002
ATTN: PUBLIC INFORMATION

Dear Judge Wilkins,

I understand the US Sentencing Commission is considering a change in the Sentencing Guidelines regarding the cultivation of marijuana plants.

THE CURRENT SCHEDULE ASSIGNING A WEIGHT OF 1000 GRAMS (1KILOGRAM) TO EVERY PLANT OVER A COUNT OF FIFTY IS ARBITRARY AND IRRATIONAL AND SHOULD BE CHANGED. FURTHERMORE, THE NUMBER OF PLANTS REQUIRED TO TRIGGER THE FIVE YEAR MANDATORY MINIMUM AND TEN YEAR MANDATORY MINIMUM, RESPECTIVELY, SHOULD BE ADJUSTED TO REFLECT THIS CHANGE IN ASSIGNED WEIGHT PER PLANT.

Dr. Mahmoud A. Elsohly, Research Professor and Program Coordinator of the Drug Abuse Research program at the University of Mississippi, has been researching factors involving the production of marijuana since 1976 and is, in fact, the only person licensed by the federal government to grow marijuana for research. He has written over 100 research papers and testified at over 60 criminal trials related to drugs of abuse, particularly marijuana. DR. ELSOHLY HAS TESTIFIED THAT THE CURRENT SENTENCING GUIDELINE BASED ON 1000 GRAMS, OR 1 KILOGRAM, PER PLANT IS EXTREMELY IRRATIONAL AND UNREASONABLE, BUT A SENTENCING SCHEME BASED ON 100 GRAMS PER PLANT WOULD BE REALISTIC AND REASONABLE.

The Sentencing Guidelines currently assign a five year mandatory minimum for possessing 100 kilograms of marijuana of 100 marijuana plants, and a ten year minimum for possessing 1000 kilograms or 1000 plants. The segment of this guideline requiring mandatory minimums for 100 and 1000 kilograms, respectively, is justified; HOWEVER, THE SEGMENT RELATING TO 100 AND 1000 PLANTS IS NOT JUSTIFIED, PRIMARILY BECAUSE 100 PLANTS CANNOT PRODUCE 100 KILOGRAMS OF MARIJUANA, AND 1000 PLANTS CANNOT PRODUCE 1000 KILOGRAMS OF MARIJUANA.

Based on Dr. Elsohly's research, and based on the underlying premise of parity inherent in the Sentencing Guidelines, I urge the Sentencing Commission to do three things:

1. CHANGE THE CURRENT GUIDELINE AND ASSIGN A WEIGHT OF 100 GRAMS PER PLANT REGARDLESS OF NUMBER OF PLANTS INVOLVED
2. REFLECT THIS CHANGE IN THE GUIDELINES BY ADJUSTING THE NUMBER OF PLANTS REQUIRED TO TRIGGER THE FIVE YEAR AND TEN YEAR MANDATORY MINIMUMS
3. MAKE THESE CHANGES RETROACTIVE.

Thank you for your time and interest in this matter.

Sincerely,

J. Sylvia Meloche

025

February 28, 1994

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002
ATTN: PUBLIC INFORMATION

Re: Marijuana Amendment

Dear Chairman,

I am writing to express support for a change in the Sentencing Guidelines for the manufacture of marijuana. It is my understanding that the guidelines were established to provide uniform and impartial sentencing. For the marijuana, however, the guidelines impose an additional penalty for cultivation which is over and above the given for the possession of even large quantities of harvested marijuana. This has caused an inconsistency in sentencing that should be rectified in the interest of justice.

The U.S. Sentencing Commission has recognized that the equivalency of 100 grams of marijuana per plant used in offenses involving fewer than fifty plants is related to the actual yield of marijuana plants grown under a variety of conditions. Congress, however, has arbitrarily assigned a one kilogram weight per plant for over forty-nine plants regardless of the actual weight of the marijuana plant. A person with 100 marijuana plants, only several inches in height, receives the same mandatory five-year sentence as a person who possesses 100 kilograms of the dried marijuana for distribution, even if it has been smuggled into the country.

The current guideline of one kilogram per plant should be changed to 100 grams per plant for the following reasons:

- A ten fold in weight per plant from plausible yield is arbitrary and excessively punitive
- A marijuana cultivator is no more culpable than a person who possesses marijuana on a regular basis for sale or distribution
- Even with an adjusted weight of 100 grams per plant, the guidelines would ensure that growers with large numbers of plants would be sentenced to longer terms.

