PUBLIC COMMENT ON EMERGENCY GUIDELINE AMENDMENTS

EMERGENCY AMENDMENT PROCESS

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Uncomfortable with emergency amendment process in general and its use in these four amendment circumstances. Does not appreciate Congress's rationale for addressing outside normal amendment cycle. Increases burden on Commission; ABA would support effort to communicate problem to appropriate Congressional committee.

National Association of Criminal Defense Lawyers
Questions Commission's promulgation of emergency amendment when the statute requires only that amendments be promulgated "as soon as practicable." Questions whether reasoned empirical basis exists for amendments. Due to shortcomings of abbreviated emergency amendment procedures, Commission should promulgate only those option directly required by legislation.

Also concerned about serious amendments being undertaken when Commission missing one vice-chair and one federal judge.

Increasing use of Congressional directives threatens to undermine cohesiveness of guidelines; troubleshooting in limited areas fails to consider the interrelated complexity of guidelines. Enabling legislation provides for dynamic process that permits fine tuning as warranted. Commission should try to persuade Congressional leader to refrain from such action.

PUBLIC COMMENT ON EMERGENCY GUIDELINE AMENDMENTS

AMENDMENT 1 List I Chemicals (§2D1.11)

Federal Public and Community Defenders
Notes that amendment is in response to Congressional directive; does not oppose amendment.

National Association of Criminal Defense Lawyers
Does not support amendment because Congress had insufficient evidence that existing penalties were inadequate. Recognizes Commission authority in promulgating.

Department of Justice
Proposed 2-level increase in offense levels satisfies Congressional directive except at offense level 12 in proposed Chemical Quantity Table, the amendment would result in no increase for many quantities of the listed chemicals previously subject to this offense level. For example, less than 2.7 kilograms of anthranilic acid would result in level 12, with the same result under the current guideline (level 12 for less than 3.6 kilograms). Proposal fails to comport with Congressional mandate; if exception desired for small quantities, it should be sought from Congress.

Notes quantity 3.6 kilograms or more of anthranilic acid, which should be increased from level 14 to 16, seems to be missing from table.

Recommend Commission review effect of 2-level increase over next year to see whether sufficient.

AMENDMENT 2 Alien Smuggling (§2L1.1)

General Comments

National Association of Criminal Defense Lawyers
Commission should amend to meet statutory objective, not go beyond without empirical evidence. Should not delete provisions currently in effect that are not addressed by the Congressional directives. Grant of emergency authority is limited. No authority to amend provisions not referred to in IIRIRA § 203.

U.S. Department of Justice
Generally agrees with proposed amendment. Recommends including as basis for departure knowing involvement in smuggling, transporting, or harboring unlawful alien who engages in, or intends to engage in, unlawful activity upon arrival in this country.

Judicial Conference of the United States Committee on Criminal Law
Commission should proceed cautiously in making upward adjustments higher than mandated by Congress; these cases usually result in guilty pleas; enhanced sentences mean more cases going to trial. More trials are a problem because transported or smuggled aliens tend to make poor witnesses and because of the difficulties in detaining these witnesses prior to trial.

Base Offense Level

Federal Public and Community Defenders
A 3 level increase satisfies the Congressional directive. Without data indicating that these offense levels are inadequate, there is no rationale for the proposed increase of 3-5 levels.

National Association of Criminal Defense Lawyers
Should not be increased beyond the 3 levels mandated by statute. 3-level increase would raise BOL to 23 for offenses under §2L1.1(a)(1); this would be equal to or greater than that for most violent offenses (BOL 22 for assault with intent to commit murder, where object of offense would not have constituted first degree murder; BOL 15 for aggravated assault; 15 for criminal sex abuse of minor).

§2L1.1(a)(2) would go from 9 to 12; Commission has no evidence or reason to increase beyond what Congress required. Aggravated conduct will already have substantial increase as result of other directives.

Judicial Conference of the United States Committee on Criminal Law
Commission should proceed cautiously in adjusting higher than mandated by Congress

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Base offense levels should be increased by the least amount required by legislative directive; Commission has not met burden of justifying additional increase such as data showing need for something more onerous.

Number of Aliens Smuggled

Federal Public and Community Defenders
Proposal unnecessarily increases punishment far beyond the 50% required by Congress. Legislation contains no authorization to promulgate emergency amendment for an enhancement for an offense involving 3-5 aliens. Commission should collect data to determine if necessary.

National Association of Criminal Defense Lawyers
Should only increase enhancements by 50% as mandated by statute instead of entirely reformulating and surpassing required enhancements.

U.S. Department of Justice
Proposed amendment to Application Note 5 represents too great a gap between enhancement for 100 aliens and the number required for upward departure. Recommend current language allowing departure when "substantially more than 100 aliens" are involved. Also, note 5 should not eliminate inhumane treatment of aliens as basis for upward departure.

Judicial Conference of the United States Committee on Criminal Law
Commission should be slow to make quantity-driven guideline increases in this area. Number of aliens transported often has little bearing on culpability as defendants are often low-level underlings or undocumented aliens selected by coyote to drive group for discounted fee.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
In absence of data or rationale, recommends option or point in enhanced range that would result in least severe alternative.

Enhancement for Prior Similar Convictions

Federal Public and Community Defenders
Only convictions occurring before the instant offense should be counted; chapter 4 already provides punishment for prior convictions. Enhancement required by Congress should be reserved for those who commit offense after previous punishment for same offense. Approach more consistent with "3 strikes" provision and career offender guidelines, which lessen

prosecutorial manipulation of sentences.

National Association of Criminal Defense Lawyers
Opposes both options as harsher than required by Congressional directive; options ignore cumulative effect of double-counting in guidelines. Proposes: if defendant has 1 prior, increase by 1; 2 priors, increase by 2. Priors are double counted already because they increase both the criminal history and the base offense level. Also, enhancement should only apply to those with prior conviction of instant offense, and only if prior existed at time offense commenced; this is more in keeping with blameworthiness rationale and with career offender and gun guidelines.

U.S. Department of Justice
Urges option 2, more closely reflects statutory directive. Sees no reason for limitation of option 1. If conviction occurred before current sentencing and involved separate transaction, it is an appropriate basis for enhancing to reflect recidivist tendencies.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Recommend Option 1 as fairer, more responsive to legislative directive, more consistent with other aspects of guidelines.

Definition of Immigration and Naturalization Offense

Federal Public and Community Defenders
Much too broad; Chapter 2 part L covers a wide range. Congress did not call for such a broad application of the recidivist enhancement.

National Association of Criminal Defense Lawyers
Unduly broad; should be limited to those offenses covered by §2L2.1; this is plain reading of "same or similar conduct."

U.S. Department of Justice
Should include related offenses under state or local law.

Firearm Enhancement

Federal Public and Community Defenders
Opposes provision for minimum offense levels, which would only result in greater proportional increase for possession of weapon in less egregious cases where BOL would be determined under 2L1.1(a)(b). This overpunishment inconsistent with thoughtful legislation such as safety valve statute. Enhance should simply provide uniform increase for use of a weapon. Opposes as unauthorized by legislation the proposed enhancement for possession of a weapon; no Congressional authorization for enhancement on defendant who did not personally use a

weapon. Complying with Congressional directive, enhancement should read "if the defendant discharged a firearm" and the §2L1.1(4)(B) enhancement should read "if the defendant brandished or otherwise used a dangerous weapon."

Opposes addition of application note holding defendant accountable when "another person" discharges, etc., a firearm or possesses a dangerous weapon during the offense. Legislation requires that defendant personally use weapon. Also, language flawed because "another person" could mean border patrol agent. Awareness of weapon insufficient or at least defendant should have to have been aware of the weapon when offense commenced in order to be responsible for it.

National Association of Criminal Defense Lawyers
Opposes vicarious liability provisions; Congress directed enhancements only where defendant himself used firearm or caused the injury. Commission should restrict itself to Congressional mandate. Opposes imposition of minimum offense level if firearm enhancement applies. Minimums not mandates by Congress and are not used in either robbery or aggravated assault guidelines that contain similar enhancements.

U.S. Department of Justice
Options create essentially a special relevant conduct rule for firearms use in connection with alien smuggling; unnecessarily complicates guidelines and causes litigation. Normal relevant conduct rules should apply.

Cross-Reference to Murder Guidelines

Federal Public and Community Defenders
Congressional directive did not require adding a cross reference to the murder guideline; proposal is overly broad in attributing enhancements and penalties when defendant is only vicariously accountable.

National Association of Criminal Defense Lawyers
Opposes cross-reference to murder guidelines, which can result in life imprisonment with parole. Such penalty should not result without safeguard of grand jury indictment, right to confrontation, proof beyond reasonable doubt, etc. Sentence of life pursuant to cross-reference is tail wagging dog. U.S. v. Watts noted the circuit conflict over, but declined to address, whether such a harsh sentence on the basis of mere preponderance violates due process. The statute does not require the cross reference; Commission should not undertake on emergency basis.

Reckless Risk of Bodily Injury or Death

Federal Public and Community Defenders
Neither option properly responds to Congressional directive, which requires that defendant "engage in conduct that consciously or recklessly places another in serious danger . . . "; amendment is broader, applying "if offense involved" creating risk of injury. Commission without authority to hold defendant responsible for conduct not his own.

Double counting could result under option 2: a sentence could be enhanced for discharge of weapon under §2L1.1(b)(4), for creating risk of death/bodily injury under §2L1.1(b)(5); and for actual injury under §2L1.1(b)(6). The Congressional directive used "or", which is disjunctive.

Opposes part of this amendment that creates minimum offense level, which disproportionately increases sentence for less serious offenders.

National Association of Criminal Defense Lawyers
Commission should cap the cumulative effects of weapons and injury enhancements, which currently can cause an increase of up to 14 levels where the offense results in injury short of death. Also, commentary defining "reckless conduct" is too broad; definition includes conduct typical for the offense.

U.S. Department of Justice
Prefers option 2 because it provides a cumulative, rather than alternative, enhancement to risk created by weapon. Cumulative enhancement needed unless the risk of injury/death arises only from the presence of a weapon. Under option 1, one who brandishes weapon and transports aliens in the trunk of a car would receive same sentence as one who only brandished weapon. Application Note 9 that explains the type of conduct that might create the risk of injury or death should read "includes" instead of "may include" because court may conclude it need not apply enhancement in the situations listed.

