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# UNITED STATES SENTENCING COMMISSION

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## WITNESS TESTIMONY

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### PUBLIC HEARING ON PROPOSED GUIDELINES AMENDMENTS

MARCH 22, 1993

VOLUME I

**United States Sentencing Commission**  
**Public Hearing on Proposed Guideline Amendments**  
**March 22, 1993**

1. 9:00 a.m. Don Bergerson  
Barry Dumont
2. 9:15 a.m. K.M. Hearst  
U.S. Postal Inspection Service
3. 9:30 a.m. Judge Vincent Broderick  
Judge Mark Wolf  
Judicial Conference of the United States
4. 9:45 a.m. Thomas Guidoboni  
David W. O'Brien
5. 10:00 a.m. Carol Brook  
Federal Defenders
6. 10:15 a.m. Rabbi Moshe C. Horn  
Aleph Institute
7. 10:30 a.m. Donald E. Santarelli  
Steve Salky  
American Bar Association
- 10:45 a.m. Break
8. 11:15 a.m. Stephen R. LaCheen  
Pennsylvania Association of Criminal Defense Lawyers
9. 11:30 a.m. Michael P. Dolan  
Internal Revenue Service
10. 11:45 a.m. Alan Chaset  
National Association of Criminal Defense Lawyers
11. 12:00 p.m. Santina Bayerle
12. 12:15 p.m. Eric Sterling  
Criminal Justice Policy Foundation
- 12:30 p.m. LUNCH

13. 1:30 p.m. Roger Pauley  
Department of Justice
14. 1:45 p.m. James M. Becker  
Criminal Law Committee, Federal Bar Association
15. 2:00 p.m. John Beresford
16. 2:15 p.m. Gene Brown  
Faye Flanagan  
Douglas Thrasher  
Denise Helou  
Marlene Miller
17. 2:30 p.m. Julie Stewart  
Families Against Mandatory Minimums
18. 2:45 p.m. Nkechi Taifa  
American Civil Liberties Union
- 3:00 p.m. Break
19. 3:15 p.m. Michael Stepanian  
Drug Policy Foundation
20. 3:30 p.m. David Overlock Stewart  
Ropes & Gray
21. 3:45 p.m. Chuck Morley  
The Morley Group
22. 4:00 p.m. Mary Shilton  
International Association of Residential and Community  
Alternatives
23. 4:15 p.m. John Zwierling  
National Organization for the Reform of Marijuana Laws
24. 4:30 p.m. Paul B. Bergman  
New York Council of Defense Lawyers
25. 4:45 p.m. Ed Rosenthal





10 General

Before the

**UNITED STATES SENTENCING COMMISSION**

*In re Proposed Amendments to the  
United States Sentencing Guidelines*

**STATEMENT OF DONALD THOMAS BERGERSON**

In Support of Proposed Amendment Number 50  
(LSD Sentencing)

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2431 Fillmore Street  
San Francisco, California, 94115  
Telephone: (415) 621-8149

# UNITED STATES SENTENCING COMMISSION

--oo00oo--

*In re: Proposed Amendments to U.S. Sentencing Guidelines*

## STATEMENT OF DONALD THOMAS BERGERSON

In Support of Proposed Amendment Number 50  
(LSD Sentencing)

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TO: THIS HONORABLE COMMISSION and INTERESTED PARTIES:

I am Donald Thomas Bergerson. I am an attorney in San Francisco, California. I was counsel for one of the litigants in *Chapman v. United States* 500 U.S. \_\_\_, 114 L.Ed.2d 524 (1991), discussed below. This is written testimony in support of proposed amendment 50 to the Sentencing Guidelines. The proposed amendment will ameliorate the impact of language in the statute and the Guidelines which has led to unjust results in *Chapman* and in all other cases involving LSD.

In this statement, I shall outline (1) the background of the issue; (2) criticisms of the current "carrier weight based sentencing" scheme in the Guidelines; and (3) some thoughts about why modification of the Guidelines is a valid interim solution even though Congress has not yet acted to ameliorate the underlying problem.

### I Background

As the Commission is aware, drug offenders are generally sentenced on the basis of the weight of the "mixture or substance containing" the drug. Although some drugs are *also* penalized in

their pure form, this "mixture or substance" language was inserted into each statutory subsection specifying the quantity of drugs which trigger a given penalty.

In *Chapman v. United States, supra*, 500 U.S. \_\_\_, the Supreme Court held that absorbant paper containing minute quantities of LSD constitutes a "mixture or substance containing LSD" for sentencing purposes. Most LSD trafficking involves this technique of placing LSD on paper.

*Chapman* reached its result by using a broad "dictionary" definition of the word "mixture." This approach was misleading because LSD does not, in fact, "mix" with blotter paper in any scientific sense. See, Testimony in *U.S.A. vs. Forbes, et. al.*, (NDCA CR-91-0087-VRW (LSD is attracted to the surface of the paper by a process akin to static electricity, but does not "mix" with its fibers). More importantly for purposes of this Commission, the *Chapman* definition of "mixture" appears to vary from the Congressional intent underlying the incorporation of that word into the relevant statute. The House report accompanying the legislation states that the word was used to target dealers who adultrate drugs with 'cut' or 'filler' in order to increase the apparent volume of contraband, and thereby boost their profits<sup>1</sup>. While weighing the 'cut' is an appropriate technique to discourage trafficking in drugs that are sold by weight, LSD is not sold by the weight of the mixture containing it; rather, it is sold by the dose.

The absorbant paper used in LSD trafficking fills a completely different role from that played by the 'cut' in heroin or cocaine dealing. A dose of LSD is an infinitesimally small droplet of stuff, typically weighing a mere fifty *millionths* of a gram. This is too tiny a measure to be handled by either the user or the seller. To be handled, a dose of LSD must be placed onto something considerably larger than the dose, itself. In the 1960s, a variety of materials, (most commonly, tablets or sugar cubes), were used for this purpose; more recently, sheets of gelatin or paper have been employed. The typical LSD consumer is not "fooled" by the size of the tablet or paper into thinking he has bought "more" LSD merely because he has bought a bigger tablet or a heavier piece of paper. No matter how big the carrier may be, the size of the dose of LSD, and its

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1. See, H.R. Rep. 98-845 at pp. 11-12 (1986)



price<sup>2</sup>, is unaffected<sup>3</sup>.

## II The Problem

Weighing paper *does*, however, impact drastically on LSD sentences. Because LSD is so light, *any* carrier is far heavier than the drug. As such, weighing the carrier greatly increases the weight of the "LSD" for sentencing purposes. For example, in one of the cases considered along with *Chapman*, the LSD weighed only six tenths of a gram, while the paper weighed over a hundred grams. This is the difference between a level 22 and a level 36 sentence,--a difference of some twelve and one half years at the lowest end of each respective Guidelines range<sup>4</sup>. [*United States v. Marshall* 908 F.2d 1312 (7 Cir., 1990) *aff'd* sub. nom., *Chapman v. United States*, *supra*, 500 U.S.

— This yields sentences in typical LSD cases which are *hundreds* of times more severe than are sentences for other drugs. Ironically, this is the result of an apparent effort by Congress to place drug

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2. According to the National Narcotics Intelligence Consumers Commission, Report 1988: The Supply of Illicit Drugs to the United States 52 (1989), the price of LSD is as little as thirty-five cents per dose. As indicated hereafter, this means that first offender can get five years in prison for \$75.00 worth of LSD if sentenced according to carrier-weight-based sentencing.

3. I recognize that arguing the difference between carrier and 'cut' may "prove too much." Arguably, LSD carriers are more integral to LSD dealing than 'cuts' are in heroin or cocaine trafficking, since the latter drugs could, as a practical matter, still be sold even if in pure form while LSD cannot.

A distinction must be drawn between the importance of the carrier in LSD trafficking and the appropriateness of weighing the carrier in determining the LSD sentence. No doubt, money is also essential to LSD trafficking (and the value of the transaction is a good indication of its size); however, one would not think of weighing the currency involved in a dope deal, lest the kingpin who was paid in thousand dollar bills get a lesser sentence than a similar dealer who accepts payment in twenties. It can be argued that carriers are properly targeted in LSD cases because wiping them out would eliminate the traffic. But this argument can be made with regard to other paraphernalia, e.g. syringes in the heroin trade, which no one would rationally think of weighing in order to determine the quantity of the drug involved in the transaction.

4. The distortion is magnified when other carriers are used. For example, sugar cubes, another LSD carrier, weigh approximately 2 grams apiece; as such, trafficking in a mere five doses of LSD on sugar cubes will trigger the ten year mandatory minimum for trafficking in over ten grams of LSD. 21 USC 841(b)(1)(A)(v) See, *Chapman*, *supra*, 114 L.Ed.2d at 533, fn 2.

penalties in parity with each other. For example, the basic anti-drug statute, 21 USC 841(b), imposes a five year minimum sentence for selling a mixture containing 100 grams of heroin or 500 grams of cocaine; according to the relevant authorities<sup>5</sup>, each of these amounts corresponds to something in the neighborhood of 20,000 doses of each respective drug. For LSD, the five year minimum is triggered at 1 gram. Not surprisingly, a gram of *pure* LSD yields 20,000 doses (at 0.00005 grams per dose), putting LSD right in line with heroin and cocaine. However, when paper is factored in, these equivalencies are skewed wildly; Chapman's 1,000 doses weighed 5.7 grams<sup>6</sup>, meaning that Chapman crossed the 1 gram threshold with less than 200 doses; Chapman's punishment was thus one hundred times greater than that which would have been meted out to a trafficker in heroin or cocaine. Nor is Chapman's a unique case; in his dissent, Justice Stevens pointed out that this problem plagues *all* LSD cases. *Chapman*, 500 U.S. at \_\_\_, 114 L.Ed.2d at 543, fn. 10, Stevens, J., dissenting.

Indeed, Chapman's case was 'unusual' only in that he trafficked in extremely *light* paper. This leads to a second troubling paradox in LSD cases; since not all paper weighs the same, bigger dealers sometimes get lesser sentences merely because they use lighter paper. The paper used by trafficker who sold under 500 doses of LSD in *United States v. Rose* 881 F.2d 386 (7 Cir., 1989) weighed .0154 grams per dose. Although Chapman trafficked in over twice the number of doses as did Rose, his anticipated Guidelines sentence (level 28) would have been *less* than that for Rose (level 30), had Rose been sentenced under the Guidelines. In other words, carrier-weight-based sentencing yields a skewed schedule of penalties amongst traffickers in identical amounts of LSD.

A third problem created by the carrier-weight-based sentencing scheme is that the gossamer weight of the LSD, itself, has virtually no impact on the ultimate sentence. As a practical matter, this means that some large dealers in pure LSD are escaping punishment altogether. To supply just one anecdote, just after I did the *Chapman* case, I handled an LSD arrest in San Francisco involving three

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5. Platt, Heroin Addiction: Theory, Research, and Treatment 50 (2d Ed., 1988); Scott, Diamorphine 63, 98, (1988); Washton, Cocaine Addiction: Treatment, Recovery, and Relapse Prevention 18 (1989); Cocaine Use in America: Epidemiologic and Clinical Perspectives, 214 (Kozel & Adams, Eds., NIDA Pamphlet No. 61, 1985).

6. Marshall, *supra*, 908 F.2d at 1316, fn. 1.

grams of pure LSD. Although this fell within the five year mandatory minimum, it was deemed to be too small for prosecution in the Federal court, so the primary defendant in the case was prosecuted in state Court, where he ended up with only a probationary sentence. This defendant, who trafficked in six times the quantity of LSD that fetched the defendant a twenty year sentence in *Marshall*, was *obviously* a fairly large dealer, since three grams of crystal LSD suggests access to an actual LSD laboratory. Yet, because of carrier-weight-based sentencing, he escaped with only a minor penalty.