I would also request that the U.S. Sentencing Commission strongly consider making this change retroactive. this would not only help provide needed prison space for hardened criminals, but would ensure complete and impartial parity, which is the premise of our democratic government.

Your consideration and recommendation of this important change in the Sentencing Guidelines would be greatly appreciated.

Sincerely,

Chris + Lena Gehring

026

# GUNN & ASSOCIATES

P.O. BOX 1449
FERNLEY, NEVADA 89408

(702) 343-0200 FAX: 343-0202


March 4, 1994

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

To whom it may concern,

The law dictating the use of mandatory sentencing in non-violent crimes must be reconsidered. First time offenders, without criminal history are punished much more severely than violent habitual criminals.

As an American citizen and taxpayer, I resent the tax liability and attitude taken by judicial law makers in this situation. I believe that our money could be better allocated to the benefit of humanity. This would be done by treating the violent criminal more harshly than the non-violent element.

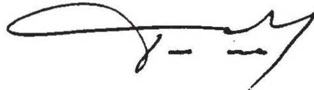
As I understand mandatory sentencing was directed towards the war on drugs. I think that most Americans feel that the current approach to the war on drugs is not effective and will never be.

Many non-violent first time drug offenders are good productive citizens, whom have made a serious mistake. Due to mandatory sentencing they are sitting in over crowded medium security institutions. Costing taxpayers millions of dollars, when perhaps a strong repremand, large fine, enforced community service, and public humiliation could well address the felon. Along that same line, they should be forced to have continued employment, and pay their fair share of the tax base requirements of our country.

I feel that non-violent first time offenders should be excluded from mandatory sentencing laws. Especially in the area where misdemeanor crosses the line to a felony. Any and all sentencing changes should be retroactive.

Americans want a proper perspective in the laws governing criminal sentencing, not an unbalanced costly program allowing violent felons easy access back into the community. And hard working non-violent tax paying felons being neutralized through lengthy incarceration, and perhaps endangering the development of American families and their prospects.

Sincerely,



Tom Gunn
Gunn & Associates

TG:scm

027

Honorable Chairman & Members
United States Sentencing Commission
Room 2-500 Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Date 2-14-94

Re: Proposed Sentencing Guideline Changes for effective date of November 01, 1994: Public Commentary on Retroactivity, Title 28 U.S.C. Section 994(O), 994 (s)(1)(2)(3):

Dear Mr. Chairman & Members:

The proposed amendments to the U.S. Sentencing Guidelines as reported in The Criminal Law Reporter 54 CrL 2023-2046, Section 2, December 22, 1993 have been reviewed and I am submitting my public comments for the consideration of the U.S. Sentencing Commission on the issue of whether or not these proposed amendments should be applied retroactively.

The amendments to Chapter Two, Part D (Offenses involving Drugs) and Chapter Three, Part B (Role in the Offense) demonstrates this Commission has recognized the harshness of the severity of sentencing under the U.S. Sentencing Guidelines. While the Commission has reduced some of the severity my position is that a further step should be taken to ensure that disparity of sentencing does not occur.
Secondly, each of these amendments should be applied retroactively to currently incarcerated inmates through U.S.S.G. 1B1.10(d).
Thirdly, the mechanism of a motion under Title 18 U.S.C. 3582 should be allowed as is being utilized in cases of the amendment regarding LSD.

I would also comment to this Commission that the 100-1 ratio from Cocaine base to Powdered Cocaine is unreasonable, unworkable and class based discrimination against minorities and the poor. Cocaine base and Powdered cocaine should be addressed at the level in which powdered Cocaine is currently being applied. The mitigating factors of 3B1.2(a)(b) should be used and applied.

Lastly, prison space is a expensive proposition. The cost of building of a prison is merely a downpayment of my tax dollars. It still requires $12-14 Million dollars per year thereafter construction is over to operate the facility. I do not want my tax dollars directed to locking up the non-violent, first time offender. I want that money being directly applied toward housing the violent offenders in the CURRENT existing space of the non-violent, first time and offenders are currently housed.

The Bureau of Justice Statistics currently has a excellent summary and study on Fine based incarceration and how well it works in the State Courts and I see no reason (as fine based sentencing has not been tried on the Federal Level) why the federal level cannot take advantage especially given the expediture of public monies for this study and the public deserves the benefits of the monies expended in this area and fine based sentencing being actually tried on the federal level and upon a large scale with non-violent, first time offenders.