Bodily Injury or Death

Federal Public and Community Defenders
Congressional directive limited accountability of defendant to acts defendant committed or aided and abetted. Amendment is too broad, providing enhancement if any person "died or sustained bodily injury as a result of the offense."

National Association of Criminal Defense Lawyers
The statute does not call for an enhancement based on vicarious liability, but only where the bodily injury or death was caused by the defendant himself. Proposals too broad.

Downward Adjustment

Federal Public and Community Defenders
Opposes change in existing adjustment. Congress did not require amendment, but only required Commission to consider the appropriateness of a downward adjustment under the circumstances described. There is no emergency authority to delete reduction provided by § 2L1.1(b)(1). Further study required.

National Association of Criminal Defense Lawyers
Commission should add downward adjustment for offense involving defendant's spouse or child but should leave untouched the existing adjustment, except to increase it to maintain a proportional reduction in the offense level. There is no emergency authority to delete reduction. Should not eliminate "not for profit" language since the existing adjustment addresses different mitigating factors than the one directed by Congress.

U.S. Department of Justice
Strongly agree with narrowing reduction to 2-3 levels when the offense involves defendant's spouse or child. Current reduction subject to overuse and does not correctly identify least serious class of alien smugglers. Also, difficult to assess what is profit. Greater reduction is appropriate if Commission select more than a three-level increase in the base offense level. Should retain current limitation that reduction apply only if BOL is determined under subsection (a)(2) for ordinary smuggling/related offenses. BOL determined under (a)(1) indicates defendant who was previously deported after aggravated felony conviction; these defendants should not get reduction.

Judicial Conference of the United States Committee on Criminal Law
Commission should not abandon "not for profit" language in §2L1.1(b)(1); there are many cases of a defendant helping relatives other than a spouse or child. Should clarify that this language does not refer to whether defendant personally expected to profit but rather whether the transported aliens were paying someone for the service, as distinguished from working with a close friend or relative.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Commission should permit a decrease for this factor equal to the base offense level increase.

Upward Adjustment for a Previously Deported Alien

Federal Public and Community Defenders
Opposes. No Congressional authority to add an enhancement for a defendant's status as a previously deported alien.

National Association of Criminal Defense Lawyers
Potentially may cause triple counting; not warranted in light of high base offense level when there is violent offense. Provision not directed by Congress, no evidence required emergency treatment by Commission.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Recommend Option 1 as fairer, more responsive to legislative directive, more consistent with other aspects of guidelines.

AMENDMENT 3 Immigration Document Fraud (§2L2.1, 2L2.2)

General Comments

Federal Public and Community Defenders
Commission should move no more than minimally required; legislative directives in this area flow from volatile, emotional political environment not best suited to produce rational, fair sentencing law.

National Association of Criminal Defense Lawyers
Many comments from Amendment 2 apply here with equal force.

Base Offense Level - §§2L2.1, 2L2.2

Federal Public and Community Defenders
Should increase base offense level by 2, minimum required, as there is no data to indicate current levels are inadequate.

National Association of Criminal Defense Lawyers
Should not be increased beyond the 2 levels mandated by statute; no evidence supports greater increase at this time; other enhancements deal adequately with more aggravating conduct.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Base offense levels should be increased by the least amount required by legislative directive; Commission has not met burden of justifying additional increase such as data showing need for something more onerous.

Downward Adjustment - §2L2.1

Federal Public and Community Defenders
Opposes both proposed options; legislation does not authorize Commission to promulgate emergency amendment to limit/revise reduction currently available under §2L2.1(b)(1).

National Association of Criminal Defense Lawyers
Opposes deletion/change of 3-level adjustment; not required by Congress. Also, adding requirement of no priors in order for adjustment to apply has the effect of triple-counting a single aggravating factor, when combined with enhancements for priors. Existing adjustment should not be amended except to increase to maintain a proportional reduction in the offense

level; currently is a 33% reduction; to maintain proportionality should now be 4 levels.

There should be an additional adjustment is the offense involved documents related only to the defendant's spouse and child. Existing adjustment addresses different mitigating factors.

U.S. Department of Justice
Prefers option 2 because reduction not appropriate in all not-for-profit cases, such as providing false documents for numerous aliens, even if not for profit.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Commission should permit a decrease in case of defendant assisting wife or child equal to the base level increase.

Enhancement for Number of Documents - §2L2.1

Federal Public and Community Defenders
Commission should increase the enhancement only by 50% as mandated, pending study, as no further adjustment may be required.

National Association of Criminal Defense Lawyers
Should only increase enhancements by 50% as mandated by statute instead of entirely reformulating. Adding enhancement for 3-5 documents results in disproportionate increase for mid-level offenders.

U.S. Department of Justice
Upward departure language should be included in §2L2.1 for offenses involving more than 100 documents.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
In absence of data or rationale, recommend option or point in enhanced range that would result in least severe alternative.

Enhancement for Prior Similar Convictions - §§2L2.1, 2L2.2

Federal Public and Community Defenders
Only convictions occurring before the instant offense should be counted; chapter 4 already provides punishment for prior convictions. Enhancement required by Congress should be reserved for those who commit offense after previous punishment for same offense. Approach more consistent with "3 strikes" provision and career offender guidelines, which lessen prosecutorial manipulation of sentences.

AMENDMENT 4 Involuntary Servitude (§2H4.1)

Federal Public and Community Defenders
Oppose Amendment 4(A); such cases brought infrequently; current guidelines for involuntary servitude calls for offense level of 15 or 2 plus underlying offense, usually kidnaping or alien smuggling. Thus any disparity between current guideline base offense level and those for kidnaping and alien smuggling is due to guideline itself. Therefore no increase to eliminate disparity is necessary; adds complexity.

Request for comment 4(B): believes multi-count rules ensure appropriate incremental punishment; if increase inadequate, can always depart upward. Cases involving large number of victims infrequent, specific offense characteristic to account for such is unnecessary.

U.S. Department of Justice
Involuntary servitude and like offenses are similar to kidnaping and should result in similar offense levels. DOJ supports level 24, the base level for kidnaping. If Commission adopts level 24, it should use lower specific offense characteristic increases for serious or life-threatening bodily injury in proposed subsec. (b)(1) or for use of dangerous weapon, subsec.(b)(2). Higher enhancements should be used under (b)(3), length of servitude, because they reflect seriousness: 5-level increase for more than 1 year, 3 levels if more than 30 days. In this aspect, distinguishable from kidnaping as involuntary servitude usually longer duration; kidnaping's highest duration enhancement is 2 levels for more than 30 days.

2-level increase under proposed subsec.(b)(4) for other offense committed inadequate in light of 4-level increase for same factor under kidnaping guideline.

Proposal fails to provide enhancement for minor victim.

"Dangerous weapon" should be defined more appropriately to slavery to include device capable of causing injury to prevent escape such as dogs, razor wire.

Request for comment 4(B): upward departure language and multi-count rules not sufficient to ensure enhanced sentences for large numbers of victims. Guideline increase is needed but should not interfere with multi-count rules where there are 6 or fewer victims.

ABA, Criminal Justice Section Committee on the U.S. Sentencing Guidelines
Commission has not met burden of justifying anything more than the minimum increases in either base offense level or specific offense characteristic increases; should adopt least severe alternatives. Insufficient information about these crimes; without indication that current

mechanisms for dealing with atypical circumstances do not function well, there should be no need for amendment or addition of specific offense characteristics.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Post Office Box 1060
Laredo, Texas 78042

(210) 726-2237

FACSIMILE

(210) 726-2349

February 4, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

I am writing in response to the published "emergency amendments" on guideline §2L1.1, on behalf of the Committee on Criminal Law. I also have a personal interest in immigration cases, based on handling countless cases of this kind for over seventeen years.

In general, we urge the Commission to proceed cautiously in making upward adjustments higher than those mandated by Congress. Historically, most of these cases usually result in guilty pleas, at least partially because the sentences are relatively modest. If the sentences are significantly enhanced and more of these cases proceeded to trial, serious logistical problems will result. Typically, these cases involve "material witnesses," namely the aliens being smuggled or transported. These witnesses inevitably must be detained. They are generally indigent, illegally in this country, very poorly educated, and require interpreters. The combination of those factors means that they are usually very poor witnesses. Because they have been dealt with by many persons along the transportation chain, usually under clandestine conditions, they often cannot identify defendants and give testimony inconsistent from other material witnesses or from what they have allegedly told Border Patrol agents at the time of their own arrest.

The pre-trial detention of the necessary witnesses is itself a logistical problem of no small proportion. They must be detained in crowded pretrial detention facilities, which are limited and often located far from the court location. Indeed, the Department of Justice recently wrote to me, asking the assistance of the Criminal Law Committee in conveying to all judges the fact that housing pretrial

detainees has become a major problem for the Marshals Service--in absolute numbers, in medical needs, and in transportation needs.

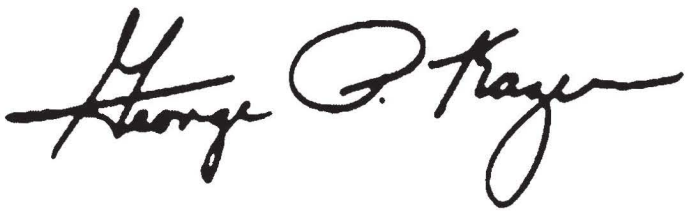
It is also true that the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings. In fact, often the defendant is himself an undocumented alien selected by the "coyote" to drive or guide the group for a discounted fee. Moreover, at a time when the Commission is rethinking quantity-driven guidelines in narcotics cases, it should be slow to make quantity-driven increases in this area. Even more than with narcotics, the number of aliens being transported often has little bearing on the degree of culpability of the defendant.

We would also urge you not to abandon the "not for profit" language of §2L1.1(b)(1). There are many cases of defendant's helping relatives other than a spouse or child. In that connection, however, at some appropriate time it would be useful to clarify that this language does not refer to whether the defendant personally expected to profit but rather whether the transported or harbored aliens were paying someone for this service, as distinguished from directly working with a close friend or relative. Frequently I encounter cases where it is undisputed that a purely commercial venture was afoot, but there is no evidence that the particular defendant driving or guiding the group was directly receiving any money.

In sum, we realize you have no choice with respect to certain changes, but we urge great caution in going beyond the Congressional mandate.