Carrier-weight-based sentencing produces all sorts of similarly silly results. For example, if an LSD dealer manages to dispose of his LSD, (either by selling it or destroying it prior to his arrest), he will be sentenced only for the weight of a 'typical' dose of *pure* LSD. (U.S.S.G. 2D1.1, *Commentary* 11) Carrier-weight-based sentencing affords *this* offender a massive "break" for either inserting LSD into the stream of commerce (the very thing the drug laws are supposed to prevent) or for obstructing justice.

Beyond its implications for LSD offenders, carrier-weight-based sentencing threatens to impact adversely on the deployment of enforcement resources in an era of shrinking budgets. The typical LSD dealer, particularly the modest trafficker in hundreds of doses such as Chapman, is a young person from a sheltered background who has temporarily embarked on a period of 'hippie-style' experimentation. Naive and passive, he presents an easy 'mark' for enforcement officers, and carrier-weight-based sentencing inflates the value of the small quantities seized from him. No wonder LSD arrests have increased during the period since *Chapman*; the 'value' of LSD arrests is 'subsidized' by carrier-weight-based sentencing. It is questionable that this reflects the intent of Congress; when the antidrug amendments were debated in 1986, the only reference made to LSD was a statement to the effect that its menace was *diminishing*<sup>7</sup>. At any rate, it is hard to defend the targeting of LSD dealers as a rational enforcement priority.

In short, LSD sentencing is a mess. No one believes that LSD is a more dangerous drug than heroin or cocaine. Yet LSD sentences are roughly a hundred times greater than those assessed for more dangerous drugs, and vary wildly amongst LSD offenders, themselves on the basis of a wholly aleatory factor.

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7. See, 132 Cong. Rec. S14270 (9/30/1986; Sen. Harkin).

### III What This Commission Should Do,--and Why

I realize that however compelling the foregoing arguments may be, this Commission may be hesitant to act. Congress has, after all, thus far not amended the sentencing statute in response to *Chapman*, and a primary purpose of the Guidelines is to implement the statute. For reasons as follow, however, I believe that such concerns are misplaced.

First, nothing in this Commission's charter compels it to amplify Congress' mistake and continue to base punishment to the weight of LSD carriers. While this Commission is not empowered to enact remedial legislation, it can use its Guidelines-shaping power to ameliorate palpable injustices within the bounds of the existing mandatory minimum penalties provided by statute.

Second, by doing nothing, the Commission will in fact countenance a dismantling of sentencing uniformity in LSD cases *anyway*. It is an open secret that only a fraction of LSD sentences are Guidelines-sentences; a large remainder (which may, for all I know, constitute the majority) are mandatory minimum sentences imposed by judges who think carrier-weight-based sentencing to be foolish and Draconian. This perverts and undermines the basic principal of determinate sentencing. One first offender may get twenty years under the Guidelines for 10,000 doses, while another, in front of a different judge, may get a mandatory minimum half as long; I have no question that were the respective defendants to change judges, they would change penalties. I suppose that this happens, to a degree, with many types of crimes. But I suspect that it is a particularly troubling artifact in LSD cases, not only because the sentences in *both* types of cases are disproportionately long, but because sentence-selection is so nakedly tied to the judge's agreement or disagreement with the substantive law,--which *surely* was the one factor we hoped to eliminate with the passage of determinate sentencing.

Third, this Commission is vested with broad duties beyond merely constructing a sentencing table based on mandatory minima. Specifically, this Commission is charged with insuring that penal resources are efficiently allocated. 28 USC 994(c)(1)-(7). I have suggested *ante* that carrier-weight-based sentencing inefficiently focuses scarce enforcement resources on making fairly modest LSD seizures. This Commission is clearly empowered to eliminate such waste.

Finally, action by this Commission in the absence of previous Congressional action would have the salutary impact of *inspiring* such Congressional action. The Supreme Court has recognized that this is an "expert body," [*Mistretta v. United States* 488 U.S. 361, 379

(1989)], endowed with "significant discretion to determine which crimes have been punished ... too severely." *Id.*, at 377. This Commission is chartered with a host of duties ancillary to the exercise of this discretion, including revising inappropriate Guidelines, [28 USC section 994(o)]; recommending changes in statutory penalties, [28 USC section 994(r)]; issuing policy statements aimed at implementing its perception of the intent of Congress in passing criminal legislation, [28 USC section 994(a)]; and assisting the Federal judiciary in meeting its sentencing responsibilities, [28 USC section 995(a)(22)]. In light of these multiple founts of authority, this Commission should not hesitate to declare that LSD is punished disproportionately. If Congress disagrees, it will override the instant amendment to the Guideline. If it *agrees*, however, this Commission can credit itself with goading Congress towards a long overdue reform.

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I cannot close without making a personal comment. The reason I became involved in the *Chapman* case is that it arose out of a Seventh Circuit case involving my wife's brother. *United States v. Marshall, supra*, 908 F.2d 1312.

Stanley Marshall was a National Merit finalist and High School debate star who lost his bearings when his mother died unexpectedly. For years, he lived aimlessly. He tried LSD during this period, and I guess he liked it. Sometime in 1988, he was arrested for a first felony offense of having sold a few thousand dollars worth of LSD over several months.

Stanley was not a kingpin. He sold the LSD because he was homeless and his girlfriend was pregnant. Despite this, he got the sort of sentence traditionally reserved for a dealer like Manuel Noriega.

I was glad that Stanley was sentenced to prison. Prison sobered him and restored his mind. He learned to get up in the morning and eat regularly. He took a job, and he tells me he likes to work. Even so, I felt Stanley was ready to go home after two years; he had recovered sufficiently to get a *real* job and start a family. But he can't go home. He must still serve at least twelve more years of his twenty year sentence.

I need not tell the Commission how sad this is, not only for Stanley, but for the daughter he will never get to raise, and for my wife, and my children who love their uncle with his playful wit and foolish smile. Obviously, I miss him too.

If one of you can think of a reason why Stanley should serve twelve more years, please tell me. But I hope it is more compelling

than that he stored his drugs on a quantity of paper only a little heavier than the pamphlet you are now holding in your hands.

*Respectfully Submitted:*

DONALD THOMAS BERGERSON  
2431 Fillmore Street  
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**I**

**Background**

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their pure form, this "mixture or substance" language was inserted into each statutory subsection specifying the quantity of drugs which trigger a given penalty.

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### III

#### What This Commission Should Do,--and Why

I realize that however compelling the foregoing arguments may be, this Commission may be hesitant to act. Congress has, after all, thus far not amended the sentencing statute in response to *Chapman*, and a primary purpose of the Guidelines is to implement the statute. For reasons as follow, however, I believe that such concerns are misplaced.

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Third, this Commission is vested with broad duties beyond merely constructing a sentencing table based on mandatory minima. Specifically, this Commission is charged with insuring that penal resources are efficiently allocated. 28 USC 994(c)(1)-(7). I have suggested *ante* that carrier-weight-based sentencing inefficiently focuses scarce enforcement resources on making fairly modest LSD seizures. This Commission is clearly empowered to eliminate such waste.

Finally, action by this Commission in the absence of previous Congressional action would have the salutary impact of *inspiring* such Congressional action. The Supreme Court has recognized that this is an "expert body," [*Mistretta v. United States* 488 U.S. 361, 379

(1989)], endowed with "significant discretion to determine which crimes have been punished ... too severely." *Id.*, at 377. This Commission is chartered with a host of duties ancillary to the exercise of this discretion, including revising inappropriate Guidelines, [28 USC section 994(o)]; recommending changes in statutory penalties, [28 USC section 994(r)]; issuing policy statements aimed at implementing its perception of the intent of Congress in passing criminal legislation, [28 USC section 994(a)]; and assisting the Federal judiciary in meeting its sentencing responsibilities, [28 USC section 995(a)(22)]. In light of these multiple founts of authority, this Commission should not hesitate to declare that LSD is punished disproportionately. If Congress disagrees, it will override the instant amendment to the Guideline. If it *agrees*, however, this Commission can credit itself with goading Congress towards a long overdue reform.

--oo00oo--

I cannot close without making a personal comment. The reason I became involved in the *Chapman* case is that it arose out of a Seventh Circuit case involving my wife's brother. *United States v. Marshall, supra*, 908 F.2d 1312.

Stanley Marshall was a National Merit finalist and High School debate star who lost his bearings when his mother died unexpectedly. For years, he lived aimlessly. He tried LSD during this period, and I guess he liked it. Sometime in 1988, he was arrested for a first felony offense of having sold a few thousand dollars worth of LSD over several months.

Stanley was not a kingpin. He sold the LSD because he was homeless and his girlfriend was pregnant. Despite this, he got the sort of sentence traditionally reserved for a dealer like Manuel Noriega.

I was glad that Stanley was sentenced to prison. Prison sobered him and restored his mind. He learned to get up in the morning and eat regularly. He took a job, and he tells me he likes to work. Even so, I felt Stanley was ready to go home after two years; he had recovered sufficiently to get a *real* job and start a family. But he can't go home. He must still serve at least twelve more years of his twenty year sentence.

I need not tell the Commission how sad this is, not only for Stanley, but for the daughter he will never get to raise, and for my wife, and my children who love their uncle with his playful wit and foolish smile. Obviously, I miss him too.

If one of you can think of a reason why Stanley should serve twelve more years, please tell me. But I hope it is more compelling

than that he stored his drugs on a quantity of paper only a little heavier than the pamphlet you are now holding in your hands.

*Respectfully Submitted:*

DONALD THOMAS BERGERSON  
2431 Fillmore Street  
San Francisco, California, 94115  
Telephone: (415) 621-8149







**WRITTEN TESTIMONY OF K. M. HEARST**  
**DEPUTY CHIEF INSPECTOR**  
**UNITED STATES POSTAL INSPECTION SERVICE**  
**BEFORE THE**  
**UNITED STATES SENTENCING COMMISSION**  
**MARCH 22, 1993**

I AM K. M. HEARST, DEPUTY CHIEF INSPECTOR FOR CRIMINAL INVESTIGATIONS, UNITED STATES POSTAL INSPECTION SERVICE. I AM JOINED BY H. J. BAUMAN, COUNSEL.

I WANT TO THANK THE COMMISSION FOR THE OPPORTUNITY TO TESTIFY ON SEVERAL ISSUES OF INTEREST FOR THE POSTAL SERVICE. THE POSTAL SERVICE SUBMITTED FOUR AMENDMENTS TO THE COMMISSION. OUR FORMAL WRITTEN COMMENTS ON THESE PROPOSALS HAVE PREVIOUSLY BEEN SUBMITTED AND I WILL BRIEFLY SUMMARIZE THOSE COMMENTS.

WE ASK THE COMMISSION TO CONSIDER THE UNIQUE CHARACTER OF UNITED STATES MAIL AS THE CARRIER OF THE NATIONS CORRESPONDENCE, AND THE EFFECT OF MAIL THEFT CRIMES ON THE PUBLIC, AS IT CONSIDERS THESE PROPOSED AMENDMENTS. WE HAVE SEEN A CONTINUING INCREASE IN THE OVERALL VOLUME THEFTS OF MAIL. FOR EXAMPLE, MAIL THEFTS INCREASED OVER FIFTEEN PERCENT LAST YEAR. MORE SIGNIFICANTLY, VOLUME THEFT ATTACKS ATTRIBUTED TO POSTAL VEHICLE BREAK-INS, LETTER CARRIER CARTS/SATCHELS, AND MAIL STORAGE BOXES HAVE INCREASED SIXTY-ONE PERCENT WHEN COMPARED TO THE SAME PERIOD LAST YEAR. IN THESE CRIMES, NUMEROUS PIECES OF MAIL ARE TAKEN IN ONE CRIMINAL ACT, AND THE SAFETY OF POSTAL LETTER CARRIERS IS JEOPARDIZED. WHEN THEFT OF MAIL OCCURS, NOT ONLY ARE THE

CITIZENS WHO SEND OR RECEIVE MAIL VICTIMIZED, BUT ALSO THE POSTAL SERVICE, BECAUSE IT IS AN ATTACK ON AN ESSENTIAL GOVERNMENTAL SERVICE PROVIDED TO AMERICAN CITIZENS.