I will appreciate acknowledgement of my submission for public commentary[1] on the U.S. Sentencing Guidelines proposed amendments for enactment after November 1, 1994. I will also appreciate the numbers on submissions for and against retroactivity of these proposals.

Sincerely Yours,

Helen Shipman
Rt 4, Box 402
Marshall, Tx 75670

1/ I back this commentary with my vote at the ballot box.

cc; Congressional Black Caucus
344 House Annex 2
Washington, D.C. 20515-6805

Democratic Caucus
House Annex 1
Washington, D.C. 20515-6524

Congressional Hispanic Caucus
557 House Annex 2
Washington, D.C. 20515-6526

Republican Committee on Committees
U.S. Capital Bldg. Room H-230
Washington, D.C. 20515-6543

028

# COMMITTEE ON CRIMINAL LAW
of the
# JUDICIAL CONFERENCE OF THE UNITED STATES

United States Post Office & Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Honorable Joseph Anderson
Honorable Richard J. Arcara
Honorable Richard H. Battey
Honorable Charles R. Butler, Jr.
Honorable Stanley S. Harris
Honorable George P. Kazen
Honorable Charles P. Kocoras
Honorable Richard P. Matsch
Honorable David A. Nelson
Honorable David D. Noce
Honorable Stephen V. Wilson
Honorable Mark L. Wolf

Maryanne Trump Barry
Chair

(201) 645-2133

FACSIMILE

(201) 645-6628

March 11, 1994

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

Dear Chairman Wilkins:

Enclosed you will find two separate position papers which I am submitting as chair, and on behalf, of the Subcommittee on Criminal Law and Sentencing, for the Judicial Conference Criminal Law Committee. The members of the Subcommittee are District Judges Maryanne Trump Barry, Stephen V. Wilson, Mark L. Wolf, and Richard J. Arcara. These papers are submitted in support of proposed amendment #14, and our proposed amendment to §1B1.10 (Issue for Comment #31). These papers are the Subcommittee's written response to the proposed amendments for this amendment cycle.

We appreciate the Commission's consideration of the views expressed in these position papers. In addition, we look forward to being able to comment on them orally when we meet with the Commission on March 25, 1994. We will also be prepared to comment on certain other proposed amendments at that time.

We thank the Commission for its careful consideration of the enclosed, and for the invitation to meet, on March 25th at 10 a.m.

Sincerely yours,

George P. Kazen

# POSITION IN SUPPORT OF PROPOSED AMENDMENT #14

Submitted by

Judicial Conference Committee on Criminal Law
Subcommittee on Criminal Law and Sentencing Procedures

## Introduction

An amendment concerning unusual combinations of characteristics as a basis for departure was first proposed in 1990, and was approved by the Committee and by the Judicial Conference. It was not adopted by the Commission in 1992, when most other Judicial Conference recommendations were adopted in some form. The Committee on Criminal Law continues to believe that there is a genuine need for this proposal.

The original Judicial Conference recommendation called for addition of an application note to Chapter 5, Part H, "Specific Offender Characteristics," to encourage departure in cases where characteristics, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case. (See The 1990 Recommendations of the Judicial Conference for Amendments to the Sentencing Guidelines) (emphasis added).

This year the Commission agreed to publish a proposed amendment on departures (#14), which combines the Judicial Conference recommendation of combination of circumstances with a recommendation by the Department of Justice endorsing the criteria for departures set out in U.S. v. Rivera, 994 F.2d 942 (1st Cir. 1993).

The Committee continues to urge an amendment to allow departures involving an unusual combination of circumstances. The Commission's combination of this concept with the Rivera analysis is a good one, because the Rivera criteria and analytical construct provide the additional control on this and other kinds of departure. As a result, we believe that amendment #14 in its present form (including the bracketed language regarding combination of circumstances) represents a statement of guided, reasonable departure which is not only helpful, but necessary, to more fairly and proportionally adjudicate some of the cases which come before the courts.

The Committee urges the Commission to adopt proposed amendment #14, including the bracketed language, during this amendment cycle. Our position is explained more fully, below. Some of this material was submitted to the Commission in the fall of 1993, in support of the publication of a combination of circumstances departure amendment. We have added additional information in support of our proposal in its current form (as proposed amendment #14).