Thank you for your consideration of these suggestions.

Sincerely,



cc: Commissioner Michael S. Gelacak
Commissioner Wayne A. Budd
Commissioner Michael Goldsmith
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Edward F. Reilly, Jr., ex-officio
John Kramer, Staff Director
John Steer, General Counsel
Members of the Committee on Criminal Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
PROBATION OFFICE

January 30, 1997

LOUIS G. BREWSTER
CHIEF PROBATION OFFICER
POST OFFICE BOX 61207
HOUSTON 77208-1207

700 E. LEVEE, SUITE #101
BROWNSVILLE 78520-5263

606 N. CARANCAHUA, SUITE #1500
CORPUS CHRISTI 78476-2001

POST OFFICE BOX 3636
ALICE 78333-3636

POST OFFICE BOX 547
LAREDO 78042-0547

POST OFFICE BOX 2670
GALVESTON 77553-2670

TEXAS COMMERCE CENTER, SUITE #729
McALLEN 78501-5159

100 N. TEXAS
RIO GRANDE CITY 78582-3628

109 COMMERCIAL CIRCLE, SUITE #102
CONROE 77304-2203

PLEASE REPLY TO: Houston

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

Attn: Michael Courlander, Public Information Splst.

Re: Proposed Amendments for Public Comment

Dear Mr. Courlander:

Except for those amendments required as a result of Congressional directive, I urge no modifications to the Sentencing Guidelines at this time.

Below are my comments concerning proposed emergency amendment #2 and #3. Bolded sections reflect preferred choices.

Amendment #2: Smuggling, Transporting, or Harboring an Unlawful Alien

2L1.1(a) (Base Offense Level)

(1) **23** if convicted under 8 U.S.C. § 1327 .....

(2) **12** otherwise

(b) (Specific Offense Characteristics)

(1) ..., decrease by **2** levels.

(2) Number of aliens and associated levels are appropriate.

(3) **Option 2** is preferred.

(4) ...**involved a dangerous weapon**...

(A) ....**a firearm was discharged**,.....offense level is less than level **22**, increase to level **22**.

(B) ...**a dangerous weapon (including a firearm) was brandished or otherwise used**, ...offense level is less than level **20**, increase to **20**.

(C) ...less than level **18**, increase to level **18**.

(5) **(Option 2** preferred) ...level is less than **18**, increase to level **18**.

(6) Nature and associated levels for injury are appropriate.

(7) ...increase by **2** levels.

Application Notes:

1. *Why is it necessary that the "for profit" clause remain in application note number 1?*

9. *How do we determine the official passenger "rated capacity" of a motor vehicle? May contribute to unnecessary litigation.*

10. *Does an "immigration and naturalization offense" include class A misdemeanor convictions? Or is it intended this specific offense characteristic [(2L1.1(b)(3)] is triggered only by prior felony convictions?*

11. *If possible, provide the definitions for "child" and "spouse" in the application note rather than referencing Title 8.*

Amendment #3:

2L2.1 Trafficking in a Document Relating.....

(a) Base Offense Level: **11**

(b) Specific Offense Characteristics

(1) **Option 2** is preferred.

(2) Number of documents and associated levels are appropriate.

(3) No changes.

(4) **Option 2** is preferred.

Application Notes:

(1) *Is it necessary to include reference to "for profit" if Option 2 [2L2.1(b)(1)] is chosen as the specific offense characteristic?*

(5) *Does an "immigration and naturalization offense" include class A misdemeanor convictions? Or is it intended this specific offense characteristic [(2L2.1(b)(4)] is triggered only by prior felony convictions?*

(6) *If possible, provide the definitions for "child" and "spouse" in the application note rather than referencing Title 8.*

2L2.2 Fraudulently Acquiring Documents Relating.....

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) No changes.

(2) **Option 2** preferred.

(c) No changes

Application Notes:

(3) *Does an "immigration and naturalization offense" include class A misdemeanor convictions? Or is it intended this specific offense characteristic [(2L2.2(b)(2)] is triggered only by prior felony convictions?*

The Commission's consideration of these comments are appreciated.

Sincerely,

Jerry Denzlinger, Deputy Chief
United States Probation Officer

1 copy - file 1 w/ Acquitted Conduct - Other - Amendments Notebook

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

December 13, 1996

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

Dear Commissioner Goldsmith:

Thank you for sending the Committee a copy of the Sentencing Commission's Guideline Simplification Priorities for the 1997 amendment cycle. We appreciate your willingness to keep the members of the Senate Committee on the Judiciary informed about the subjects that the Sentencing Commission will address in its upcoming amendment cycles. We also are glad that you met with Manus Cooney and Paul Larkin of the Judiciary Committee staff when you were in town. Please feel free to keep them up to date on new Sentencing Commission initiatives.

While we have not by any means reviewed all of the proposals in your letter (or in the Sentencing Commission's Federal Register notice, 61 Fed. Reg. 34,465 (July 2, 1996)), we are deeply concerned about two particular subjects that, according to your letter, the Sentencing Commission may consider during the 1997 or 1998 amendment cycle: One would prohibit entirely, restrict greatly, or raise the standard of proof for the use at sentencing of conduct underlying a charge on which the defendant has been acquitted. The other would involve an exploration of changes to the relevant conduct Sentencing Guideline limiting the use of unconvicted conduct at sentencing. In our view, both proposals are prohibited by an Act of Congress, 18 U.S.C. § 3661, and also are unwise as a matter of sentencing policy.

We realize that the Sentencing Commission may not consider all or any of these options during the current amendment cycle and that the Commission may not decide on such matters until its December meeting. At the same time, it is our understanding that the Commission well may consider the first issue -- *viz.*, the use at sentencing of conduct underlying a charge on which the defendant has been acquitted -- even if it does not address the other proposal. Also, in your November 14, 1996, letter you listed the so-called "acquitted conduct" issue as the first intercircuit conflict that the Commission

should address. Accordingly, it seems quite likely that the Commission will address that particular issue. We therefore would like to share with you our thoughts.

1. *Conduct underlying a charge on which the defendant has been acquitted*: The first proposal that we find objectionable is the one that would prohibit entirely, or restrict greatly, the use at sentencing of conduct underlying a charge that was brought against the defendant, but that resulted in his acquittal. Every federal circuit with authority over criminal cases but one has held that a district court may consider at sentencing conduct underlying a charge on which the defendant has been acquitted. *E.g.*, *United States v. Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 180-81 (2d Cir. 1990); *United States v. Ryan*, 866 F. 2d 604, 608-09 (3d Cir. 1989); *United States v. Isom*, 886 F.2d 736, 738-39 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 748-49 (5th Cir. 1989); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990); *United States v. Fonner*, 920 F.2d 1330, 1332-33 (7th Cir. 1990); *United States v. Dawn*, 897 F.2d 1444, 1449-50 (8th Cir. 1990); *United States v. Coleman*, 947 F.2d 1424, 1428-29 (10th Cir. 1991); *United States v. Averi*, 922 F.2d 765, 765-66 (11th Cir. 1991); *United States v. Foster*, 19 F.3d 1452, 1454-55 (D.C. Cir. 1994). Only the Ninth Circuit has held that such conduct cannot be considered at sentencing. *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991).

We believe that it is a valuable undertaking for the Sentencing Commission to resolve conflicts among the circuits on the interpretation of the Sentencing Guidelines. The Supreme Court has stated that it believes that the Sentencing Commission should undertake that responsibility, *Braxton v. United States*, 500 U.S. 344, 347-48 (1991), and we concur in that view. Sentencing Guidelines have the same legal status as regulations, *Stinson v. United States*, 508 U.S. 36, 44-45 (1993), and it always is preferable to have the responsible agency modify its own regulations, rather than ask the Supreme Court to resolve disagreements among the circuit courts on such an issue. It seems to us, however, that if the Commission does wish to resolve this conflict, it should do so by adopting the view adopted by the vast majority of the circuits that have considered this issue, for three reasons. *First*, there is an Act of Congress that governs this issue, and the Sentencing Commission lacks authority to adopt Guidelines that are inconsistent with an Act of Congress. *Neal v. United States*, 116 S. Ct. 763, 769 (1996). *Second*, in our view, the course set out in the first proposal is, quite clearly, wrong as a matter of sentencing policy. *Third*, far from simplifying sentencing, which we understand to be the stated purpose of the proposals, the new approach would take the law into uncharted territory, thus resulting in a whole new set of legal issues that would have to be litigated.

The background principles of federal sentencing law are well settled. To start, the Supreme Court has made clear for more than four decades that, as a matter of federal constitutional law, a sentencing court is, and should be, free to consider all relevant and

reliable evidence. *See, e.g., Williams v. New York*, 337 U.S. 241, 247 (1949); *United States v. Tucker*, 404 U.S. 443, 446 (1972); *United States v. Grayson*, 438 U.S. 41, 53 (1978); *Bearden v. Georgia*, 461 U.S. 660, 670 (1983); *Wasman v. United States*, 468 U.S. 559, 563 (1984); *Payne v. Tennessee*, 501 U.S. 808, 820-21 (1991); *Dawson v. Delaware*, 503 U.S. 159, 164 (1992); *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993); *Nichols v. United States*, 114 S. Ct. 1921, 1927-28 (1994); *Witte v. United States*, 115 S. Ct. 2199, 2205 (1995). Evidence that a defendant has committed other crimes, even if they have not been proved beyond a reasonable doubt, surely is relevant and is not inherently unreliable. More specifically, the Supreme Court has held that neither the Double Jeopardy Clause nor the Due Process Clause prohibits the use at sentencing of conduct underlying a charge on which the defendant has been acquitted. *Dowling v. United States*, 493 U.S. 342, 352-54 (1990). And the lower federal courts had unanimously agreed, before the Sentencing Guidelines went into effect, that a sentencing court could consider acquitted conduct at sentencing. *See United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.) (stating that it was "well established that a sentencing judge [could] take into account facts introduced at trial relating to [] charges * * * of which the defendant ha[d] been acquitted"); *see also, e.g., United States v. Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990); *United States v. Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States v. Morgan*, 595 F.2d 1134, 1136 (9th Cir. 1979); *United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States v. Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States v. Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972).