THE UNITED STATES MAIL HAS HISTORICALLY BEEN THE CARRIER OF THE "PUBLIC'S PAPERS." DUE TO THE EXPECTATION OF PERSONAL PRIVACY AMERICAN CITIZENS HAVE IN THEIR CORRESPONDENCE ENTRUSTED TO THE CARE AND CUSTODY OF THE POSTAL SERVICE, MAIL IN OUR CUSTODY, UNLIKE DOCUMENTS IN THE POSSESSION OF A COMMON CARRIER, IS PROTECTED BY THE FOURTH AMENDMENT.

TWO OF THE FOUR GUIDELINE AMENDMENTS ARE IN THE AREA OF MAIL THEFT. THE FIRST AMENDMENT WOULD INCREASE THE LEVEL FOR MAIL THEFT TWO LEVELS, IN ADDITION TO LEVELS ADDED FOR THE DOLLAR LOSS. WE BELIEVE THIS INCREASE IN THE LEVEL MORE PROPERLY REFLECTS THE HARM CAUSED BY THE MAIL THEFT IN GENERAL.

OUR SECOND AMENDMENT DEALS WITH THE RELATED ISSUE OF SCHEMES TO STEAL LARGE QUANTITIES OF MAIL. OUR EXPERIENCE HAS SHOWN THAT THESE CRIMES ARE OFTEN COMMITTED BY ORGANIZED CRIME ORGANIZATIONS OR GANGS. LARGE VOLUMES OF MAIL ARE STOLEN IN

ORDER TO INSURE THE THIEVES OBTAIN MAIL WHICH CONTAINS ITEMS OF VALUE, SUCH AS CREDIT CARDS AND WELFARE OR SOCIAL SECURITY CHECKS WHICH ARE THEN FRAUDULENTLY NEGOTIATED OR USED. WHILE MANY MAIL THEFT CRIMES ARE OFTEN CRIMES OF OPPORTUNITY, THESE OFFENSES, WHICH ARE THE PRODUCT OF PLANNING AND SURVEILLANCE BY CRIMINALS, ARE EVEN MORE SERIOUS AND DISRUPTIVE. THEY IMPACT THE ECONOMIC WELL BEING OF NUMEROUS VICTIMS AND CAUSE A MAJOR DISRUPTION TO OUR POSTAL SYSTEM. IN THIS REGARD, WE HAVE PROPOSED A NEW GUIDELINE WHICH WOULD SIGNIFICANTLY INCREASE THE OFFENSE LEVEL FOR SCHEMES INVOLVING THE THEFT OF MULTIPLE PIECES OF MAIL.

THIS LEADS TO OUR NEXT AMENDMENT ISSUE WHICH IS OF SPECIAL IMPORTANCE -- THE PUBLIC TRUST GUIDELINE -- AS APPLIED TO EMPLOYEES OF THE POSTAL SERVICE. AS YOU ARE AWARE, THERE ARE TWO PROPOSED AMENDMENTS ON THIS GUIDELINE PENDING BEFORE THE COMMISSION. OUR PROPOSAL WOULD PLACE LANGUAGE IN THE GUIDELINE COMMENTARY WHICH WOULD CLARIFY THAT A POSTAL EMPLOYEE, BY VIRTUE OF THE SPECIAL FIDUCIARY POSITION WITH THE AMERICAN PEOPLE AND THEIR CORRESPONDENCE, SHOULD BE SUBJECT TO THE ENHANCEMENT PROVIDED IN THE GUIDELINE. IT IS OUR STRONG FEELING THAT THE FEDERAL CRIMINAL STATUTES

APPLICABLE EXCLUSIVELY TO OFFICERS AND EMPLOYEES OF THE POSTAL SERVICE, WHICH HAVE BEEN IN PLACE FOR OVER ONE HUNDRED YEARS, DISTINGUISH THEIR POSITION FROM THAT OF THE ORDINARY BANK TELLER. FOR THESE REASONS, WE STRONGLY OPPOSE A MORE RESTRICTIVE INTERPRETATION OF THE PUBLIC TRUST GUIDELINE AND URGE THE COMMISSION TO ADOPT OUR PROPOSED AMENDMENT. WE WOULD CLARIFY IN THE COMMENTARY THAT THE GUIDELINE EXPLICITLY APPLIES TO POSTAL EMPLOYEES WHO ABUSE THEIR POSITION TO STEAL MAIL, POSTAL SERVICE PROPERTY, OR EMBEZZLE POSTAL SERVICE FUNDS.

IN REGARD TO OUR FOURTH AND FINAL GUIDELINE AMENDMENT, WE ASK THE COMMISSION TO SET AS ONE OF ITS PRIORITIES FOR THE NEXT AMENDMENT CYCLE, A STUDY OF MULTIPLE VICTIM CRIMES AND THE FORMULATION OF A NEW GUIDELINE. THE POSTAL INSPECTION SERVICE, AS AN ADVOCATE OF VICTIMS' RIGHTS, BELIEVES THE NUMBER OF PEOPLE AFFECTED BY A CRIME IS AN IMPORTANT ELEMENT IN MEASURING THE CRIME'S OVERALL HARM TO SOCIETY. IT IS OUR POSITION THAT THE GUIDELINES SHOULD INCLUDE THIS AS A FACTOR IN THE SENTENCE COMPUTATION.

AS A FINAL MATTER, WE FEEL NO CHANGE IS NECESSARY TO THE MONEY LAUNDERING GUIDELINES. CLEARLY, THE LEGISLATIVE INTENT WAS TO CREATE A SEPARATE CRIME WITH A MORE SERIOUS PENALTY FOR MONEY LAUNDERING OFFENSES, DISTINCT FROM THE SPECIFIED UNLAWFUL ACTIVITIES. FOR THESE REASONS, WE SUPPORT THE POSITION OF THE DEPARTMENT OF JUSTICE ON THIS ISSUE. WE URGE THE COMMISSION TO MAINTAIN THE SEPARATE AND HIGHER OFFENSE LEVEL FOR MONEY LAUNDERING OFFENSES.

I WANT TO THANK THE COMMISSION FOR THIS TIME, AND WILL NOW ENTERTAIN ANY QUESTION CONCERNING OUR COMMENTS.

# Epidemic of Mail Truck Robberies Sweeps Southland

■ **Crime:** Gangs of thieves targeting welfare and Social Security checks are growing more brazen. Officials say the problem began spreading after the riots.

By PATRICE APODACA  
TIMES STAFF WRITER

Gangs of thieves seeking government checks and credit cards are causing an epidemic-like increase in the theft of mail from postal trucks while carriers walk their rounds, according to federal authorities.

The problem began escalating in South-Central Los Angeles after last spring's riots. It has spread across Southern California, authorities say. Thieves are on the prowl from Santa Ana to Ventura.

Since October more than 100,000 pieces of mail have been stolen from trucks in the Postal Service's Los Angeles Division, which covers Los Angeles, Orange, Ventura, San Bernardino and Riverside counties. Total losses are unknown. Welfare checks totaling several hundred thousand dollars have been taken, officials say.

In the year that ended Sept. 30, postal vehicle break-ins in the region nearly doubled from the previous year, to 289. More than 200 have already been reported in the five months since then.

It's an "epidemic-type situation," said David H. Smith, the head Los Angeles postal inspector.

"It started picking up after the riots, then it just took off," Smith

said. "Before you could say boo, it jumped from five or six a check day to 25 or 40 a check day." Check days are when public assistance checks are delivered.

Los Angeles postal inspectors recently broke up a gang that they think broke into trucks from Long Beach to San Jose.

The gang is believed to have brought illegal aliens across the border and then coerced them into smashing truck windows and grabbing mail trays. An alleged kingpin and two suspected accomplices are under federal indictment in Phoenix.

The three are accused of changing the names on stolen checks and depositing them in banks in Arizona. Gang members would withdraw cash from automated teller machines or write checks against the accounts, prosecutors say. When the arrests were made in January, one Arizona account contained about \$24,000.

Vehicle break-ins are now "the major focus of my attention," Smith said.

This type of crime comes in waves every few years, officials say but the latest surge may be the biggest ever.

Among causes, they cite high unemployment.

Please see THEFTS, A34



## THEFTS: Epidemic of Mail Robberies

Continued from A3

"As people get more desperate for money, they resort to more desperate means," postal inspector Pamela Prince said.

Another likely cause of the surge: The crime has become organized.

In a typical operation, "one central person is controlling a group of runners who are going out and breaking into the vehicles," Smith said. "All it takes is one or two or three really smart operators."

Gang members sometimes cash the checks using phony identification. Or they alter the checks and cash them at places that do not ask many questions. Stolen credit cards can be taken to Las Vegas and charged to the limit.

For a welfare recipient, the theft of a check can be a major problem. Getting a replacement can take months, officials say, despite their policy of making it a high priority.

"For some elderly people on Social Security, if their check is stolen they're in dire straits," postal inspector Ray Chavez said.

Prince says an underlying cause of the increase in break-ins is diminishing respect for the mail and mail carriers. If the Postal Service was once considered sac-

rosanct, last year's riots showed that it no longer is. Several post offices were plundered. One was burned to the ground.

While stealing from unattended vehicles is the most common technique, recent incidents suggest that mail thieves are growing more brazen.

In August, a carrier in Redondo Beach was attacked by a man who cut him with a knife and stole a tub of mail. The attacker has pleaded guilty to assault.

In September, a female carrier was attacked in Los Angeles by two men who held a sawed-off shotgun to her chest, sprayed a chemical disabler in her face and grabbed 500 pieces of mail.

This month, two armed robbers stole a load of mail at a postal facility on Washington Boulevard near Crenshaw Boulevard.

Federal officers have started patrolling streets on check days, and the number of truck break-ins has dropped from more than 25 to 15 or 20 a day, Smith said.

Since October, 12 arrests tied to postal vehicle break-ins have been made in the Los Angeles district. An undercover task force hopes for more arrests, Smith said.

"We are getting more and more leads on who these people are, and we are getting closer and closer to getting identifications," he said.

Burglarizing a postal vehicle and stealing or receiving stolen mail are punishable by up to five years in federal prison. Related offenses, such as forgery, interstate transportation of stolen property and violation of organized crime statutes carry heavier penalties.

Postal officials are sending warnings to check-cashing establishments, the ultimate loss when a stolen check is traced back to them. Printed warnings tell them to spot phony identifications, altered checks and other signs of trouble.

Also, about 85% of the older delivery trucks in the Los Angeles district have been replaced with vehicles lacking rear windows.

To encourage public involvement, officials are giving talks in neighborhoods "good" and "poor" notices asking that people watch for suspicious activity around mail trucks.

"My job is to stop this," Smith said. "If I have to do it by arrest, so be it. If I have to do it by public awareness, that's great. We're going to get them."

Postmaster  
33 College Ave.  
Waterville, ME 04901-9998

Morning Sentinel, Thursday, February 25, 1983 9

# Ex-postal clerk gets 60 days for theft

By JOEEN HEALY

Ory Caswell Service

**PORTLAND** — A former U.S. Postal Service mail handler was sentenced in federal court Wednesday to 60 days in prison for stealing two checks worth \$15 from the Naples post office.

The sentencing of Lisa M. Burns, 28, highlights what the U.S. government contends is a widespread problem of theft in the Postal Service.

The U.S. attorney for Maine has handled eight postal theft cases in the past three years and 50 or more over the last decade, authorities said Wednesday.

"And these are just the ones we've caught," said Postal Inspector Robert E. Kelly.

Paula Sibley, the assistant U.S. attorney who prosecuted Burns, told U.S.

District Judge Geese Carter, "The government believes a significant number of postal employees do precisely what Lisa Burns did, and that is steal from their employer."

The Postal Service was unable to provide any detailed statistics of such crimes. But the president of the local postal workers' union, while conceding that thefts occur, said they are rare.