By adopting Amendment #14, the Commission can resolve a conflict in the Circuits, strengthen a data source for guideline refinement, implement the Judicial Conference

recommendation, and send the needed signal that departures in truly unusual cases, properly guided by the Rivera criteria, are encouraged.

**Need for an amendment to encourage appropriate departures.**

The Commission has encouraged judges at Sentencing Institutes and in conversation to depart from the guidelines in appropriate cases. The impression remains among many judges, however, that departures are somehow dubious and should be made in only the most extreme cases. In part, this situation may be due to a lingering impression initially created by unfortunate talk of "compliance," or by language in the introductory section of the guidelines manual that is interpreted to discourage departures.

This impression may also result from the Commission's formal response to some of the departures that have been made. The Commission does not "plug every hole" created in the guidelines by downward departures, but the Commission has repeatedly amended the guidelines to make a factor identified in a departure no longer available. For example, in past years the Commission has passed amendments explicitly aimed at eliminating departures based on a defendant's "lack of guidance as a youth and similar circumstances indicative of a disadvantaged upbringing," military service, physique and vulnerability to sexual assault, or prior good works. The Commission has never added an adjustment in light of a mitigating factor identified by a departing court. Our proposal would help balance desired uniformity and needed individualization of sentences.

A clearer signal needs to be sent that departures are not per se discouraged, but even encouraged in the appropriate circumstances, and that the factors identified by judges as important sentencing considerations will be added to the guideline rules.

**Combinations of characteristics are the most difficult aspect of the sentencing decision to set into guidelines.**

Judge Wilkins has written that when each individual factor has been adequately taken into account by the Sentencing Commission, or when the factors do not individually warrant a departure, "[v]iewing the factors cumulatively adds nothing significant to the calculus." *United States v. Goff*, 907 F.2d 1441 (4th Cir. 1990). The Committee respectfully submits that it is impossible for the Commission, or any guideline system, to adequately anticipate unusual combinations of circumstances and create rules that are right for every situation.

No workable guideline scheme can capture the many ways in which factors combine and interact in actual cases. Guidelines generally must, as the federal guidelines do, give the same weight to a relevant factor regardless of what other circumstances are present in a case. In this way the guidelines mimic the statistical regression analyses used in their development—a simple additive model in which each variable is assumed to have a constant impact on the outcome variable, regardless of the value of other variables. It is not possible to uncover every interaction or oddity that may exist in the data; these situations are

typically treated as "noise." But these interactions are the extraordinary cases where judges should be encouraged to examine the total picture and make their sentencing decisions accordingly.

Typical factors that alone do not warrant a departure can combine in unusual and relevant ways (e.g., a pregnant offender who exercised poor romantic judgment and became involved with a drug dealer but has now broken off the relationship and begun drug rehabilitation). It is sometimes only an unusual combination of circumstances that reveals how sentencing purposes can best be met in the individual case.

**The split in the Circuits**

Since the initial Judicial Conference recommendation, three Circuits have upheld departures based on the "totality of the circumstances" or on "combinations of factors" which—though not individually sufficient— together justify a departure, given the total context of the offense, criminal record, and other offender characteristics:

a)The Ninth Circuit wrote that "[A] wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision." *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991). *See also United States v. Anders*, 956 F.2d. 907, 914 (9th Cir. 1992)(narrowing application to those factors authorized and not expressly prohibited by the guidelines);

b)The Tenth Circuit affirmed a downward departure based on the "unique combination of factors" that, standing alone, were each insufficient to justify a departure. *United States v. Bowser*, 941 F.2d 1019, 1024-25 (10th Cir. 1991). In an earlier case, the Tenth Circuit affirmed a downward departure based on "the aberrational character of [defendant's] conduct, combined with her responsibility to support two infants. *United States v. Pena*, 930 F.2d 1486, 1495 (10th Cir. 1991);

c)Recently, the Sixth Circuit adopted the Ninth Circuit approach and held that "[i]t is permissible to use a totality of the circumstances approach to departures, so long as the factors considered are not factors the guidelines have already taken into account or expressly deemed irrelevant." *United States v. McKelvey*, 7 F.3d 236 (6th Cir. 1993).

Other Circuits have rejected this approach:

a)The Fourth Circuit reversed a downward departure based on four factors which standing alone did not justify departure. *United States v. Goff*, 907 F.2d 1441 (4th Cir. 1990).

b)The First Circuit rejected a departure based on the "totality of the circumstances." *United States v. Pozzy*, 902 F.2d 133, 138 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 353 (1990). *But see, U.S. v Rivera*, 994 F.2d 942 (1st Cir. 1993)(district court has superior "feel" for "unusualness" of case).