The reason why is that there is a different standard of proof applied at each stage of the process. As explained below, while the reasonable doubt standard applies to factual findings made at the guilt stage of a criminal prosecution, both before and since the Guideline went into effect the preponderance standard has been held to apply to factual findings made at the sentencing stage of a criminal case. *See, e.g.,* Sentencing Guidelines § 6A1.3 (Commentary) (1995). Since an acquittal establishes only that the prosecution did not prove its charges against the accused beyond a reasonable doubt, an acquittal does not mean that a sentencing court is barred from considering the same evidence under the lower standard of proof applicable at sentencing. Accordingly, there is no federal constitutional impediment to considering at sentencing conduct underlying a charge on which the defendant has been acquitted.

There also is no statutory bar to considering such evidence. On the contrary, 18 U.S.C. § 3661 prohibits erecting such a bar. Section 3661 provides as follows:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive

> and consider for the purpose of imposing an appropriate sentence.

In our view, "[n]o limitation" means "no limitation." Of course, Section 3661 does not require a sentencing court to consider information when the Constitution prohibits a court from doing so. But Section 3661 makes clear that the Constitution establishes the only limitation that exists in this regard. The Ninth Circuit's decision in the *Brady* case makes up a limitation found nowhere in the Constitution, and therefore is an unlawful departure from Section 3661. Because the Supreme Court made clear last Term that the Sentencing Commission, like a court, is bound by an Act of Congress, *Neal*, 116 S. Ct. at 769, the Sentencing Commission can no more adopt Guidelines that are inconsistent with Section 3661 than a court can decide cases without adhering to its terms.

The two reasons given by the Ninth Circuit in the *Brady* case for the rule that conduct underlying a charge on which the defendant has been acquitted cannot be considered at sentencing -- namely, an acquittal proves that a defendant was not involved in the earlier crimes, and considering such conduct punishes a defendant for actions that he did not commit -- are deeply flawed. The Supreme Court has rejected both propositions on numerous occasions. *E.g.*, *Witte*, 115 S. Ct. at 2206; *Dowling*, 493 U.S. at 349; *see Grayson*, 438 U.S. at 52. The Ninth Circuit's decision in *Brady* therefore supplies no legitimate basis for changing the settled law in every other circuit.

It could be argued that the *Brady* rule is not inconsistent with 18 U.S.C. § 3661 (the strong form of the argument), or at least that the Sentencing Commission has the statutory authority to adopt the *Brady* rule in a Sentencing Guideline notwithstanding Section 3661 (the weak form of the argument). The argument would be that Section 3661 makes clear that court may consider evidence underlying an acquittal, but the courts or the Sentencing Commission may assign a weight to the type of evidence that may be considered at sentencing. In our view, that argument is unpersuasive. A scheme that would assign a limited weight (if any at all) to evidence underlying an acquittal would fly in the face of Section 3661. Section 3661 makes clear Congress's judgment that sentencing courts should be free to consider, and in fact must take into account, all reliable evidence. Evidence underlying an acquittal is not unreliable and therefore must be considered. The policy that Section 3661 embodies -- *viz.*, that all reliable evidence should be considered at sentencing -- is controlling on the courts and, under *Neal*, 116 S. Ct. at 769, on the Sentencing Commission, too.

In any event, as we discuss elsewhere in this letter, we do not believe that the *Brady* rule states a sound sentencing principle, so we do not believe that the Commission should endorse that rule even if the Commission has the statutory authority to do so. In a similar context, the Supreme Court has looked with disfavor on efforts to assign

different weights to probative evidence. In *United States v. Sokolow*, 490 U.S. 1 (1989), the Supreme Court reversed a Ninth Circuit decision that assigned different weights to different types of evidence for purposes of the Fourth Amendment decision whether there is reasonable suspicion that a crime has occurred. We realize, of course, that the sentencing issue discussed here and the Fourth Amendment issue discussed in *Sokolow* are different. Our point is not that the *Sokolow* case is controlling here, but is that the structure of the Court's analysis in *Sokolow* is instructive here: Just as it makes little sense to complicate the reasonable suspicion analysis by adopting different categories of evidence, so, too, does it make little sense to complicate the sentencing process by creating different categories of evidence, some of which are deemed disfavored for reasons having nothing to do with reliability.

Finally, far from simplifying sentencing, barring the use of evidence of conduct underlying a charge of which the defendant has been acquitted will spark all sorts of new litigation. For example, it may be unclear whether the evidence whose use is being proposed at sentencing was used in connection with the trial of the charge of which the defendant was acquitted, or whether it was used in connection with the charge of which the defendant was convicted. It also may be unclear whether the evidence sought to be used at sentencing is the same evidence that was used in connection with the charge of which the defendant was acquitted, or if it is new evidence that was not used at all in the earlier trial. What is more, the need to distinguish between the two kinds of evidence could create all sorts of peculiar incentives to refrain from presenting certain charges or evidence to the jury in order to ensure that evidence relating to those charges would be able to be used at sentencing in connection with the other charges. For all these reasons, this proposal is likely to complicate, rather than simplify, the factfinding process.

Perhaps all this new litigation would be productive if it furthered the factfinding process at sentencing. But that is not the case here. Indeed, to the extent that the evidence that would be excluded by this proposal is reliable, its exclusion plainly *hinders* the truthfinding process. It should go without saying that there is little to commend a rule that both retards the accuracy of and complicates the procedures used in the factfinding process.

We understand that some people who are not familiar with the law governing sentencing believe that there is, to use the vernacular, "something un-American" about using against a defendant conduct underlying an acquittal. As you know, however, because the reasonable doubt standard does not apply to factfinding at the sentencing stage, there is no truth to this allegation. We would therefore be most surprised and also would be deeply concerned if an expert body, such as the Sentencing Commission, succumbed to the untutored reactions of such persons by modifying the Guidelines to limit the use of conduct underlying an acquittal.

It is our understanding that the Sentencing Commission is considering at least three different options in this regard. The first option generally would prohibit use at sentencing of conduct underlying an acquittal. There also are two variations on that basic proposal. One variation would allow such conduct to be used if it independently is established by evidence not previously admitted at trial, while another variation on the first proposal would allow such conduct to serve as a basis for an upward departure. We find the basic option unacceptable, for the reasons given above. The two variations ameliorate the harms caused by that option, but they do not do so entirely, and those variations doubtless will create their own, new problems. The question whether evidence not admitted at trial "independently" establishes conduct underlying an acquittal surely will raise a host of new problems for district courts. And allowing district courts to depart upward on the basis of conduct underlying an acquittal in lieu of requiring them to use such conduct when performing Guidelines adjustments unacceptably enhances the likelihood of the disparate sentencing that the Guidelines were designed to reduce.

The second option would treat conduct underlying an acquittal as relevant conduct only if such conduct is proved by clear and convincing evidence, rather than by a preponderance of the evidence. That approach is the oddest of the three. It is odd because the proposed solution (*viz.*, demanding a heightened degree of confidence that conduct underlying an acquittal in fact occurred) bears no relationship to the perceived problem (*viz.*, considering such conduct is unfair, regardless of whether it occurred, because the defendant was acquitted when tried for committing it). Perhaps that is why neither the Ninth Circuit in *Brady* nor anyone else (to our knowledge) has ever suggested such a remedy. This proposal therefore seems to be little more than a compromise solution for a problem that does not exist.

This proposal is odd for another reason, too: It would create one rule for conduct underlying an acquittal and a different one for conduct that never has been the subject of a criminal charge. The former type of evidence cannot be used unless the prosecution carries a higher burden of proof than is applicable in the case of the latter. That disparity might make sense if there were good reason to believe that the former evidence is more likely to be inaccurate than then the latter. But no one has ever proved that this proposition is true. Indeed, we are not aware of any serious argument to that effect.

For nearly 50 years -- beginning with *Williams v. New York* in 1949 and continuing through *United States v. Witte* in 1995 -- the Supreme Court has held that sentencing courts may consider evidence that a defendant has committed other crimes -- without reference to whether the defendant was acquitted on a count involving that conduct or whether the conduct was uncharged -- and the Court never has suggested that a burden of proof higher than the preponderance standard is applicable in that regard. On the contrary, the Court has said that the preponderance standard is generally applicable to

factfinding at sentencing, *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), and under the Guidelines, too, *Nichols*, 114 S. Ct. at 1928. What is more, the Court also has held that the preponderance standard applies to factfinding at trial when so-called "other crimes" evidence is at issue. *Huddleston v. United States*, 485 U.S. 681 (1988). Moreover, every circuit court with jurisdiction over criminal cases has held that the preponderance standard is the applicable standard at sentencing under the Guidelines. *See, e.g., United States v. Butt*, 955 F.2d 77, 88 (1st Cir. 1992); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 182 (2d Cir.), *cert. denied*, 498 U.S. 844 (1990); *United States v. Williams*, 1996 U.S. App. LEXIS 14616, at *10 (4th Cir. 1996); *United States v. Mergerson*, 4 F.3d 337 (5th Cir. 1993); *United States v. Zajac*, 62 F.3d 145, 148 (6th Cir. 1995); *United States v. Masters*, 978 F.2d 281, 286 (7th Cir. 1992); *United States v. Gooden*, 892 F.2d 725, 728 (8th Cir. 1989); *United States v. Sanchez*, 967 F.2d 1383, 1387 (9th Cir. 1992); *United States v. Schell*, 692 F.2d 672, 679 (10th Cir. 1982); *United States v. Elgersma*, 971 F.2d 690, 697 (11th Cir. 1992). Only one circuit court, in one admittedly aberrational case, ever has held that the clear and convincing evidence standard is the applicable standard.

That case was *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990), *aff'd after remand*, 947 F.2d 72 (1991). There, the defendant was convicted of passport and explosive violations, which resulted in a 27-33 month presumptive sentencing range, for conduct proving that the defendant would have used bombs for the purpose of committing murder. The district court departed upwards, imposing a 30-year sentence. The Third Circuit held that, under the unusual circumstances of that case, involving a quantum level increase in the sentence imposed above the one recommended by the Sentencing Guidelines, the clear-and-convincing-evidence standard, rather than the preponderance standard, was the appropriate one. The Third Circuit made both clear in *Kikumura* and in later cases, however, that the rule endorsed there has but exceptionally limited application. Even if the *Kikumura* rule is not as limited as "a restricted railroad ticket, good for this day and train only," *Smith v. Allwright*, 321 U.S. 649, 669 (1943) (Roberts, J., dissenting), that decision clearly adopts an exception, not the rule. Since the Third Circuit decided *Kikumura*, that court never has followed that decision. On the contrary, the Third Circuit consistently has distinguished its decision in that case and has held that the preponderance standard is the appropriate one. *See United States v. Mobley*, 956 F.2d 450, 458-59 (3d Cir. 1992); *United States v. Miele*, 989 F.2d 659, 663 (3d Cir. 1993); *United States v. Paulino*, 996 F.2d 1541, 1545 (3d Cir.), *certs. denied*, 114 S. Ct. 449, 450, 618 (1993); *United States v. Seale*, 20 F.3d 1279, 1289 (3d Cir. 1994).