"I can't see where anyone would say it's widespread and getting worse," said Wayne Peabody.

Judge Carter tried to use Wednesday's sentencing hearing to deter other postal employees and to reassure the millions of people who rely on the mail service.

"You were a federal government employee in violation of a solemn oath," Carter admonished Burns, who was earning \$14.50 an hour after 10 years

with the post office at the time of the thefts in 1982.

Carter stressed that the crime was more serious than simple theft.

"You've violated those who entrust their property to the integrity, the safekeeping and the care of the United States Postal Service," Carter said.

Burns' attorney, William Maselli of Auburn, indicated that he may appeal the sentence. He pleaded for leniency, arguing that Burns suffered from alcoholism at the time of the crime and has since become sober.

Burns was convicted by a federal court jury last November of stealing and cashing five "bearer coupons," the kind of checks consumers receive in popular rebate programs from manufacturers.

The checks, worth \$5 and \$10, were sent by the post office's inspection ser-

vice as part of a random investigation intended to root out theft.

Bethel, the postal inspector, said the post office does not mailer the monetary value of internal theft.

"We're not looking at monetary value; it's not important," he said. "The integrity of the mail is all that matters. The sanctity of the mail is the most important thing."

Peabody, the head of the Portland local of the American Postal Workers Union, said the national union regularly uses its newsletter to warn postal workers of the risks of stealing.

He added that the union may include a story about the Burns case in an upcoming issue "just to make people aware of what they're jeopardizing."

"I can't understand where anybody would think it would be worth it for such a small amount of money," Peabody said.

# Postal truck crooks hit again

■ Thieves of welfare, Social Security checks reach out to Richmond

By Cecily Burt  
STAFF WRITER

RICHMOND — Crooks targeting monthly deliveries of welfare checks are expanding their territory beyond Oakland and San Francisco, breaking into two postal vehicles in Richmond early this month.

Thieves in Oakland and San Francisco have been targeting first-of-the-month mail deliver-

ies because they include an abundance of public-assistance and Social Security checks. In Oakland alone, more than a dozen postal vehicles have been broken into since the end of last October.

Now thieves have turned their attention to postal vehicles in Richmond. Even though theft of such mail has not typically been a problem in the city, the break-ins of two vehicles on Feb. 1 prompted the Postal Inspection Service to offer rewards of as much as \$1,000 for information leading to the arrest and conviction of the perpetrators.

One of the vehicles was broken into at about 1:30 p.m. while parked at the corner of South and Beck streets. The other vehicle was broken into at about 3:15 p.m. while parked at 1600 Gaynor St.

Persons convicted of felony mail theft can face fines up to \$250,000 or five years in jail, or both.

Anyone with information should call the Postal Inspection Service in Oakland at 510 636-2600 and ask for the External Crimes Team. Anonymous tips are welcome.

SAN FRANCISCO DIVISION

## BAY AREA REPORT

### ■ REGION

### Reward Offered In Carrier Robberies

The U.S. Postal Service yesterday offered two \$10,000 rewards for information leading to the arrest of suspects in the beating and robbery of a San Francisco letter carrier and the armed robbery of an Oakland postal clerk.

On February 1, a San Francisco carrier was beaten by three men near the Daly City BART station after he refused to hand over mail containing welfare and Social Security checks, said Michael Baum, spokesman for the U.S. Postal Inspection Service. The robbers stole the carrier's wallet but ran off without taking any mail.

The next day, a gunman described as 25 to 30 years old stole an unspecified amount of cash from a postal clerk outside the North Oakland Postal Station, Baum said.

Anyone with information is asked to phone 415-550-5625 or 510-636-2000.

# Encinitas mail thefts said to triple

By Mirna Alfonso  
Staff Writer

Mail thefts in Encinitas have nearly tripled, a federal postal inspector said.

In 1992, 850 mail thefts were recorded, compared with 262 the year before, U.S. Postal Inspector David Fast said.

"We're extremely worried about the situation," he said. "It's just like a tide. You don't know when it's going to hit."

Officials reportedly suspect most of the thefts, which mainly target mailboxes, are committed by the "Route 78" bandits, a loosely knit crew whose members move up the North County coast, then onto Highway 78 into Escondido.

"They're starting to move into the wealthier areas," Fast said, adding that criminals term

Escondido "yuppie haven."

The group, which allegedly recruits new people as members are jailed, usually are methamphetamine users who burglarize mailboxes looking for checks, credit cards and identification, Fast said.

The method involves either following mail trucks, knowing when checks will arrive or watching for a mailbox's red flag to be up.

One arrest involved a man named Nick Bruno, also known as Nick Robertson.

On Jan. 4, Bruno was sentenced to five years in federal prison for stealing a number of credit cards and other mail in Carlsbad, Leucadia and Encinitas between 1990 and June 1992.

Bruno had rigged a device with which he quickly jimmed open post office boxes, Fast said.

He finally was caught when he broke in a box in the midst of 40 people at the Carlsbad Post Office.

Postal inspectors, who had staked out the office, arrested him outside, Fast said.

Officials urge residents not to have checks or credit cards sent to their homes, but to leave mail in their boxes for pickup, and to can arrange it, to be home when the mail can arrives.

People who suspect or know that mail has been stolen should call the postal inspector office at 233-0610.

"People have to report this more in order to make arrests," Fast said.

"The most minuscule little thing maybe is a big thing that breaks these cases," he said.

Blade Citizen  
Oceanside, CA  
January 24, 1993  
SAN DIEGO DIVISION



Santa Barbara police Officer Leonard Gómez checks out a U.S. Postal Service vehicle as mail carrier Steven Berg takes inventory after the Jeep was broken into Monday.

## Mail thieves strike again, seize welfare checks off postal Jeep

By Jesse Chavarria  
News-Press Staff Writer

They struck again.

Mail thieves broke into a U.S. Postal Service Jeep in Santa Barbara on Monday and took 1,800 letters, including government welfare checks, authorities reported.

The heist was a worrisome repeat of December, when thousands of pieces of mail, including Social Security checks and dozens of Social Security checks, were stolen from Postal Service Jeeps in the city's lower Eastside and lower Westside neighborhoods.

"This is getting to be a real problem," said Lt. John Thayer. "Before December, I don't ever remember this sort of thing in Santa Barbara."

Police and postal officials said they suspect the same Los Angeles-based mail-theft ring pulled Monday's job. The thieves struck at the corner of San Andres and Valerio streets at 11:22 a.m.

"It's a pretty heartless thing," Thayer said. "They're taking money from needy people."

The burglary took place minutes after the postal carrier had locked the Jeep and started on door-to-door deliveries in the Westside neighborhood.

The robbers smashed the Jeep's rear window and pulled out two trays of mail. More might have been taken, but a nearby witness saw them, police said.

The trays contained letters bound for homes at the 1600-1900 blocks of San Pascual Street, the 1600-1900 blocks of San Andres Street, the 600 block of Mulberry Avenue, the 800 and 600 block of West Pedregosa Street and the 1800 block of Dutton Avenue, according to Santa Barbara's Post Office spokeswoman Mary Frink.

"As it happened, we were lucky," Frink said.

An off-duty mail carrier spotted the break-in and called 911, Frink said.

"He got a description of one of the suspects and took down the license plate," she said.

Police arrived quickly, but the two men had driven off toward the freeway and vanished.

Police believe their best chance of tracking down the pair is the getaway vehicle, described as a blue Ford Bronco with a white strip "in beat-up condition."

A computer check of the license number identified the truck's plates as from Los Angeles, police said.

Frink also is confident the thieves eventually will be caught.

Authorities already have nabbed suspects in the December mail theft in Santa Barbara, she said.

The arrests came in Phoenix after the suspects attempted to deposit stolen Social Security checks from Santa Barbara into a bank account, Frink said. She had no further details, however.

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CITY & ST: Santa Barbara  
DATE: 2-2-93  
LOS ANGELES DIVISION  
CASE INSP:  
DOMICILE:

LOS ANGELES TIMES FEB 27 1989

# Man Arrested in Thefts From Postal Trucks

**By Patricia...  
Los Angeles Times**

SANTA ANA—Federal agents Friday arrested a man who allegedly acted as a figure for a gang that is responsible for stealing checks and credit cards from mail trucks throughout Orange and Riverside counties.

Marcello Barragan, 19, was taken into custody Friday morning at his home after he sold stolen checks and credit cards to undercover federal agents twice within the past month, authorities said.

Postal inspectors, assisted by Secret Service agents and Santa Ana police, also seized mail found at Barragan's home that was addressed to others, several credit cards, assault rifles, pistols and knives. About half a dozen more credit cards were found in the

trunk of Barragan's dilapidated car. Authorities also found several found in the back yard that they believe might have been used for illegal coin-flipping.

Barragan's arrest followed a nearly two-month investigation by a special postal inspection task force formed to combat what authorities call an epidemic-like increase in mail theft from postal vehicles throughout Southern California. In the last five months, about 220 mail trucks have been broken into in Los Angeles, Orange, Ventura, Riverside and San Bernardino counties.

The surge in thefts is attributed to such factors as the weak economy and high unemployment, and to mail theft evolving into an organized crime.

Authorities say gang members

from neighborhoods in search of mail vehicles that have been left unattended while carriers make their rounds on foot. They smash the trucks' windows and steal bags of mail containing government assistance and business checks and credit cards. Other gang members sell the checks, or cash them using phony identification or by altering the names of the payees. Credit cards are often taken to Las Vegas, where they are quickly changed to their limit.

Postal inspectors said the gang Barragan was associated with has stolen hundreds of thousands of dollars worth of checks and credit cards in recent months. The gang also may be involved in armed robberies of mail carriers and drug sales, they said.

**BURRELLES**  
NEWSPAPER

PAGE 3



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

CHIEF POSTAL INSPECTOR  
INSPECTION SERVICE

March 15, 1993

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

Attention: Public Information

Gentlemen:

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

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



OFFICIAL OLYMPIC SPONSOR



separateness and that the concept of "closely related" offenses should not apply. The commentary of the proposed guideline also draws a distinction which is not supported by the legislative intent or statutory definitions of "actual money laundering" as compared to "other money laundering." Simply stated, we believe if the government proves the elements of the statute, the defendant should be sentenced accordingly, without a further analysis of the criminal intent by the sentencing court. In view of our concerns with these proposed amendments, we support the existing guidelines which provide for a separate and higher offense level for money laundering not tied to the offense level of the specified unlawful activity. For the above reasons, the Postal Service endorses the position of the Department of Justice to maintain higher levels for money laundering offenses.

**Proposed Amendment 23, § 3B1.3.** We disagree with this proposed amendment's application to employees of the Postal Service, and submit in the alternative a revision to the commentary portion of this section which would make the public trust guideline specifically applicable to postal employees (Amendment 46). Historically, postal employees have held a special fiduciary relationship with the American public because their personal correspondence is entrusted to the care and custody of the agency. This special trust is corroborated in the oath of employment and the long-standing federal criminal statutes which relate to the theft or obstruction of mail and embezzlement which apply exclusively to postal employees. In addition, these types of crimes significantly impair the Postal Service function and negatively impact on the public's trust in the institution.

Our proposed revision to the commentary would make the public trust guideline apply to employees of the Postal Service sentenced for theft or obstruction of United States Mail, (18 U.S.C. §§1703, 1709); embezzlement of Postal Service funds (18 U.S.C. §1711); and

theft of Postal Service property (18 U.S.C. §§1707, 641). To make this amendment comport to guideline commentary format, the statute citations are deleted. Application Note 1 is amended by inserting the following paragraph at the end:

"This adjustment, for example, will apply to postal employees who abuse their position to steal or obstruct U.S. Mail, embezzle Postal Service funds, or steal Postal Service property."