Three other circuits have reversed departures based on combinations of characteristics, but it is unclear whether these Circuits believe departures based on the totality of circumstances are always inappropriate, or whether the particular facts of the cases made a departure inappropriate. The Third Circuit held that a "combination of typical factors does not present an unusual case." *United States v. Rosen*, 896 F.2d 789, 792 (3d Cir. 1990). *See also, United States v. Barone*, 913 F.2d 46, 50-52 (2d Cir. 1990); *United States v. Carey*, 895 F.2d 318, 322-25 (7th Cir. 1990).

By adopting the proposed policy statement, the Commission would resolve this split in the circuits.

**Opening the floodgates?**

Some Commissioners have expressed concern that if this type of departure were explicitly encouraged, it would "open the floodgates" to a large number of inappropriate departures and widespread sentencing disparity. Because three circuits have ruled that these departures are permitted, we have a natural experiment that can be used to test these concerns. Obviously, we cannot attribute any change in departure rates to only these rulings—other decisions, guideline amendments, or administrative changes can all affect departure rates. But if there is no sudden increase in the departure rate after a circuit approves this type of departure, then it is clear that the approval did not open any floodgates.

We examined monthly downward departure rates, excluding departures for substantial assistance, in the two circuits that have permitted these departures for over a year. The attached chart shows the departure rates in the 9th and 10th circuits <u>before</u> the relevant decisions (the decisions are indicated with vertical lines), as well as the rate <u>after</u> the decisions. For comparison, it also shows the departure rate in all other circuits combined. The chart shows that so far there is no significant increase in the number of departures in these two circuits.

We note also that the Commission's published list of reasons given by sentencing courts for downward departures does not include "totality of the circumstances" or "combinations of characteristics," which we take to mean that this reason for departure is rarely cited. It appears likely that if the proposed amendment is adopted, judges will use the new flexibility only in rare cases when unique circumstances call for a sentence outside the normal (presumptive) guideline range.

**Preserving the Heartland**

In addition, even if departures were to slightly increase under the proposed approach, the "heartland" of cases would easily be preserved, and the overwhelming majority of cases would continue to be sentenced within the guideline range, as they have been in the circuits already allowing such departures. The "heartland" concept reflects a "bell-curve" of normalcy. This would imply perhaps a 60-70 percent of "normalcy" within the bell. However, the Commission's national data (fiscal year 1992), indicates that there is an average departure rate of only 6% downward (other than substantial assistance departures), and 1.5% upward. Even if the current combined 7.5% departure rate were to double (although there is no reason to expect it would), there would still be 85% of the cases either sentenced within the range or subject to 5K motions.

Also, if this kind of departure were to be endorsed, it is reasonable to presume that at least some of the cases which are either: a) given technically unearned 5K motions (a subject of much discussion and criticism in the literature), or b) subject to "covert departures" (i.e. adjustments made in such a way that departure is effected, without being termed as such), might decrease and become reasoned, articulated departures guided by the Rivera criteria and, it should not be forgotten, controlled by the right to appeal.

**Effect of Rivera Case**

As we have noted, the criteria and analytical framework set out in Rivera, which the Department of Justice has proposed and which constitutes the major part of proposed amendment #14, would in itself function as the reasonable criteria which would work to guide these and other departures, and would work to prevent unwarranted or unrestrained use of the combination of circumstances departures.

Moreover, language in Rivera itself endorses the restrained but flexible case-by-case analysis we are proposing. Judge Breyer noted that the district court has the superior "feel" for the "unusualness" of the case. This is precisely why we are urging this kind of amendment.

**Departure as Feedback to Guideline Refinement**

For the departure mechanism to work as envisioned in the Sentencing Reform Act, departures must become a basis for continual refinement of the guideline rules. This refinement must include not only pruning of unwanted variation, but also incorporation of factors and circumstances that are identified by sentencing judges as relevant to just sentencing.