Accordingly, the "clear and convincing evidence option, in addition to lacking any justification in law, also is inconsistent with all the governing precedent and practice in this area. We can see no reason for the Commission to adopt this option.

The last option would authorize such evidence to be considered for all purposes at sentencing, but also would allow district courts to disregard such conduct if, all things considered, using such conduct "raises substantial concerns of fundamental fairness." If so, the court may depart downward. We would like to say that this option at least has the virtue of unabashedly abandoning any pretense of limiting a sentencing courts' discretion and just throwing up for grabs the issue whether such evidence should be considered and, if so, what weight it should receive. That is the certain effect of this proposal, as the commentary that would accompany this proposal makes clear.

At the outset, we do not believe that allowing courts to depart when they find a Guidelines sentence to be "fundamentally unfair" would impose a serious limitation on the courts' sentencing discretion. The reason is that such a standard is far too subjective to serve as a useful restriction on the courts' discretion. But the proposal being considered by the Commission does not adopt that standard. According to the commentary, a sentencing court need not actually find that considering such evidence would be "fundamentally unfair" in order for the court to depart from the sentence indicated by the Guidelines. No, the court would merely need to find that doing so "raises *substantial concerns* of fundamental fairness." That is no limitation at all. The judge hasn't been born who could not make such a finding whenever he or she did not want to consider such evidence, for any reason. When that fact is coupled with the fact that the Supreme Court has ruled that a district court's decision to depart from the Sentencing Guidelines should be reviewed under the "abuse of discretion" standard, *see Koon v. United States*, 116 S. Ct. 2035, 2046-48 (1996), it becomes clear that a district court's decision to depart downward because it believes that considering evidence underlying an acquittal "raises substantial concerns of fundamental fairness" invariably will be immune from review on appeal. For that reason, this proposal would allow district court to disregard the conduct at will.

That being said, unfortunately we cannot say that the rule has the virtue of being honest about achieving that result. The reason is that *the proposal is not an amendment to the relevant conduct Guideline at all, but is an amendment to the Commentary accompanying the Guideline.* Thus, to all appearances the current rule (*viz.*, that relevant conduct underlying an acquittal must be considered) remains in place. In truth, however, the rule would be eviscerated in this regard by the change in the commentary. Commentary has virtually the same legal status as the Guidelines themselves. *Stinson*, 508 U.S. at 44-45. Yet, the Sentencing Reform Act does not require the Sentencing Commission to submit its commentary to Congress for review. The Act allows commentary to take effect immediately, so there is no guarantee that other Members will be aware of the effect of this option or that Congress will have the same opportunity to pass on it that it would have were the proposal offered as an amendment to the Guidelines. Moreover, only lawyers (and few of them) likely are aware of the legal effect

of the Sentencing Commission's commentary. The result is that, atop all of the other harms that this option would give rise to, this proposal is in a form that is both quite misleading to Congress and to the public and also could readily be construed as an attempt to evade the Sentencing Reform Act's process for Guidelines amendments. We cannot overstate how seriously it would concern us if the Commission were to make a change of this magnitude in such a fashion.

2. *Unconvicted conduct*: The second proposal that concerns us involves the issue whether the Commission should adopt changes to the relevant conduct Sentencing Guideline that would limit use of unconvicted conduct at sentencing. Here, too, we believe that the Sentencing Commission lacks the authority to adopt any such limitation. Section 3661 of Title 18 is directly applicable here, and, once again, makes clear that district courts may consider any reliable evidence at sentencing, regardless of whether the defendant previously was convicted of an offense involving that conduct. What is more, the Supreme Court long has approved use of such evidence at sentencing. To identify just one area, the Supreme Court twice has held -- most recently, in a unanimous opinion -- that a district court may enhance a defendant's sentence if the court finds that the defendant committed perjury on the stand when the defendant testified. *Grayson*, 438 U.S. at 50-51; *United States v. Dunnigan*, 507 U.S. 87, 92-94 (1993). Indeed, the Sentencing Guideline at issue in the *Dunnigan* case necessarily contemplated that the defendant had not yet been convicted of the underlying offense of perjury. The Commission's proposal would nullify that guideline, as well as others.

Further evidence of Congress' view of the appropriateness of the use of unconvicted conduct (as well as conduct underlying a charge on which the defendant has been acquitted), can be seen in laws that, while not focused on sentencing, nonetheless make clear that such evidence is probative and reliable. For instance, in 1994 Congress enacted Rules 413 and 414 of the Federal Rules of Evidence. Those rules provide, *inter alia*, that, in sexual assault or child molestation cases, evidence of the defendant's prior commission of similar offenses is admissible. The Rules apply even to conduct that was uncharged, as well as offenses resulting in acquittals. It would indeed be ironic if the Sentencing Commission adopted guidelines barring or limiting in the *sentencing* stage of a trial the use of evidence that Congress by statute has made specifically admissible during the *guilt* phase of the same case.

3. We would also like to raise a few other points. Since the Supreme Court's 1949 decision in *Williams v. New York*, it has been firmly settled law that a sentencing court should consider any reliable evidence about a defendant's conduct, given the importance and the difficulty of making sentencing decisions. The Supreme Court has reaffirmed that proposition on numerous occasions since then; the Supreme Court has rejected the claim that there is any double jeopardy or due process objection that could be raised against the

use of acquitted conduct, unconvicted conduct, or the preponderance standard of proof at sentencing (which necessarily refutes any claim that acquitted or unconvicted conduct is not reliable); and, with the exception of one aberrant Ninth Circuit decision, the circuit courts have uniformly said that courts applying the Sentencing Guidelines may rely on acquitted and unconvicted conduct in making factual findings, and, in reliance on the Supreme Court's decisions in *McMillan v. Pennsylvania*, and *Nichols v. United States*, may make such findings under the preponderance standard. There is no good reason, in our view, for the Sentencing Commission to reject nearly a half century of wisdom and practice in the federal and state courts on these matters.

Whether such a course is the best policy, however, is not the only concern at issue here. In our view, it is impossible to see how such proposed departures from not only well-established post-Guidelines law, but also well-established pre-Guidelines law, could be labeled "simplification" proposals. To the contrary, far from "simplifying" anything, the proposals would, by dramatically changing the background legal principles against which judges for decades have sentenced, unsettle firmly-established law and trigger the new rounds of litigation that inevitably follow such changes. We have described above some of the potential issues raised by the changes you have brought to our attention. Both proposals certainly would lead to a new wave of litigation in the district and circuit courts.

Amendments that, in truth, merely clarify specific Guidelines provisions or that merely simplify application of the *Guidelines Manual* likely would not spawn such litigation. But the proposals discussed above do not bear those stripes. Rather, the point of these amendments is to make substantive changes to the Sentencing Guidelines. Even an untrained eye can spot the common denominator in them. Each one has long been sought by the defense bar because each one makes it more difficult for the prosecution to prove, and for the courts to find, facts at sentencing establishing aggravating features of a defendant's crime and background. Indeed, that is the likely reason why the defense bar for so long has sought to persuade sentencing courts not to consider acquitted or unconvicted conduct and to use a higher standard of proof.

Regarding the simplification project more generally, we understand that concerns have been raised that the Guidelines may be too complex or may unduly restrict the discretion of sentencing courts. We believe that those concerns deserve a fair hearing. It is very important, however, that, in attempting to address these concerns, we not undermine the genuine improvements that the Guidelines already have made in assuring that sentences are predictable and do not permit unwarranted disparity among offenses or offenders -- which was not true under the pre-Guidelines regime. Moreover, at a certain point change itself tends to become a source of complexity. Indeed, the complaint we hear the most about complexity and the Guidelines is that they are amended too

frequently. (By comparison, we do not, for example, have large changes every year in the Federal Rules of Evidence.)

In any event, nothing could be more damaging to any simplification effort than the fear that it may simply be a disguise for a wholesale lowering of sentences. Unfortunately, the Commission's proposed reconsideration of the role of evidence underlying charges of which the defendant was acquitted or evidence that is connected with uncharged conduct strongly suggests that such a concern is well founded. Plainly, the proposed revisions discussed here would not simplify the sentencing process for district courts (on the contrary, they will *complicate* it by creating a legal regime untried even before the guidelines system took effect), would not enhance the accuracy of sentencing decisions (on the contrary, they will *reduce* accuracy), and would not remedy injustices at sentencing (on the contrary, they will *cause* them). We hope that any continuing simplification effort will focus on what truly could be deemed mere matters of simplification, not on proposals like the ones discussed here, so that the Sentencing Guidelines process will better serve the intended purposes of sentencing without unduly burdening the district courts who must implement the Guidelines. We would also suggest that you insist that any future simplification proposals be accompanied by a careful analysis of what effect they would likely have on the sentences given -- whether they would systematically raise or lower them, and if so by how much -- so as to make clear up front whether the proposals would serve any substantive agenda.

All that being said, we also believe that we should commend you for the article that you wrote for the Washington Post in its November 14, 1996, edition. As you noted in your article, the recent Post series on the Sentencing Reform Act of 1984 unfortunately did not present a balanced picture of the effects of that landmark piece of legislation. Congress sought to address two central sentencing problems by enacting that statute -- the unjustified disparities and rampant dishonesty that had existed under the old, purely discretionary sentencing/parole system -- and the Sentencing Guidelines have made massive strides toward eliminating those vices in the old law. The Sentencing Commission deserves credit for its efforts, which continue to this day, in that regard, and the Post series was sorely deficient in not doing so. Similarly, we have no truck for persons who criticize the Sentencing Commission on the ground that sentencing hearings now take more time than they did before the Guidelines went into effect. No one wants to see courts, federal or state, engage in "drive-by sentencing," particularly when a person's life or liberty is at stake. The increased amount of time that judges must spend before and at sentencing proceedings under the Guidelines is well worth the cost. The tradeoff -- a few hours of a judge's time to ensure that a defendant is not given a few (or more) months of incarceration too many (or too few) -- is well worth it, both from the perspective of the defendant, who must serve the sentence that is imposed, and from the perspective of society, which must be assured that sentences are accurately, impartially,

and fairly calculated. You deserve credit for your response to the Post series. We hope that it is read as widely as the original series of articles.