It is our opinion the enhancement is justified because these crimes disrupt an important governmental function--the nation's postal system--as prescribed in § 5K2.7. Moreover, without the offense enhancement provided by § 3B1.3, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused by the offense under similar rationale discussed in § 2B1.3, comment (n.4). For example, the theft or destruction of mail by employees of the Postal Service necessarily impacts numerous victims, while the total dollar loss may be minimal.

Our proposal clarifies that the special trust relationship a postal employee has with the public and its written correspondence is significantly different from that of the employment relationship of the ordinary bank teller as cited by example in §3B1.3, comment (n.1), of the current guideline. Adoption of our proposed amendment would also provide for consistency in the application of this guideline in light of several court decisions, United States v. Milligan, 958 F.2d 345 (11th Cir. 1992) (court held that a postal clerk who embezzled funds had occupied a position of trust); United States v. Lange, 918 F.2d 707 (8th Cir. 1990) (postal employee who had access to certified and Express Mail was in a position of trust); United States v. Arrington, 765 F. Supp. 945 (N.D.Ill 1991) (a casual mail handler

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

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

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

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

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

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

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

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

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

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

Sincerely,

*K. J. Hunter*

K. J. Hunter











BEFORE THE UNITED STATES SENTENCING COMMISSION  
WASHINGTON, D.C.

March 22, 1993

TESTIMONY OF

THOMAS A. GUIDOBONI, ESQUIRE  
DAVID W. O'BRIEN, ESQUIRE

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Mr. Chairman, Members of the Commission, and staff, we appreciate the opportunity to appear before the Commission at this public hearing. We appear on behalf of ourselves as members of the bar with experience in the defense of Federal criminal prosecutions. That experience includes representing Robert Tappan Morris in the so-called "Internet Virus" case. This case, which was tried in the Northern District of New York in 1990, resulted in Mr. Morris' conviction for a violation of 18 U.S.C. § 1030(a)(5)(A) under the Computer Fraud and Abuse Act.<sup>1/</sup> Our testimony today will focus on the amendment proposed by the Department of Justice, which would create a new guideline, § 2F2.1 to address violations of the Computer Fraud and Abuse Act. In the interests of brevity, we will limit our testimony to our major concerns with the proposed amendment.

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<sup>1/</sup> United States v. Morris, 89-CR-139 (N.D.N.Y.), aff'd, 928 F.2d 504 (2d Cir.) cert. denied, 112 S. Ct. 72 (1991).

## I. GENERAL CONSIDERATIONS - BASE OFFENSE LEVEL

We agree with the Department that it is often inappropriate to apply the fraud guidelines found at Guideline § 2F1.1 to certain violations of 18 U.S.C. § 1030. In the Morris case, the trial court held that the offense created by 18 U.S.C. § 1030(a)(5) did not require proof of an intent to cause damage, much less an intent to defraud. That ruling was upheld on appeal. 928 F.2d at 509. As a consequence, we argued to the Court at sentencing that Mr. Morris' offense was outside the "heartland" of typical "Fraud and Deceit" cases.<sup>2/</sup> Judge Munson agreed, and also found, under Guideline § 2X5.1, that there was "not a sufficiently analogous guideline" for sentencing Mr. Morris.<sup>3/</sup>

This is not to say, however, that it is always inappropriate for the Fraud and Deceit Guideline to be applied to any of the various offenses contained in § 1030. Those defined by subsections a(4) and a(6), require proof of an intent to defraud, and indexing to the Fraud and Deceit Guideline may be appropriate for these crimes. As to these subsections, as well as subsection (a)(1)<sup>4/</sup>,

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<sup>2/</sup> Defendant's Memorandum in Aid of Sentencing is attached hereto as Appendix A. See pp. 4-6.

<sup>3/</sup> The judgment, including sentence under the Sentencing Reform Act in the Morris case, is attached hereto as Appendix B. See p. 7.

<sup>4/</sup> Section 1030(a)(1) which relates to obtaining national defense type data by use of unauthorized computer access is indexed to Guideline § 2M3.2 (Gathering National Defense Information). In our opinion, this is an appropriate indexing for the offense described in subsection (a)(1).

a new guideline is probably unnecessary as these offenses are adequately addressed by appropriate existing guidelines.

The remaining offenses created by § 1030(a) do require a new guideline unrelated to fraud. We believe, however, that the proposed Base Offense Level of 6 is too high, and a Base Offense Level of 4 is more appropriate. This conclusion is supported by reference to existing guidelines. The crime encompassed by subsection (a)(2) can best be described as "theft of information" by use of a computer.<sup>5/</sup> The Base Offense Level for theft is 4. Guideline § 2B1.1. The crimes included in subsection (a)(3) are described in the legislative history of the statute as "computer trespass." See S. Rep. No. 432 (Judiciary Committee), 99th Cong. 2d Session (1986) at 7, reprinted in 1986 U.S. Code Cong. & Admin. News 2479, 2484-85; H.R. Rep. No. 612 (Judiciary Committee), 99th Cong. 2d Sess. at 12 (1986). Trespass too has a Base Offense Level of 4. Guideline § 2B2.3. Finally, the offenses codified in subsection (a)(5) are acts of "malicious mischief," S. Rep. No. 432, supra at 5, 1986 U.S. Code Cong. & Admin. News at 2482; or "malicious damage," H.R. Rep. No. 612 supra at 7, 8. The Base Offense Level for Property Damage or Destruction is also set at 4, Guideline § 2B1.3. Thus, the most analogous guideline offenses carry a Base Offense Level of 4. There is no principled reason for

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<sup>5/</sup> Congress has explicitly found that computerized information should be considered "property" for purposes of Federal Criminal Law. S.Rep. No. 612, supra at 13-4, 1986 U.S. Code Cong. & Admin. News at 2491.

utilizing a higher Base Offense Level here simply because the offenses involve the use of a computer.

This raises a related objection to the Department's proposal. In virtually every case brought under § 1030, the prosecution can be expected to urge an upward adjustment of two levels for "use of a special skill," Guideline § 3B1.3, since the offenses included in § 1030 can only be committed by a person with some level of skill in the use of computers. We therefore urge the Commission to conclude that use of a special skill is included in the Base Offense Level or specific offense characteristic, as permitted by Guideline § 3B1.3.

## II. SPECIFIC OFFENSE CHARACTERISTICS

We have several concerns with characteristics b(1) and (2) relating to the reliability and confidentiality of data. Our first is that the definition of "protected information" as set forth in the Commentary is too broad. Section 1030 itself enumerates certain types of information which are protected. These include classified national defense, foreign relations and restricted atomic energy data [subsection (a)(1)]; financial records of a financial institution or card issuer [subsection (a)(2)]; consumer credit information [subsection (a)(2)]; medical records [subsection (a)(5)(B)]; and passwords [subsection (a)(6)]. Level increases should be limited to obtaining or disclosing these types of information.

Our second problem relates particularly to the protection of government "whistleblowers." When enacting the Computer Fraud and Abuse Act, Congress went to some lengths to try to exclude such "whistleblowers" from its coverage. See S. Rep. No. 432, supra at 8, 1986 U.S. Code Cong. & Admin. News at 2485-86; H.R. Rep. No. 612, supra at 7. The proposed guideline appears contrary to this Congressional intent by virtue of its enhancement of the offense level for disclosure of "confidential" "non-public government information".

Another major concern with specific offense characteristics relates to the characteristic of "economic loss" in proposed subsection (b)(4). As we learned in the Morris case, calculation of such loss is speculative and inherently unreliable. See Appendix A at 7-10. This proposition was confirmed in the case of United States v. Craig Neidorf, 90-CR-70 (N.D. Ill. 1990), where a 20 year old student was accused of interstate transportation of stolen property, to wit, an E911 computer file which BellSouth characterized as "proprietary" and valued between \$25,000 and \$75,000. This prosecution was abruptly terminated mid-trial, when Neidorf introduced evidence that the file was publicly available and could be ordered at a cost of less than \$20.<sup>6/</sup>

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<sup>6/</sup> The evidence in the case also indicated that the "proprietary" notice was placed on all BellSouth documents without any review of whether it was proper. This evidence calls into question the proposed enhancement based on obtaining and disclosing "proprietary commercial information."

Nor is inflation of such costs an isolated problem. For example, in Mr. Morris' case the "losses" included the costs of repairing pre-existing security defects in the UNIX operating system software. As the trial judge observed to a government witness, he "was patch[ing] a hole which should have been patched anyway." See Appendix A at pp. 9-10.

The "costs of system recovery" set forth in subsection b(4)(4)(A) are particularly susceptible to this type of abuse. In the Morris case the Army Research Lab spent hours examining and researching the virus long after it was aware of how to stop it. In addition, the Army Lab voluntarily chose to remain off the network for many hours after the other infected sites had reconnected. Nevertheless, all of this time was included in the Labs' damage estimate. At a minimum "costs" as used in the guideline should be limited to "reasonable costs."

Finally, we submit that unintentional costs or damages should not be weighed as heavily as intended consequences. Use of a computer is not equivalent to the use of an inherently dangerous instrument, and what constitutes an "unauthorized access" to another computer is not always clear-cut. See United States v. Morris 928 F.2d at 510. Under the circumstances it is inappropriate to utilize the same loss calculations for unintended results as are applied to intentional fraudulent conduct.

### CONCLUSION

In summary, we believe that a new guideline is appropriate for the offenses proscribed by 18 U.S.C. § 1030(a)(2), (a)(3), and (a)(5), but unnecessary for the other offenses in this statute. The Base Offense Level for the new guideline should be set at 4, not 6, and no upward adjustment permitted for use of a special skill. Finally, the specific offense characteristics must be more narrowly and realistically articulated in order to promote the goals of both the Sentencing Reform Act and the Computer Fraud and Abuse Act.

We thank the Commission for this opportunity to present our views.



UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT TAPPAN MORRIS,

Defendant.

DEFENDANT'S MEMORANDUM  
IN AID OF SENTENCING

Case No. 89-CR-139  
Hon. Howard G. Munson

I. INTRODUCTION

On January 22, 1990, after an eight day trial, a jury in the United States District Court for the Northern District of New York, Syracuse Division, returned a guilty verdict against the defendant on a one count indictment charging a violation of 18 U.S.C. § 1030(a)(5)(A). Post-trial Motions For Judgment Of Acquittal Or For A New Trial were argued and denied from the bench on February 27, 1990. Mr. Morris is now before the Court for sentencing. The offense carries a maximum penalty of five years imprisonment, 18 U.S.C. § 1030(c)(3)(A)<sup>1/</sup>, and a fine of not more than \$250,000. 18 U.S.C. § 3571(b)(3).<sup>2/</sup> Mr. Morris

1/ Mr. Morris has not been previously convicted of "another offense under this subsection or an attempt to commit [such] an offense." 18 U.S.C. § 1030(c)(3)(A).

2/ Pursuant to 18 U.S.C. § 3571(d), the Court could consider an alternative fine "of twice the gross gain or twice the gross loss." For reasons set forth at pp. 7-10, infra, defendant submits that imposition of such a fine "would unduly complicate or prolong the sentencing process."

is also subject to a mandatory special assessment in the amount of \$50.00. 18 U.S.C. § 3013(a)(2)(A).

## II. CALCULATION OF THE SENTENCING GUIDELINES

Since the date of Mr. Morris' offense was November 2, 1988, the Federal Sentencing Guidelines apply to his case. Pub. L. No. 98-473, §235(a)(1) as amended by Pub. L. No. 99-217, §4, 99 Stat. 1728 (Dec. 26, 1985). 18 U.S.C. § 3553(a)(4) provides that the Court must consider the guidelines "that are in effect on the date the defendant is sentenced." The parties have agreed, however, that such an application could raise constitutional problems under the ex post facto clause of Article I, § 9 of the United States Constitution, see Miller v. Florida, 482 U.S. 423 (1987), and the Court should apply the Sentencing Guidelines which were in effect at the time of the commission of the offense, where applying the later guideline would result in a harsher punishment.<sup>3/</sup> Therefore, unless otherwise indicated, all further citations to the Guidelines will refer to those in effect on November 2, 1988.