As the Commission states in a neglected passage in the introduction to the guidelines manual: "It is difficult to prescribe a single set of guidelines that encompass the vast range of human conduct potentially relevant to a sentencing decision...By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court

decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."[1]

By adopting Amendment #14, the Commission would resolve a split in the circuits, it would incorporate for the first time a mitigating circumstance identified by the courts, it would provide a framework for useful feedback for further fine-tuning of the guidelines, and it would preserve the guideline sentence as the presumptive sentence in the vast majority of cases. The result would be increased fairness and flexibility to fit truly unusual case within a reasonable analytical framework for departures. In addition, all departures would be guided by the Rivera criteria, and subject to challenge on appeal.

**Conclusion**

For all these reasons, the Judicial Conference Committee on Criminal Law, through the Subcommittee on Criminal Law and Sentencing, urges the Commission to adopt proposed amendment #14.

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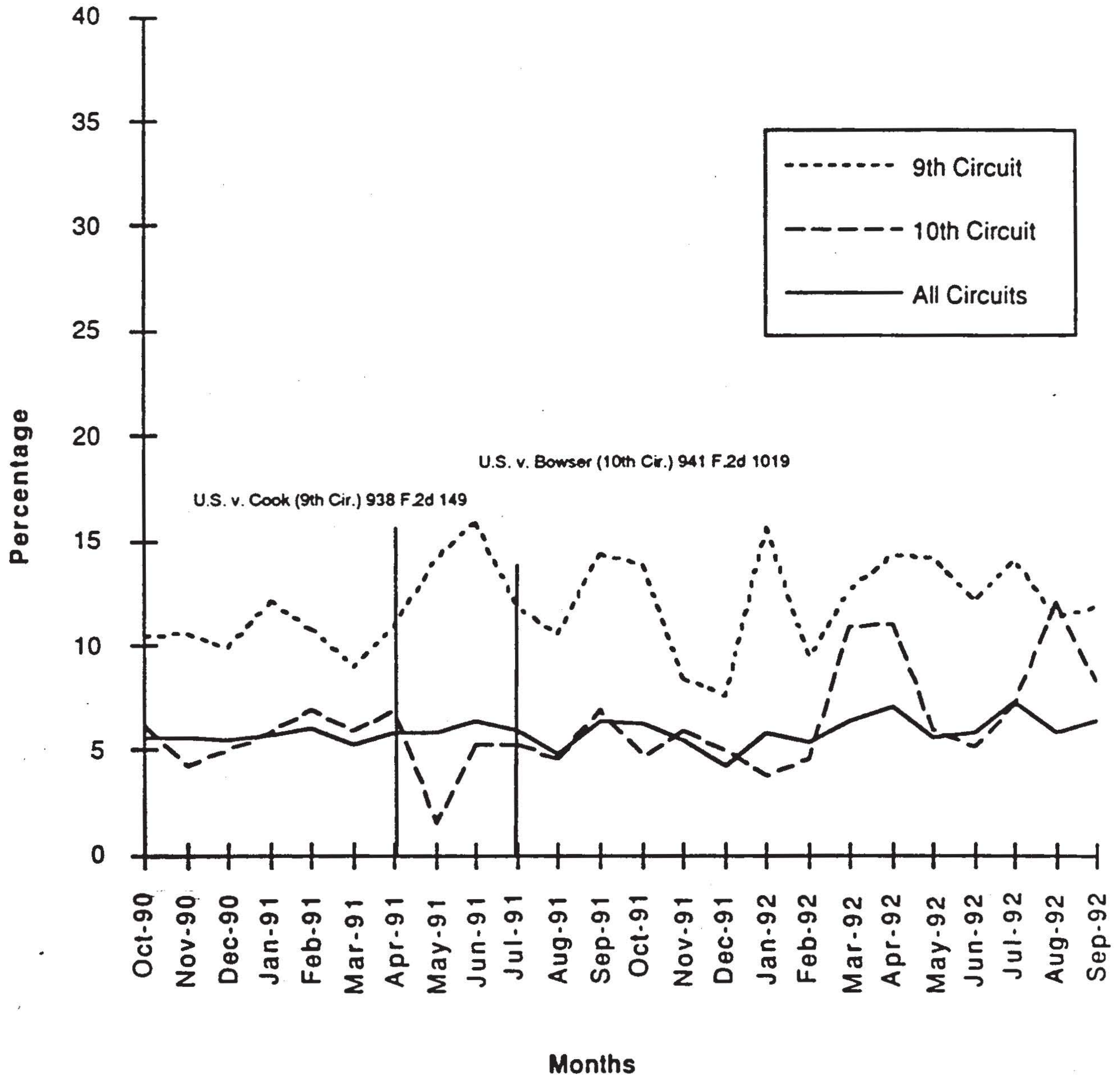
United States Sentencing Commission, *Guidelines Manual* (Nov. 1993), at 6.