Once again, thank you for making us aware of these proposals. We look forward to a continuing dialogue with the Commission as it moves forward into the 1997 and 1998 amendment cycles.

Sincerely,

Spencer Abraham
United States Senate

Orrin G. Hatch
Chairman, Senate Committee
on the Judiciary

cc: Senator Joseph Biden
Ranking Member
All other Members of the Senate Committee on the Judiciary
Rep. Henry Hyde
Chairman, House Committee on the Judiciary
Rep. William McCollum
Chairman, House Committee on the Judiciary
Subcommittee on Crime
Richard P. Conaboy
Chairman, United States Sentencing Commission
All other Members of the United States Sentencing Commission
Attorney General Janet Reno

file - Public Comment Notebook

Association of Americans for Constitutional Laws and Justice (AACLJ)
P.O. Box 240147
Honolulu, Hawaii 96824
AACLJ Internet Home Page: http://www.pixi.com/~itmc

November 14, 1996

TO: MEMBERS OF CONGRESS

Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington DC 20510-6275

House Judiciary Committee
2138 Rayburn House Bldg
Washington DC, 20515-6216

SUBJECT: Public Law 104-38. Commentary on the Department of Justice's report on charging and plea practices of federal prosecutors with respect to the offense of money laundering; Consistency and appropriateness in the use of the money laundering statutes. (Title 18 U.S.C Sections 1956 and 1957). Need to amend 18 U.S.C.§ 1956(a)(3) and Public Law 104-38.

Dear Members of Congress:

Reference is made to Public Law 104-38 and to the Department of Justice report regarding charging and plea practices of Federal prosecutors with respect to the offense of money laundering, a report which must include "an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute". The purpose of this letter is to comment on: (a) the inadequacy of the Department of Justice report in addressing the issues of the Congressional directive; (b) the continuing lack of centralized guidelines and policy regarding the offense of money laundering; (c) the frequent misapplication by federal prosecutors of 18 U.S.C.§ 1956(a)(3), the "sting" money laundering statute; (d) the perpetual abuses of the high sentencing levels of money laundering by federal prosecutors in coercing defendants into "plea-bargaining" submission; (e) the ongoing anomalous and disparate application of sentencing guidelines; and (f) the urgent need for Congressional clarification and amendments for constitutional application and interpretation of the money laundering laws.

Example of Improper Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money Laundering.

The above issues are best exemplified and partially documented by a case presently pending in the Supreme Court of the United States (see enclosed copy of Petition docketed as No. 96-5882). This specific case illustrates the clear abuse of the "sting" money laundering statute, 18 U.S.C.§ 1956(a)(3), by a federal prosecutor to target and convict Dr. George Pararas-Carayannis, a naturalized Greek-American and a prominent U.S. Government scientist whose work and contributions to international science for more than three decades have been widely recognized by United Nations organizations and the scientific community. The money laundering "sting" statute was abused in a unprecedented and novel way to stage and allege artificial "nexus" with his

government work for the additional purpose of discrediting him and removing him as Director of the International Tsunami Information Center (U.S. Department of Commerce/NOAA, under the auspices of the Intergovernmental Oceanographic Commission of UNESCO). The record shows that there was not on-going misconduct, "money laundering", or "nexus" with his work, to justify the abusive "sting" targeting of Dr. Pararas-Carayannis.

The repressive actions taken under the "color of law" of this "sting" statute, not only grossly violated his professional rights as a scientist, but also his internationally protected rights as a human being. Over a three year period prior to trial, Dr. Pararas-Carayannis refusals to be coerced into "plea bargaining" for a count of "his choice", resulted in other piecemeal, collateral, retaliatory and frivolous indictments (one of them in California) and two superseding indictments (in Hawaii). The legal bulldozing was aimed to torture him psychologically and destroy him financially so that he would not be able to defend himself on the tramped up charges (which would be subsequently dismissed). Shortly after trial, and as a result of this unprecedented torture and stress, Dr. Pararas-Carayannis suffered an acute and almost fatal heart attack requiring emergency heart surgery.

In order to get a conviction, the government prosecutor engaged in outrageous conduct violating the rules of evidence and procedure and distorting the evidence on record. Trial Court records show that the Government prosecutor, during trial and while the trial was in session, had government witnesses illegally remove the court's admitted videotape "evidence" from the courtroom to the hotel room of a government technician (also a witness) converted into an electronic laboratory. The court record shows that the videotape "evidence" had been "enhanced" electronically twice before trial. The jury was not allowed to hear the testimony and facts relating to charges of tampering or about the illegal removal of the evidence from the court by the federal prosecutor to a hotel room, during trial. The jury was permitted to view the tainted evidence. Thus, Dr. Pararas-Carayannis was improperly prosecuted, convicted and sentenced to 41 months of imprisonment with two additional years of probation for the "thought crime" of alleged "definitional money laundering", arrived at by inference and innuendo, and based on "definitional" underlying elements of a hypothetical, unrepresented, misdemeanor state offense which "needed not be proven" at trial. In spite of his dire health and failing heart, Dr. Pararas-Carayannis' sentence was enhanced from level 20 to level 22 for "obstruction of justice" because he insisted that the government prosecutor's conduct in removing illegally the evidence and testimony regarding the state of the evidence, be made known to the jury. Fifth and Sixth Amendment constitutional protections available to offenses of real money laundering were ignored by the courts in their interpretation of 18 U.S.C.§ 1956(a)(3) in this case, as not being applicable to hypothetical, "sting" money laundering. The courts ruled that one may be found guilty of a § 1956(a)(3) violation based on an underlying offense, which may be a state misdemeanor and which the government "need not represent" in a "sting" nor "prove" at trial as an element of the charged "money laundering" crime. Finally, the alleged amount of money "laundered" by Dr. Pararas-Carayannis was a few hundred dollars. To orchestrate this particular money laundering

"conviction", the government prosecutor wasted more than $3 million of taxpayers' money.

(a) Commentary on the Inadequacy of the Department of Justice Report.

The Department of Justice report submitted to Congress does not address the misapplications of the money laundering statutes nor the widely reported plea-bargain abuses by federal prosecutors. These are a matter of public record and have resulted in public outcry for legislative reforms and have prompted the Congressional inquiry. The report comments that *"the Department has instituted approval, consultation and reporting requirements which are designed to promote communication between the Department's Criminal Division and the prosecutors in the United States Attorneys Offices"* (p. 12). However, simple "promotion of communications", holding conferences, or publishing a newsletter, does not and cannot substitute for the Department's lack of centralized controls or guidelines, does not promote uniformity in the application of the money laundering statutes, and does not provide specific steps that need to be taken to assure proper charging and plea bargaining by government attorneys in the field. As the Department of Justice report shows (p.15), only in 9 cases approvals were sought. The report does not indicate how many cases were prosecuted by field prosecutors without any consultation with the Department.

Finally the report does not indicate what specific steps are being taken by the Department of Justice to assure that offense levels comport with the seriousness of a defendant's offense conduct or how unwarranted sentencing disparities can be prevented. The Department of Justice's proposed sentencing levels remain extremely high and differ significantly from those which were proposed by the U.S. Sentencing Commission and were based on a thorough three-year study.

(b) The Continuing Lack of Centralized Guidelines and Policy Regarding the Offense of Money Laundering.

The lack of centralized guidelines regarding the use of the money laundering laws, and 18 U.S.C.§ 1956(a)(3) in particular, is a matter of public record. It was emphasized again at recent public hearings of the U.S. Sentencing Commission. The Department of Justice report submitted to Congress makes it evident that no centralized controls or guidelines have been instituted yet by the Department on the use of this statute. Reference to 18 U.S.C.§ 1956(a)(3) in the report is limited to only a brief comment.

Under the Section entitled "Prosecutive Policies on Money Laundering" the Department of Justice report avoids any discussion on the use of 18 U.S.C.§ 1956(a)(3), the "sting" provision of the money laundering statutes, which is widely reported as being the most abused. The report does not acknowledge the existence of any Department of Justice guidelines in the use of this particular statute, specifically on how targets are selected for government "sting" investigations; on how government confidential informants are qualified, screened and monitored; on what is the effect of the statute on Fifth Amendment's injunction against self-incrimination; on how to safeguard against

abuses.

Without centralized controls the criminal justice process is continuously being undermined by the use of this easily proven criminal statute which in most cases is not connected with any organized crime activity or with organized drug activity. The public record and testimony at public hearings indicates that 94 separate policies continue to exist throughout the country with each U.S. Attorney deciding how this statute is going to be used or abused.

(c) Misapplication by Federal Prosecutors of 18 U.S.C.§ 1956(a)(3), the "Sting" Money Laundering Statute

Excessive charging and continuing abuses of the money laundering laws by government attorneys are a matter of public record. They have resulted in improper and excessive prosecutions depriving defendants of due process. The money laundering statutes, and 18 U.S.C.§ 1956(a)(3) in particular, the "sting" provision, are not being used always against drug traffickers or criminals as Congress intended. The statutes are used often to punish harshly ordinary citizens who neither had intent nor willfulness to break any laws, neither imagined that routine innocuous financial transactions, some of them fabricated by government attorneys in overzealous "sting" operations, could be construed and charged as "money laundering". Without proper and centralized guidelines, federal prosecutors have become indiscriminate in their "crackdown" characterizing many traditional, ordinary, routine, banking or business transactions as "structuring" or "money laundering".