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<sup>3/</sup> For example, if a loss figure of \$165,000 is utilized, under the guidelines in effect at the time of the offense, the offense level would be increased by 6. See Guideline § 2F1.1(b)(1)(G) (as amended June 15, 1988), while under the guidelines currently in place, the increase in offense level becomes 7. Guideline § 2F1.1(b)(1)(H). See Exhibits A and B attached hereto, the letters confirming this discussion and agreement between the parties.

Appendix A to the Guidelines, the "Statutory Index," specifies that an offense under 18 U.S.C. § 1030(a)(5), is ordinarily referenced to guideline § 2F1.1, entitled Fraud and Deceit. This guideline provides for a base offense level of six. § 2F1.1(a). The government has advised that it is limiting its evidence of "loss" to that which it believes was adduced at trial: approximately \$165,000. This loss figure would result in an increase in offense level of six. § 2F1.1(b)(1)(G). In addition, it is anticipated that the government will urge the Court to apply an increase of 2 for "more than minimal planning," § 2F1.1(b)(2)(A), and an upward adjustment of 2 for "use of special skill" § 3B1.3, resulting in a total offense level of 16.

The guideline sentence for an offense level of 16 in a Criminal History Category of I,<sup>4/</sup> is 21 to 27 months imprisonment, and a fine of \$5,000 to \$50,000, Guideline § 5E4.2(c)(3),<sup>5/</sup> plus costs of the sentence, § 5E4.2(3)(i). The defendant submits that he is eligible for a downward adjustment of 2 levels for acceptance of responsibility, Guideline § 3E1.1.

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4/ There has been no suggestion that defendant's "criminal history" would place him in any category other than I. See Guidelines §§ 4A1.1 et seq.

5/ Other maximum fines are arguably available, See Guideline 5E4.2(c)(2)(B), but for a variety of reasons, they are unrealistic, and difficult to establish, See n.2, supra.

If this adjustment is applied, the offense level becomes 14 with a guideline sentence of 15 to 21 months imprisonment, and a fine of \$4,000 to \$40,000, Guideline § 5E4.2(c)(3), plus the costs of the sentence. The defendant accepts these calculations as accurate, but for the reasons stated below does not agree that the facts support the application of the particular guidelines utilized.

### III. DEFENDANT'S POSITION ON THE GUIDELINES

#### A. The Base Level Offense Classification

The defendant requests a downward departure from the base offense level of 6 on the grounds that the particular offense committed by Mr. Morris is outside the "heartland" of typical fraud and deceit cases, See Guidelines Ch. 1, Part A, 4(b). In this regard, the Sentencing Commission has stated as follows:

The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of § 5H1.4, and the last sentence of § 5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions,

however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

(emphasis added).

It is difficult to conceive of a less "typical" case of "fraud and deceit" than the one before the Court. While there is no single definition of "fraud" in federal law, it is generally understood to mean "wronging one in his property rights by dishonest methods or schemes," and "usually signify [ing] the deprivation of something of value by trick, deceit, chicane or overreaching." Carpenter v. United States, 108 S.Ct. 316, 321 (1987) quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). The statute under which Mr. Morris was convicted, however, requires no proof of "intent to defraud". Compare 18 U.S.C. § 1030(a)(4). Moreover, in enacting the Computer Fraud and Abuse Act of 1986, Congress explicitly rejected the view that "trespass" into a computer should be treated as a theft or fraud by computer. See S. Rep. No. 432 (Judiciary Committee), 99th Cong 2d Sess (1986) at 9-11, reprinted in 1986 U.S. Code Cong. & Admin. News 2479 at 2486-88; H.R. Rep. No. 612 (Judiciary Committee), 99th Cong. 2d Sess at 12. (1986). Thus, § 1030(a)(4) provides that there is no fraud if the only thing of value obtained is the use of the computer itself.

In this case, not only is the element of fraud lacking, but this Court has ruled that a violation of § 1030(a)(5)(A) may be established even without proof of intent to cause damage or loss. As this Court stated:

The language and grammatical structure of the statute indicates to the Court that the requirement of intent is only applicable to the conduct of "accessing" and is unrelated to the resulting damage.

United States v. Morris, 89-CR-139, Transcript of Proceedings at 8, lines 11-14 (Nov. 3, 1989). Accord Transcript of Proceedings at 6, lines 13-19 (Feb. 27, 1990). Thus, unlike a "typical" fraud case, Morris was convicted although he had no intention to cause damage or loss to others. As was observed in a similar context, "the public might have more censure for an intentional act than for gross negligence." United States v. Bradford, 344 A.2d 208, 211 (D.C. 1975).<sup>6/</sup>

It may well be that the Sentencing Commission assigned this offense to the "fraud and deceit" classification because although it adopted an "empirical approach" to promulgation of the guidelines, it had no data available regarding this offense. See Sentencing Guidelines, Ch. 1 Part A, 2. The offense came into existence one year before the guidelines were promulgated, and it

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<sup>6/</sup> The reference is to sentencing for voluntary or involuntary manslaughter, both of which were punished under a single statutory provision.

appears that only two cases under the 1986 version of 18 U.S.C. § 1030 have now reached sentencing. Both occurred after publication of the guidelines. In the first, United States v. Herbert Zinn, Jr., No. 88-CR-672 (N.D. Ill. 1989) the defendant was sentenced to nine (9) months imprisonment and a \$10,000 fine. In the second, United States v. Kevin David Mitnick, CR-88-1031(A) (C.D. Cal. 1989), the defendant received a sentence of six (6) months community confinement, followed by six and one-half (6½) months in a halfway house. Unlike Morris, both of these defendants were charged with 18 U.S.C. § 1030(a)(4), requiring proof of intent to defraud, both cases involved repeated incidents, and in the Mitnick case the defendant had two prior convictions for some form of computer abuse.

Under these circumstances, it would appear that a downward departure in Mr. Morris' case is supported by the "empirical" approach, and would actually further the stated goals of the Sentencing Reform Act, achieving both uniformity and proportionality of sentencing. See Guidelines, Ch. 1, Part A, 3. The conduct in this case differs significantly from the norm of fraud and deceit cases, and warrants a downward departure.

B. The Specific Offense Characteristic Of Loss

Guideline § 2F1.1, Application Note 7, refers to the Commentary for § 2B1.1 for a discussion on valuation of loss. Application Note 2 to § 2B1.1 provides that "loss means the value

of the property taken, damaged or destroyed." In this case, little or no evidence was offered that anything was "taken, damaged or destroyed." Indeed, the government elected not to proceed under the "alters, damages or destroys" language of the statute, but charged instead that Morris "prevented authorized use." For this reason alone, no increased offense level for "loss" is appropriate.

Second, although the government has indicated it is limiting its evidence of loss to that adduced at trial, it nevertheless asserts that amount to be \$165,000.00. Three reporters, who attended every day of the trial, independently calculated these losses to be approximately \$150,000.<sup>7/</sup> This \$15,000.00 (10%) difference demonstrates the inherent unreliability of the government's calculation. Application Note 3 to Guideline § 2B1.1 requires that the determination of "loss" must be based on "reasonably reliable information."

A third issue is the type of loss which may properly be included. Section 1030(a)(5) requires that it be a loss caused by the prevention of authorized use. A substantial portion of

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<sup>7/</sup> Mike McAndrew, "Computer Hacker to Explain Actions," Syracuse Post-Standard, January 18, 1990 at B10; Dan Kane, "Hacker Could Go To Prison," Syracuse Herald-Journal, January 23, 1990 at p. A8; Evan Schuman, "Worm Jury Is Out," Unix Today, January 23, 1990 at 4.



the "loss", the government claims it proved at trial was related to labor expended at the various facilities "infected" by the worm program for the purpose of assuring that no computer files were destroyed and no future disruptions were likely to occur. However, while these investigations were proceeding, nothing "prevented the authorized use" of the computers. Since the statutory language makes it clear that the loss contemplated has to be caused by the prevention of authorized use, much of the government's evidence must be disregarded.

The legislative history expands on the definition of "loss" only slightly. Significantly, however, the Senate Report speaks in terms of the "costs of reprogramming or restoring data to its original condition. . ." S. Rep. No. 432, supra at 12, reprinted in U.S. Code Cong. & Admin. News 2489. Much of the labor cost attributed by the government to the defendant's conduct was actually spent repairing pre-existing security defects in the UNIX operating system. As the Court observed to a government witness during the trial: "What you did was patch a hole that should have been patched anyway."

This point is significant for two reasons. It demonstrates that the time spent repairing these "holes" cannot be said to be ". . . restoring data to its original condition," but is more properly characterized as improving the original condition.

Additionally, Mr. Morris' conduct did not "cause" these defects. For sentencing purposes, this situation might be analogized to one where a person enters another's premises without permission, through a door with a defective lock, and while inside accidentally breaks a chair. The cost of restoring the chair to its original condition may fairly be said to be caused by the individual who entered, but not the cost of repairing or replacing the lock on the door. Since the government includes both types of cost in its estimate, its estimate is again overstated and unreliable.

Finally, if the court is disposed to accept the government's loss figures, it should nevertheless grant a downward departure on the basis that "the total dollar loss that results from the offense. . .overstate[s] its seriousness." Application Note 11 to Guideline § 2F1.1. The note indicates that where, as here, the defendant's conduct is not the sole cause of the loss, a downward departure may be warranted.

C. "More Than Minimal Planning"

Guideline § 2F1.1(b)(2)(A) provides for an increase in offense level of 2 if the offense involved "more than minimal planning." Application Note 2 refers to the Guideline § 1B1.1, Application Instructions for definition of this term. The term is defined in Application Note 1(f) to § 1B1.1. This definition has been criticized as being "at best, imprecise." T. Hutchinson

& D. Yellen, Federal Sentencing Law and Practice, § 2F1.1, Annot. 2 at 147 and § 1B1.1, Annot. 10 at 24 (1989). One example supporting this criticism is particularly apt here:

What is the planning typical for an offense in the simple form? If, for example, a defendant is prosecuted for computer fraud and § 2F1.1 (fraud and deceit) applies, is the standard for comparison the planning involved in a simple fraud or in a simple computer fraud?

T. Hutchinson & D. Yellen, supra at 24. Even more puzzling is the question what is a "simple form" of the offense committed by Mr. Morris?

The background Note to §2F1.1 explains the Commission's intentions in utilizing an enhancement for "more than minimal planning," as follows:

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of actual harm.

This generalization demonstrates why such an enhancement is inappropriate in the instant case where the offense was the result of a single incident and wholly unintentional consequences. Indeed, the evidence at trial showed that Mr. Morris went to great lengths to try to limit the adverse consequences of his program, but was unsuccessful. Put another way, the offense itself was the result of too little, not too much planning, and the loss was entirely unintentional. For

these reasons, increasing the offense level would be inconsistent with the Sentencing Commission's intent.

D. Use Of Special Skill

The government is expected to urge an upward adjustment of 2 for "use of a special skill, in a manner that sufficiently facilitated the commission or concealment of the offense." Guideline § 3B1.3. The Application Note states that the term "refers to a skill not possessed by members of the general public and usually requiring substantial education training or licensing."

Defendant opposes this upward adjustment for several reasons. First, the offense itself can only be committed by someone with some level of knowledge in the use of computers, but mere knowledge in computers does not equate to the type of examples given: "pilots, lawyers, doctors, accountants, chemists and demolition experts."

Second, Mr. Morris did not have "substantial education training or licensing," as compared to the above examples. He had been a first year graduate student in computer science for about six weeks at the time of the offense. As Cornell University (which later suspended him) concluded in its Report on the Computer Worm at 38 (Feb. 6, 1989):

Many students graduate or undergraduate, at many institutions could have accomplished this act. The knowledge and skill required are possessed by most UNIX hackers.