# Monthly Downward Departure Rates FY91-FY92 in Circuits Permitting Departures Based on Combinations of Characteristics



**PROPOSED MODIFICATION OF §1B1.10 PROCEDURE**
(Proposed Issue for Comment, #31)

Submitted by

Judicial Conference Committee on Criminal Law
Subcommittee on Criminal Law and Sentencing Procedures

## Introduction

The Committee would like to express its appreciation to the Commission for agreeing to publish Proposed Issue for Comment #31 at the Committee's request. This paper presents the Committee's position in favor of changing the procedure for §1B1.10 sentence modifications to require the use of only the retroactive amendment to modify a sentence, rather than use of the entire current set of guidelines, a procedure which we believe greatly complicates the sentence modification process.

Problems involved with the application of current §1B1.10 discussed herein are just now becoming evident, now that there are several years of amendments in place, and some retroactive amendments are receiving widespread application, such as the LSD amendment effective November 1, 1993.

Most of the complications and disparate applications becoming apparent are a result of the use of the entire set of current guidelines (which we refer to as the "new-book" approach[1]) in determining the modified sentencing range pursuant to §1B1.10, rather than only the amendment specifically made retroactive in §1B1.10.

In effect, this procedure makes all amendments enacted subsequent to the defendant's sentencing retroactive to these particular defendants. It also requires recomputation of all other guidelines involved in the original sentencing calculation whose application may have changed because of subsequent case law. This de novo guideline computation based on the entire current guideline manual generates numerous new issues of fact to be determined, many of which may require evidentiary sentencing hearings at which the defendant should be present. Any issue beyond the narrow use of the retroactive amendment to the old guideline computation arguably requires a hearing.

In addition, because all changes (even if substantively unrelated to the actual retroactive amendment) are applied to only those defendants involved in the sentence modification process, and denied to all other defendants sentenced at the same time as

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[1] This is done in order to distinguish this procedure from what is often referred to as the "one-book" rule for sentencings, pursuant to § 1B1.11, which would remain unchanged and actually reinforced by our proposal.

those defendants, the new-book procedure results in unwarranted disparity in guideline application among certain defendants.

In order to avoid otherwise unnecessary new factual issues, litigation, sentencing hearings, and unfair disparity in application, we urge the Commission to amend §1B1.10 and its Commentary to allow the simple application of only the specified retroactive amendment to the original sentencing computation. We are proposing that §1B1.10(b) be amended to read "...had the amended guideline listed in subsection (d) been in effect.." (rather than ..."had the guidelines, as amended, been in effect..."). In addition, Note 1 would be amended accordingly.[2] This procedure would allow the original sentence to remain otherwise unchanged, derived from the same set of guidelines under which other defendants were sentenced at the same time as the defendant whose sentence is later "modified".

**The "New-Book" Procedure**

The Commission directed that the entire current set of guidelines, as amended, be used in computing the range for a modified sentence,[3] pursuant to §1B1.10. The Policy Statement states:

> In determining whether a reduction in sentence is warranted for a defendant...the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time. Note 1, §1B1.10(b) (emphasis added).

Application Note 1 makes it explicit:

> ... the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect). §1B1.10, comment., n. 1 (emphasis added).

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[2] Note 1 would provide that the amended form of the retroactive guideline would be substituted for the extant guideline, and the modified range would be computed, with all other aspects of the original sentence calculation remaining unchanged. See Exhibit A which suggests the form of such an amendment, as well as possible explanatory commentary.

[3] References to a "modified sentence" or range herein are not intended to infer that such a modification is automatically imposed. An actual sentence reduction based on the modified range is not mandatory, but discretionary with the court. "...the court...may reduce the term of imprisonment, after considering the factors set forth in section 3553(a)...."(18 USC § 3553(a)); "...a reduction in...imprisonment may be considered..." (§ 1B1.10(a) USSG). (emphases added). See also, U.S. v. Connell, 960 F.2d 191, 197 (1st Cir. 1992); U.S. v. Wales, 977 F.2d 1323, 1327-8 (9th Cir. 1992). This proposal would not, and should not, affect the discretionary nature of § 1B1.10.