The money laundering laws and 18 U.S.C. § 1956(a)(3) in particular, are rapidly becoming "instruments of oppression" in our country. For example, the "sting" money laundering statute allows government attorneys to fabricate in advance the "money laundering crime" and to direct every step of a "sting" money laundering operation to assure the success of the scheme. Misconduct with the handling of the fabricated evidence is often tolerated. Representation of the underlying offenses and Fifth Amendment due process and Sixth Amendment evidence requirements are routinely circumvented by government undercover agents in "sting" operations. Often, underlying offenses are unrepresented "definitional" misdemeanors allegedly committed only by a third party - the government undercover agents. Convictions are foregone conclusions and guaranteed by the low threshold of proof of this statute and the fabrication of the evidence. Elements of the "sting" money laundering crime "need not be proven" at trial. Government representation of the hypothetical, "definitional" underlying offenses can be claimed by inference or innuendo.

(d) Abuses by Federal Prosecutors of the High Sentencing Levels of Money Laundering in Coercing Defendants into "Plea-bargaining" Submission.

"Plea-bargain" practices of federal prosecutors for alleged money laundering offenses have been abusive. They have reached epidemic proportions in our country. The record and testimony

at public hearings strongly support the charges that the high sentencing levels of money laundering are frequently manipulated by federal prosecutors to coerce targeted defendants to "plea-bargain" rather than face the long prison sentences mandated by the present guidelines. Frequently, coercive practices of government attorneys include extreme collateral prosecutions, aimed to completely destroy or blackmail defendants to "plea-bargaining" submission. Defendants who refuse to "plea-bargain" are "legally" bulldozed and crushed. In essence, and through the abuse of the high sentencing levels of money laundering, "plea-bargaining" negotiations, have been become coercive threat negotiations. In some instances, as in in the example provided earlier, these practices are nothing less than human rights violations, in spite of their disguised facade of "due process".

(e) Anomalous and Disparate Application of Sentencing Guidelines.

In non-drug related cases, the Sentencing Guidelines are often improperly applied. Sentencing is often disparate, anomalous and far in excess of the alleged base underlying offense. Disparities in sentencing under 18 U.S.C. § 1956(a)(3) can be best illustrated by two recent 9th Circuit cases. ***United States v. Nelson***, 66 F.3d 1036, 1041 (9th Cir. 1995) and ***United States v. Pararas-Carayannis***, 1996 (unpublished, cited previously). Nelson was given a ten-month "split sentence" in the pre-release center in Great Falls, Montana, with five months in the custody component and five months in the pre-release component. In accordance to the same "guidelines", Pararas-Carayannis, was sentenced to a total of 65 months (41 months in prison with 24 months of supervisory release).

(f) The Need for Congressional Clarification and Amendments for Constitutional Application and Interpretation of § 1956(a)(3).

Prosecution of money laundering offenses, particularly through 18 U.S. Code, Sections 1956 and 1957 have produced sentences that are anomalous and which have undermined the uniformity Congress sought to achieve when it adopted sentencing guidelines. Frequently, our Criminal Justice System is being subverted by those who have the responsibility to uphold it - federal prosecutors. Improper application of the money laundering laws, excessive prosecutions and oppressive "plea-bargaining practices bring the law and the process into public disrepute. These are violations which should be of concern to Congress because they affect seriously substantial constitutional rights and fundamental fairness and justice. Congress and the courts should not forever tolerate the charging abuses. There is an urgent need to provide centralized controls and guidelines which will prevent perpetuation of prosecutorial abuses of the money laundering laws and the waste of taxpayers' money.

Congress has an obligation to clarify and amend the money laundering laws, and § 1956(a)(3) in particular, so that the laws can be properly and constitutionally applied, as Congress intended. We ask the Congressional Judiciary Committees to review the language of the money

laundering laws, and 18 U.S.C.§ 1956(a)(3) in particular, for the purpose of providing guidelines which will assure fundamental fairness and constitutional application of the money laundering statutes by government prosecutors.

Additionally, there is an urgent need to adjust the sentencing levels of money laundering offenses to comport with the seriousness of a defendant's underlying offense conduct. The underlying offense should be a relevant and an important factor in determining what penalties for money laundering one should receive, if convicted properly and with due process of the law. We urge the Judiciary Committees to revise, amend or repeal Public Law 104-38 because it contradicts the intent and spirit of the Sentencing Reform Act and seriously undermines the mandate and functions of the U.S. Sentencing Commission. The Commission's proposed sentencing amendments for money laundering offenses were the result of a three-year effort directly resulting from a continuous ongoing guideline review, in-house studies, public hearings, testimonies of experts, and a thorough and diligent revision process. Congress, as one of the fundamental goals of the Sentencing Reform Act, specifically directed the Commission to undertake this review of sentencing guidelines so that offense levels comport with the seriousness of a defendant's offense conduct and thus unwarranted sentencing disparities for similar offense conduct are avoided.

We ask Congress to uphold the Sentencing Reform Act, to support the amendments proposed by the U.S. Sentencing Commission in 1995, and to amend and clarify the money laundering statutes, particularly 18 U.S.C.§ 1956(a)(3) . Such amendments will eliminate the perpetuation of abuses and disparities made possible by the lack of centralized controls and by the present sentencing guidelines. If we are to survive as a democracy, we need laws that are constitutionally applied.

Thank you for your consideration and action on these important issues.

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE

Enclosures: Copy of Petition for a Writ of Certiorari to the Supreme Court of the United States, No. 96-5882.

cc:

Hon. Orrin Hatch,Chairman, Senate Judiciary Committee
Members of Senate Judiciary Committee

Hon. Henry Hyde, Chairman, House Judiciary Committee
Members of House Judiciary Committee

Hon. Alfonse D'Amato, Chairman, Senate Banking Committee
Members of Senate Banking Committee

Hon. Jim Leach, Chairman, House Banking Committee
Members of House Banking Committee

Hon. Newt Gingrich, Speaker of the House

U.S. Sentencing Commission
Judge Richard P. Conaboy, Chairman
Commissioner Michael S. Gelacak
Judge A. David Mazzone
Commissioner Wayne A. Budd,
Judge Julie E. Carnes
Commissioner Michael Goldsmith,
Judge Deanell R. Tacha,
Commissioner Edward F. Reilly, Jr.
Commissioner Jo Ann Harris
Members of Money Laundering Working Group, U.S. Sentencing Commission *

PLEASE CIRCULATE

Senator Daniel Inouye
Senator Daniel K. Akaka
Representative Neil Abercrombie
Representative Patsy Mink

Media: (Washington Post, New York Times, Boston Globe, Chicago Tribune, Detroit Free Press, San Francisco Chronicle, e.t. c.)

September 26, 1996

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

Dear Members of the U.S. Sentencing Commission:

This letter contains my comments, solicited from members of the public in your news release of July 22, 1996, on the issues of (1) departures and offender characteristics, (2) relevant conduct and acquitted conduct, and (3) simplification of the guidelines. My comments are based largely on insights gained during the following experiences.

I have been a student of federal sentencing during most of the years from 1969 to the present. As an assistant counsel to the U.S. Senate Subcommittee on Criminal Laws and Procedures in 1969 and 1970, I was one of the principal draftsmen of the Dangerous Special Offenders Sentencing provisions of the Organized Crime Control Act of 1970, and one of the principal draftsmen of the Senate Judiciary Committee's Report on those provisions.

For a period of time in the late 1960's, and for another in the early 1970's, I worked as a state prosecutor for one state and then another, and handled sentencings as well as other criminal

matters.

In 1977 and 1978, I returned to the Senate staff as Deputy Chief Counsel to the same subcommittee, and was deeply involved in processing the legislation that eventually was enacted in 1984 as the Sentencing Reform Act.

Shortly after that enactment, the Section of Criminal Justice of the American Bar Association created its Committee on Federal Sentencing Guidelines. I was named as one of the initial members of that ABA committee, and have remained an active member of the committee ever since then.

For most of the last 17 years, my teaching as a member of the full-time faculty of the Rutgers University Law School in Camden, New Jersey, has included a course in criminal procedure, in which I always spend considerable time on issues of sentencing procedure.

I want to make it absolutely clear, however, that this letter expresses only my views as a citizen. It does not purport to represent the views of any unit of Rutgers University, the ABA, or any other entity.

The three issues I shall address are interrelated, but for clarity my discussion of them below is organized in sections corresponding to topics mentioned in your news release.

I. Departures and offender characteristics

In the long run, the Guidelines should be radically revised to permit or require judges (1) to base sentences on offender characteristics that they now are forbidden to consider or strongly discouraged from considering, and (2) to give greater weight to

many offender characteristics judges currently are allowed to consider than the weight those characteristics now receive.

I say this should be done "in the long run," because probably it would not be practical to adopt such a radical change coomprehensively within the next year or two. On the other hand, it would not be wise to delay the change entirely for a period longer than that. The best course would be to try this change for a few selected categories of offenses and offenders, evaluate the results, and then make additional trials.

My principal concern is that the current Guidelines unduly forbid or minimize judges' reliance on offender characteristics that would justify greater severity of sentences, especially longer terms of imprisonment designed to incapacitate and to deter specifically and generally. However, my reasons for suggesting this change apply also to many offender characteristics that would justify more lenient sentences in some cases. My concern does extend also to the unwisdom of forbidding or minimizing reliance on mitigating facts about offenders.

The most basic reason for my recommendation is that the predominant purpose of criminal punishment should be to protect society from future crimes, through incapacitation, deterrence, and rehabilitation. The concept of "just deserts" should serve only to place a ceiling on the penalties used to serve the purpose of public protection.

Many of the facts that are most instructive, when a judge is selecting a sentence designed to protect the public, are facts

about the offender (other than facts about the crime or crimes for which he is now being sentenced). Such facts about the offender include other crimes or non-criminal, anti-social acts he has committed (whether he was convicted for them or not); his current motivations and skills; his past personal and economic experiences; and many other facts shedding light on his current and likely future character and personality, and thus on his future behavior.

Many federal judges have understood these things. Before 1987 many of them used crime prevention as the main purposes of their sentences. They relied heavily in selecting sentences on information about crimes of which an offender had not been convicted, on various kinds of information tending to show that another offender was unlikely to offend again, and on many other types of offender characteristics that the current Guidelines place off-limits or give only slight weight. The Guidelines should be revised to permit, and in many kinds of cases to require, that judges give great weight to many offender characteristics of various kinds.

It would be a red herring to respond that such a change would cause disparity in sentences. The word "disparity," when used to disparage differences in sentences, is always understood to mean <u>unjustified</u> differences. Furthermore, members of Congress and the Commission have often acknowledged that unjustified <u>parity</u> not only is as bad as unjustified disparity, but really is just a different manifestation of the same problems.