A similar sentiment was expressed by government witness Eugene H. Spafford, who has written describing the code for the virus or worm program as follows:

The code was apparently unfinished and done by someone clever but not particularly gifted, at least in the way we associate with talented programmers and designers. There were many bugs and mistakes in the code that would not be made by a careful competent programmer. The code does not evidence a clear understanding of good data structuring, algorithms, or even of security flaws in UNIX, . . . In general, the code is not that impressive, and its "success" was due at least as much to large amount of luck as it was due to programming skill possessed by the author.

Eugene H. Spafford, "The Internet Worm Program: An Analysis." Purdue Technical Report CSD-TR-823 at p. 26 (rev. December 8, 1988). Thus, even if Morris possessed a special skill, it was not "used in a manner that facilitated the commission or concealment of the offense." United States v. Foster, 876 F.2d 377, 378 (5th Cir. 1989). In sum, these two authorities, neither of whom is sympathetic toward the defendant, both concluded that no special skill was involved in the offense. The Court should not do otherwise.

E. Acceptance of Responsibility

Mr. Morris requests a reduction in offense level of 2 based on his acceptance of responsibility as provided in Guideline § 3E1.1. As the testimony at trial revealed, Robert Morris

admitted to his father, who was a high federal government official in the area of computer security, that he was responsible for unleashing the worm program. He did this by telephone about 24 hours after the worm program was released, and with the full expectation that the elder Mr. Morris would report it to the appropriate authorities. Mr. Morris (Sr.) did so advise the FBI on November 5, 1988, and undoubtedly reported it to other federal authorities prior to that time.

Robert also gave a "proffer" on December 19, 1988, to the U.S. Attorney and the FBI. The statement consists of more than 180 pages of transcript, and fully covers his involvement in the matter. He also accepted responsibility for his actions before the Academic Integrity Hearing Committee at Cornell University on April 17, 1989, in a meeting which ultimately led to his suspension from Cornell. In his testimony at trial, Mr. Morris acknowledged creating the worm, described it as an experiment which was "a dismal failure" and testified that "it was a mistake and I'm sorry".

Guideline § 3E1.1(b) provides that:

A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea, or a finding of guilt by the court of jury or the practical certainty of conviction at trial.

Application Note 2 is even more to the point. It states as follows:

Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g. to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

The latter example describes this case. Mr. Morris' chief contention was that § 1030(a)(5) did not apply to the facts of his case. It is fair to say that except for the issue of the extent of the loss, a matter about which Morris had no direct knowledge, virtually all of the facts in the case were undisputed. Under these circumstances, failure to reduce the offense level by 2 on the basis of the defendant's acceptance of responsibility would amount to an "augmentation of sentence" based on his decision to "stand on [his] right to put the government to its proof rather than plead guilty." United States v. Araujo, 539 F.2d 287, 291-92 (2d Cir.), cert. denied, 429 U.S. 983 (1976). Such an augmentation "is clearly improper." United States v. Hutchings, 757 F.2d 11, 14 (2d Cir.), cert. denied, 472 U.S. 1031 (1985).

IV. CONCLUSION

Taking into consideration the arguments previously advanced, the defendant recommends the following calculation under the Sentencing Guidelines:

1. Base Offense level of 4 - This represents a downward departure from 6 to 4. The 4 is arrived at by analogy to the Guideline for Property Damage or Destruction, Guideline § 2B1.3(a). This type of departure is consistent with the Commission's provision for "specific guidance for departure, by analogy or by other numerical or non-numerical suggestions," Ch. 1, Part A, 4(b).

2. Specific Offense Characteristic (loss) +4. This figure is calculated by reference to Guideline § 2F1.1(b)(1)(E), \$20,0001 to \$50,000, which is a more realistic total of the "loss," if any, caused by Mr. Morris' actions.

3. Specific Offense Characteristic (more than minimal planning) +0. For the reasons stated above, defendant does not believe it appropriate to increase the offense level on this basis.

4. Adjustment for Use of Special Skill +0. For the reasons stated above, defendant does not believe an upward adjustment on this basis is appropriate.



5. Adjustment for Acceptance of Responsibility -2. For the reasons stated above, defendant submits he is entitled to this adjustment.

The Offense Level under defendant's calculation then becomes 6, which, with a Criminal History Category of I, calls for a guideline sentence of 0-6 months imprisonment, and a fine of \$500 to \$5,000; plus the cost of the sentence.

Permissible sentences in this guideline range include such options as probation, community confinement, and intermittent confinement, See Guideline § 5B1.1. Defendant intends to supplement this memorandum orally to address these particular options, including the possibility of community service.

Respectfully submitted,

BONNER & O'CONNELL

By: Thomas A. Guidoboni

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Attorneys for Defendant,  
Robert T. Morris  
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HANCOCK & ESTABROOK

By: \_\_\_\_\_

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Additional Attorneys for  
Defendant Robert T. Morris  
Mony Tower I, P.O. Box 4976  
Syracuse, New York 13221  
Tel. No. (315) 471-3151

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Memorandum in Aid of Sentencing has been served upon the following counsel of record this 30th day of April, 1990.

By hand on:

Mark D. Rasch, Esquire  
Ellen R. Meltzer, Esquire  
Fraud Section, Criminal Division  
United States Department of Justice  
Second Floor  
1400 New York Avenue, N.W.  
Washington, D.C. 20005

By mail on:

Andrew T. Baxter, Esquire  
Assistant U.S. Attorney  
369 Federal Building  
100 S. Clinton Street  
Syracuse, New York 13260

BONNER & O'CONNELL

By: Thomas A. Guidoboni  
Thomas A. Guidoboni

BONNER & O'CONNELL

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WALTER J. BONNER\*  
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STEPHEN C. GLASSMAN, P.C.\*\*\*  
THOMAS A. GUIDOBONI\*  
JOHN C. HAYES, JR.\*  
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DAVID W. O'BRIEN\*  
THOMAS B. SHULL\*  
KATHLEEN M. STRATTON  
SUZANNE MCGEE  
DIANE A. GROSSI\*

PAUL R. DEAN  
OF COUNSEL

March 13, 1990

HAND DELIVERED

Mark D. Rasch, Esquire  
Fraud Section, Criminal Division  
United States Department of Justice  
Second Floor  
1400 New York Avenue, N.W.  
Washington, D.C.

Re: United States v. Robert Tappan Morris  
89 CR-139 (N.D.N.Y.)

Dear Mark:

This letter is in part to confirm, and in part, to expand upon our telephone conversation of March 12, 1990, concerning the government's position at sentencing in the above-captioned case.

In response to my initial question on the amount of "loss" upon which the government would rely, you advised that the government would rely on the amount you believe the government proved at trial, which was approximately \$165,000 and certainly not more than \$200,000. I then asked what the government's position would be with regard to which guidelines applied - those in effect at the time of the offense (as amended June 15, 1988) or those in effect at the time of sentencing (as amended November 1, 1989). You asked if it made any difference, and I said I would so determine and get back to you with a response and a more detailed description of the issue.

In response to your question, it appears to me that the guidelines utilized do make a difference in this case. The 1988 guideline for offenses involving fraud and deceit [§2F1.1] establishes a base offense level of 6 [subsection(a)] and an increase in level of 6 for a loss between \$100,001 and \$200,000

Mark D. Rasch, Esquire  
March 13, 1990

[subsection(b)(1)(G)]. Assuming no other increases or decreases, and a Criminal History Category of I, this would result in a guideline sentence of 10-16 months. Under the 1989 guidelines, the base offense level remains at 6 [§2F1.1(a)], but the increase in offense level becomes 7 for amounts between \$120,001 and \$200,000 [subsection(b)(1)(H)]. Under the same assumptions described above, this would result in a guideline sentence of 12 to 18 months.

The problem arises because 18 U.S.C. § 3553(a)(4) provides that the court must consider the guidelines "that are in effect on the date the defendant is sentenced." This may create ex post facto problems when, as is the case here, the new guidelines increase the guideline sentence. See Miller v. Florida, 107 S.Ct. 2446 (1987). In recognition of these potential constitutional problems, the Department of Justice has stated its policy as follows:

As a general rule, the guideline in effect on the date the offense was committed should be used instead of the newer guideline if the new guideline increases the guideline sentence above that which was in effect on the date of the offense in any way.

U.S. Dept. of Justice, Prosecutors Handbook in Sentencing Guidelines and Other Provision of the Sentencing Reform Act of 1984, at 72 (Nov. 1, 1987) (emphasis in original). I, of course, agree with the Department's analysis on this point.

I trust this information is sufficiently detailed to permit you to respond to my inquiry on which set of guidelines (1988 or 1989) the government will seek to have applied with regard to the offense level in this case, and I await your view.

Very truly yours,

BONNER & O'CONNELL

By Thomas A. Guidoboni  
Thomas A. Guidoboni

TAG/ps

cc: Robert Tappan Morris



Washington, DC 20530

MAR 16 1990

Thomas A. Guidoboni, Esq.  
Bonner & O'Connell  
900 17th Street, N.W.  
Suite 600  
Washington, D.C. 20006

Re: United States v. Robert Tappan Morris  
(Dkt No. 89-CR-139) (N.D.N.Y.)

Dear Mr. Guidoboni:

This will respond to your letter dated March 13, 1990 regarding the applicability of the Sentencing Guidelines to your clients' conduct. Specifically, you inquired about the government's position concerning the applicability of changes in the relevant Guidelines between the date of the commission of the offense and the date of sentencing. Citing the Prosecutors Handbook in Sentencing Guidelines, at 72 (1987) you pointed out that:

As a general rule, the guideline in effect on the date of the offense was committed should be used instead of the newer guideline if the new guideline increases the guideline sentence above that which was in effect on the date of the offense in any way.

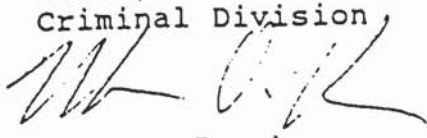
(emphasis in original).

Please be advised that, consistent with the Department of Justice policy and the ex post facto clause of Article I § 9 of the United States Constitution, the government will apply the Sentencing Guidelines which were in effect at the time of the defendant's commission of the offense where, as here, applying the later Guideline would result in a harsher punishment. The Guidelines in effect on November 2, 1988, the date of the commission of the offense were those promulgated in June of 1988.

I trust this responds to your concerns. If you have any questions, please call me at 786-4390.

Yours truly,

Laurence A. Urgenson  
Chief, Fraud Section  
Criminal Division,

  
By: Mark D. Rasch  
Trial Attorney

# United States District Court

Northern District of New York

UNITED STATES OF AMERICA

V.

ROBERT TAPPAN MORRIS

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

U.S. DISTRICT COURT  
N. D. OF N.Y.  
FILED

Case Number 89-CR-139

MAY 16 1990

(Name of Defendant) AT 10 O'CLOCK M. Thomas I. Acristi-Guidoboni, Esq.  
J.R. SCULLY, Clerk Defendant's Attorney  
SYRACUSE Arrest 5/16/90

THE DEFENDANT:

- pleaded guilty to count(s) \_\_\_\_\_
- was found guilty on count(s) Count 1 of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC, Sec. 1030 (a)(5)	Intentional access of Federal interest computers without authorization thereby preventing authorized access and causing a loss in excess of \$1,000.00	1

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) \_\_\_\_\_, and is discharged as to such count(s).
- Count(s) \_\_\_\_\_ (is)(are) dismissed on the motion of the United States.
- The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
- It is ordered that the defendant shall pay to the United States a special assessment of \$ \_\_\_\_\_, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: \_\_\_\_\_

Defendant's mailing address: \_\_\_\_\_

Defendant's residence address: \_\_\_\_\_

same as above

May 4th, 1990  
Date of Imposition of Sentence

Howard G. Munson  
Signature of Judicial Officer

Howard G. Munson, USDI/NDNY  
Name & Title of Judicial Officer

May 16, 1990  
Date

Defendant: Robert Tappan Morris  
Case Number: 89-CR-139

PROBATION

The defendant is hereby placed on probation for a term of three years.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

1. Robert Tappan Morris shall perform 400 hours of community service in a manner determined by the Probation Office and approved by the Court.