The most basic command Congress gave the Commission was to

devise Guidelines such that every sentence would be based on all the important facts about each offense and offender, in such a way that the sentence would serve the purposes of crime prevention and just punishment as well as possible in view of economic limitations. Under revised Guidelines such as I hope you will adopt, when important differences between two offenders cause them to receive different sentences for the same type of offense, there is no unjustified disparity.

Conversely, under the current Guidelines, when important differences between two offenders are ignored or given trivial weight, and consequently the two receive about the same sentences, there is unjustified parity. More importantly, one of the similar sentences fails adequately to prevent future crimes.

Research the Commission has done before promulgating the initial Guidelines, and its later research, have obscured the true incidence of both unjustified disparity and unjustified parity among sentences.

Before the first Guidelines, the Commission chose to focus its data collection and analysis only on hard sentencing variables, those that could be defined precisely and objectively and measured quantitatively. Soft variables were largely ignored, despite their great importance in explaining sentences actually imposed before the Guidelines. As a result, although the initial Guidelines purported to track past practices in most respects, in fact they treated similarly cases that judges wisely had been treating very differently.

After promulgation of the first set of Guidelines, the Commission has persisted in this error. Its data-gathering and analysis have focused almost exclusively on the few, artificially defined offense characteristics to which the Commission had unwisely confined the attention of sentencing judges. Since judges' discretion to depart from the Guidelines is limited and many of them seem timid about departing (especially upward), the data gathered have necessarily given the false impression that the Guidelines have caused almost universal sentencing parity.

The result is that the Commission has overstated the incidence of unjustified disparity that occurred before the Guidelines, and has both understated the incidence of unjustified parity and overstated that of justified parity after the Guidelines took effect. If all the important variables that judges formerly deemed important in sentencing were studied, both for the period before 1987 and for later cases, one would find that the Commission has brought about a very drastic change in the sentencing criteria on which federal sentences are based, and in the average time served for some kinds of offenders (and even for some kinds of crimes). This revolution was neither commanded by Congress, nor necessary to the reduction of unjustified disparity. On the contrary, the Commission's relentless course of demanding similar sentences for dissimilar cases has impaired the effectiveness of sentencing to prevent crime, without producing a substantial net improvement in real parity of sentences.

Without doubt, there were plenty of both unjustified disparity

and unjustified parity among federal sentences before 1987, for several reasons. There were no substantive standards for sentencing, not even general ones. There were almost no specified procedures. Judges did not have to give reasons for sentences. There was virtually no appellate review of sentences.

The drastic deficiency of that system and of the results it produced was not a good reason, though, for the Commission to build unjustified parity into the Guidelines by ascribing little or no significance to offender characteristics that shed light on the likelihood of future crimes. The Commission should begin expanding the power and duty of judges to rely on such facts.

Your news release coupled the issue of offender characteristics with that of judicial departures from the specific dictates of the Guidelines. In theory the two issues have no peculiar, intrinsic interrelationship. However, the current Guidelines' banishing or downplaying of many offender characteristics has created a practical interrelationship between these two issues, in the sense that departures are an escape valve by which a judge can in some circumstances try to ameliorate the Guidelines' deficient treatment of offender characteristics. If the Commission were to conclude, as I believe, that the current Guidelines unduly bar or restrict reliance on some important offender characteristics, the most cautious way to experiment with allowing wider and heavier reliance on whem would be for the Commission expressly to invite or even encourage specified kinds of departures in this area.

Even if the Commission does so, it would be advisable also to select some kinds of offenses and some kinds of offenders as to which the Guidelines themselves would provide for weighty reliance on certain offender characteristics that the current Guidelines give little or no significance. More would be learned from an experiment with both techniques than with only the former, especially since many judges seem loath to depart, especially upward.

II. Relevant conduct and acquitted conduct

I realize that the phrases by which you identified these issues in your news release, such as "relevant conduct," are in wide usage in this connection. Similarly, it is common to link the phrase "relevant conduct" with the phrase "real offense sentencing," as you did in the Federal Register vol. 60, no. 184, p. 49317, Sep. 22, 1995. However, I have long considered use of such phrases confusing and even misleading, for the following reasons.

All can agree that sentences should be based only on relevant facts, not irrelevant ones. Likewise all agree that, among the facts relevant to sentencing, some are best described as facts about the offense or offenses for which this sentence is to be imposed, while the other facts are best described as facts about the offender. Thus, there are relevant offense characteristics and relevant offender characterics, both of which should be considered, while irrelevant offense and offender characteristics should be disregarded.

However, the relevant offense and offender characteristics are not all facts about the conduct of the offender and his accomplices. This is true even when we examine only relevant offense characteristics. For example, some of these are facts about the offender's state of mind at the time that he or an accomplice engaged in a particular bit of conduct that is one element of the offense. Others are facts about the results of certain conduct, or about the circumstances existing at the time of certain conduct. Thus, even as to offense characteristics, the phrase "relevant conduct" is misleading.

The point is even plainer when we examine relevant offender characteristics. Some of these, such as prior convictions, are amalgams of prior conduct, states of mind, circumstances, and results. Others, such as an offender's traits of character and personality, are not facts about his conduct at all, but facts inferred from various sources including his conduct, his utterances, and things that others have done to him.

The current Guideline entitled "Relevant Conduct," section 1B1.3, covers not only conduct, but also resulting harm, "any other information specified in the applicable guideline," and "the conduct and information specified in the respective guidelines." The latter phrases cover numerous and various provisions, many of which describe mental states, circumstances, and results, rather than conduct.

The real function of section 1B1.3, beyond merely cross-referencing other Guidelines, is to prescribe the extent to which

offenders will be held responsible at sentencing for the conduct of others and for resulting harms. This function is much narrower than the title "Relevant Conduct" suggests. More importantly, section 1B1.3 barely scratches the surface of the issues encompassed by the idea of "real offense sentencing," as the Commission discusses it in Chapter 1 Part A.4.(a) of the current Guidelines.

I therefore would like to suggest different terms in which to frame the issues that people usually have in mind when they use phrases such as "relevant conduct," "acquitted conduct," and "real offense sentencing." The essential concerns regarding these issues are procedural. That is, on what kinds of evidence should a finding be based that certain alleged facts are true, when a sentencing court will rely on the finding? How heavy a burden of persuasion should the proponent of the finding carry, and otherwise what procedures should be used to make the finding? Whatever the answers are to those questios, is there unfairness in letting the government propose such a finding where the offender previously obtained an acquittal in a case where the government alleged the same or similar facts?

Terms such as "relevant conduct" are misleading ways in which to refer to these procedural issues, because the same procedural concerns should be raised not only when the facts to be found are covered by the "relevant conduct" guideline (e.g., acts committed by the offender during the offense of the current conviction (sec. 1B1.3), but also when the facts to be found are facts about

offender characteristics. Under the current Guidelines, for example, they might be facts (a) about other crimes of the offender (e.g., the offender's prior similar crimes not resulting in conviction, sec. 4A1.3(e)), (b) about the offender's lack of legitimate economic resources (e.g., his dependence on criminal activity for a livelihood, sec. 5H1.9), or (c) about his mental and emotional condition (sec. 5H1.3).

Consequently, one should not refer to this as an issue of "relevant conduct." This phrase would not be apt unless expanded to cover various other kinds of facts, e.g., "relevant harms." Nor should one refer to it as an issue of "real offense" sentencing. This phrase would likewise have to be expanded to cover the analogous question of "real offender" sentencing: should we, for procedural reasons, make judges close their eyes to some facts about the offender that bear on the risk of his offending again?

Instead of using these misleading phrases, one should simply address this topic as a set of interrelated issues in the law of sentencing procedure. There are constitutional limits, and within such limits these issues of procedure should be resolved as a matter of policy.

Discussion of these issues of policy and of constitutional law is impeded by use of misleading phrases such as "relevant conduct" and "real offense sentencing." The persons who initially chose these phrases apparently believed in the implicit premise they convey: that the sole or dominant purpose of sentencing is to give offenders their "just deserts," that is, sentences designed

entirely to be proportional to the specific crimes for which they are being sentenced. However, the premise that "just deserts" are the purpose of sentencing is unsound, as Congress, judges, and most experts have recognized for most of American history. I shall explain below why the premise is unsound. For now, it suffices to observe that, for those who view the primary purpose of sentencing as prevention of future crimes, phrases such as "relevant conduct" and "real offense sentencing" impede rational discussion of issues of sentencing procedure.

The discussion is facilitated when the procedural issues are identified more precisely: What kinds of evidence should be usable? What burdens of production of evidence and of persuasion should each party bear? What other procedures should be used? Are crimes of which an offender was previously acquitted a special case for these purposes? What does the Constitution require on each point?

The proper starting place to address these issues is recognition of the functions of procedural rules. In the context of sentencing, there are two principal functions.

First, the procedures should strike a wise balance between (a) reducing the risk of error by using thorough, careful procedures, on the one hand, and (b) reducing delay and expense by using simple, informal procedures, on the other hand. The most important factor in striking this balance is that federal sentencing is done by judges, not juries. Federal judges generally are good at evaluating evidence and applying imformal procedures in a sensible

and fair manner. For that reason, it has been wise for Congress and the courts to conclude, as they always have, that the rules of evidence applicable in trials should not govern sentencing, and that simple, informal procedures are wise.

The second principal function of rules of sentencing procedure is to allocate the risk of error between the parties. Since errors will certainly occur under any set of procedures, the procedures should wisely allocate the risk of such errors as between the parties.

The most important factor in allocating the risk of error is that (a) errors in favor of the offender typically increase the danger of future crimes by him and by other prospective offenders, due to inadequate incapacitation and deterrence, while (b) errors in favor of the prosecution typically increase the punishment of an offender above the optimal level, i.e., the level that best achieves crime prevention while limiting the economic costs of punishment and preventing greater punishment than is fair to the offender.

Sentencing procedures should be designed to place most of the risk of error on the offender, rather than on the public. After all, this problem of allocating the risk of error in sentencing would never have arisen but for the offender's admitted or already proven criminal behavior. His presumption of innocence has been waived or rebutted. The current Guidelines unwisely refer to him as the "defendant," a term that ignores the crucial change in his status when he pled or was found guilty. That misleading