Defendant: Robert Tappan Morris  
Case Number: 89-CR-139

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: Robert Tappan Morris  
Case Number: 89-CR-139

### FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of \$ 10,050. , consisting of a fine of \$ 10,000. and a special assessment of \$ 50. .

These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

On Count 1 of the Indictment. The Special Assessment of \$50. is due immediately and should be made payable to Clerk, USDC/NDNY.

This sum shall be paid  immediately.

as follows:

The fine of \$10,000. must be paid during the first year of probation in amounts determined by the Probation Officer.

The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

The interest requirement is waived.

The interest requirement is modified as follows:

Defendant: Robert Tappan Morris  
Case Number: 89-CR-139

**RESTITUTION, FORFEITURE, OR  
OTHER PROVISIONS OF THE JUDGMENT**

It is further Ordered that Robert Tappan Morris pay for the cost of his supervision at a rate of \$91.00 per month as directed by the Probation Office.

The Court has determined that formulating an Order of restitution would unduly complicate and prolong the sentencing process.

(See Addendum)

Defendant: Robert Tappan Morris  
Case Number: 89-CR-139

A D D E N D U M

The Probation Officer, using the guideline for 2F1.1., as reflected in Appendix A of the Statutory Index of the US Sentencing Commission Guideline Manual, has found the Base Offense Level to be 6. The Total Offense Level to be 14 and the Criminal History Category to be 1. Guideline Range to be 15 to 21 months. The Probation Officer, however, finds that a new sentencing statute permits the court to depart from the Guideline-specified sentence when it finds, "an aggravating or mitigating of a kind or to a degree not adequately taken into consideration by the Sentencing Commission," and recommends a downward departure.

The Court agrees with the Probation Officer that there is no applicable guideline at this time for this specific offense. The court will not accept the scoring of this offense by the Probation Officer under the guideline for "Fraud and Deceit," but will depart for the following reasons:


1. It is the conclusion of this court that the characteristics of this case were not the type of case, "heartland case," used by the Sentencing Commission in placing 18 USC 1035 (a) (5) under the Fraud and Deceit Guideline and that the Commission did not adequately take into consideration the specific characteristics of this type of case in considering alternative guidelines.
2. Although in and of itself, this offense is an extremely serious offense, by placing it in the Fraud and Deceit guideline in this specific case the total dollar lost overstates the seriousness of the offense.
3. Because of the lack of similar prosecutions of this type available to the Sentencing Commission, there was not sufficient information to establish any other appropriate guideline when 18 USC 1035 (a) (5) was placed in the Fraud and Deceit Category.

Addendum continued on page 7.

Defendant: Robert Tappan Morris  
Case Number: 89-CR-139

4. Under these circumstances, section 2X5.1 of the Sentencing Guidelines provides that "if there is not a sufficiently analogous guideline, the provisions of 18 USC 3553 (b) shall control." Section 3553 (b) in turn provides that "in the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purpose set forth in subsection (a) (2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by the guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

dated: *May 16, 1990*

  
\_\_\_\_\_  
Hon. Howard G. Munson  
US District Judge  
Northern District of New York





5

Statement of

Carol A. Brook  
Deputy Director  
Federal Defender Program, Inc.  
Chicago, Illinois

on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission  
Washington, DC

March 15, 1993



My name is Carol A. Brook, and I am the Deputy Director of the Federal Defender Program, Inc., in Chicago, Illinois, which provides representation for indigent defendants in the Northern District of Illinois and in the Court of Appeals for the Seventh Circuit. I will present the views of the Federal Public and Community Defenders on the proposed amendments to the Federal Sentencing Guideline Manual published by the Commission last December 31.

There are presently 50 Federal Public and Community Defender Organizations providing representation in 56 of the 94 federal judicial districts. Our offices operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. We represent defendants before magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of defendants in federal courts. Data for the most recent annual reporting period indicates that defender organization attorneys represented over 36,000 persons during that period. We represent persons charged with frequently-prosecuted federal crimes (like drug distribution) and with infrequently-prosecuted federal crimes (like sexual abuse). We represent persons charged with white-collar crimes (like embezzlement) and persons charged with street crimes (like first degree murder).

Federal Public and Community Defenders have a great deal of experience with the guidelines. Our comments on the proposed

amendments are based on our experience, and our desire to see that the guidelines fully implement the statutory purposes of sentencing and that the federal sentencing system is just, fair, and humane.

Since the original creation of the guidelines, the Federal Defenders have been concerned about the paucity of alternative sentences available. The failure to make these alternatives available largely results from a combination of three factors: First, the Commission's merging of the "in-out" decision of whether to incarcerate someone or to place that person on probation with the decision of how long to make the sentence; second, the Commission's reading of 28 U.S.C. § 994(j), which basically makes every offense a "serious" offense and thus eliminates all sentences but prison even for first offenders; and third, the Commission's failure to implement Congress' mandate in 28 U.S.C. § 994(k) that prison not be imposed where the primary purpose of a sentence is rehabilitation.

The Commission's refusal to separate the "in-out" decision from the question of length of sentence is the greatest obstacle to the imposition of alternative sentences. In 18 U.S.C. § 3582(a), which was part of the enabling legislation to the Sentencing Reform Act, Congress clearly expressed its belief that there should be two separate sentencing decisions -- first, whether prison is an appropriate sentence, and second, if so, for how long. This statute comports with the thought process most judges went through in sentencing before creation of the sentencing guidelines.

Section 3582(a) states in part: "The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable and recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."

Congress' belief in this two-step sentencing process was further expressed in 28 U.S.C. § 994(a)(1)(A), also part of the Commission's enabling legislation, where Congress directed the Commission to promulgate a guideline to determine "whether to impose a sentence to probation, a fine, or a term of imprisonment." Only after that determination is made is the Commission directed to establish a guideline to determine the "appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment." In addition, 28 U.S.C. § 944(e) requires the Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" (emphasis added).

The Commission's failure to heed these directives resulted in a system wherein the only question is "how long." Under this approach, absent a departure, nonprison sentences are authorized in only the lowest sentencing ranges (ten out of 43), requiring even

first offenders with relatively low guidelines to serve prison time.

Yet, in 28 U.S.C. § 994(k), Congress recognized the importance of alternative sentences and required the guidelines to "reflect the inappropriateness of imposing a sentence of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." Thus, under the Sentencing Reform Act, the court should always have the option of determining whether the primary purpose of sentencing is to provide a rehabilitative or educational opportunity (the "in-out" decision), and if that is the case, then the court should have a range of alternative sentences available to it. These alternatives should include everything from intensive supervision to community service to apprenticeships to education to fines and restitution, and should be flexible enough to allow the courts and counsel to mold the alternatives to the needs of the offender, the case and the community.

**Amendments 1, 34, and 35  
(§ 1B1.3. Relevant Conduct)**

Amendment 1 would revise the relevant conduct rule to preclude the sentencing court from considering "conduct of which the defendant has been acquitted after trial." In addition, amendment 1 would add a new application note to U.S.S.G. § 1B1.3 that states in part, "In an exceptional case . . . such conduct may provide a basis for an upward departure." Amendment 34 invites comment upon whether the relevant conduct rule should restrict the sentencing

court to consideration of (A) conduct admitted by the defendant in connection with a plea of guilty or nolo contendere, or (B) "conduct that constitutes the elements of the offense of which the defendant was convicted." Amendment 35 sets forth two options. Option 1 would revise the relevant conduct rule to preclude consideration of "conduct of which the defendant has been acquitted after a court or jury trial." Option 2 also would preclude consideration of such conduct, but would permit consideration of such conduct if the government proved the conduct by clear and convincing evidence.

We support revising the relevant conduct rule to preclude consideration of conduct for which the defendant has been acquitted. In our experience, one of the most difficult things for people to understand -- and not just our clients, but attorneys and the general public as well -- is that a court can base a defendant's sentence on conduct of which the defendant has been acquitted. Despite the differing burdens of persuasion rationale that supports using acquitted conduct, people do not perceive using acquitted conduct as just or fair.

We support that option 1 of amendment 35. Amendment 1, although similar to option 1 of amendment 35, would add an application note suggesting a departure based upon acquitted conduct "in exceptional circumstances," an inherently ambiguous standard.<sup>1</sup> There is no sound policy reason to preclude

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<sup>1</sup>The commentary to the relevant conduct guideline does not make clear what is the norm in cases where a defendant is convicted of some counts and acquitted of others. Thus, the Commission has

consideration of acquitted conduct for the purpose of applying the base offense levels and adjustments of the guidelines -- a structured process -- while at the same time allowing consideration of such conduct for the relatively unstructured process of determining how far to depart. If acquitted conduct is allowed to be considered when determining specific offense characteristics and adjustments, the impact that the acquitted conduct can have upon sentence is regulated by the guidelines. Thus, in a drug offense, possession of a weapon results in a two-level enhancement. A departure, however, need only be reasonable, and what is reasonable to one judge may not be reasonable to another judge. We would support amendment 1 if the departure language were removed.

**Amendment 2**  
**(§ 1B1.11, p.s. Use of Guideline Manual**  
**in Effect on Date of Sentencing)**

Amendment 2 would amend U.S.S.G. § 1B1.11, p.s., which took effect last November, to provide that where a defendant is convicted of more than one offense and the offenses straddle the effective date of a revision of the Guidelines Manual, the sentencing court is to apply the version of the Manual that is applicable to the most recent offense. Amendment 2 would also

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given no guidance to courts about what may be an exceptional case, ensuring that the matter will be litigated. A narrow reading of "exceptional circumstances" would require the acquittal to be, in effect, a jury nullification, i.e., the acquittal must be clearly inconsistent with a count of conviction. A broader reading of "exceptional circumstances" would permit the court to depart if the court found that the defendant engaged in the conduct by clear and convincing evidence.

amend the commentary to U.S.S.G. § 1B1.11 to set forth the rationale behind that policy statement.

Just as we opposed the promulgation of U.S.S.G. § 1B1.11, we oppose amendment 2. Congress has not -- indeed, cannot -- delegate to the Commission the authority to determine what the ex post facto clause of the Constitution may require with regard to the Guidelines Manual. The determination of which Manual to apply is a question of law that must be determined in the context of a case or controversy.

We believe the Commission should reconsider U.S.S.G. § 1B1.1 for two reasons. First, the guideline is inconsistent with advice from the Office of the General Counsel of the Administrative Office of the United States Courts. See T. Slawsky, Ex Post Facto Problems: Changes in Sentencing Guidelines and Statutes and Policy Statements on Revocation of Supervision, 55 Fed. Probation 69 (1991). Second, the guideline is in contravention of Miller v. Florida, 432 U.S. 282 (1977).

In Miller, a unanimous Supreme Court held that a change in Florida's sentencing guidelines which increased the guideline range could not be applied to a defendant whose offense was committed before the change was made. We believe Miller clearly controls here.

Thus, although both the current proposal as well as last year's amendment appear to be attempts by the Commission to reduce the complexity of guideline application, we cannot support these

attempts because we believe they sacrifice the constitutional principle of ex post facto for ease of application.

Amendment 3  
(§ 1B1.12, p.s. Persons Sentenced Under the  
Federal Juvenile Delinquency Act)

Amendment 3 would add a policy statement to Chapter One, Part B, addressing the Supreme Court's decision in United States v. R.L.C., 112 S.Ct. 1329 (1992), which limits the maximum imposable sentence for a juvenile to the maximum of the guideline range applicable to an otherwise "similarly situated" adult defendant, unless the court finds an aggravating factor sufficient to warrant an upward departure from that guideline range. We do not believe this amendment is necessary.

The Supreme Court's holding in R.L.C. is clear and requires no further comment. In R.L.C., the Supreme Court held that 18 U.S.C. § 5037(c)(1)(B), which limits the sentence of a juvenile to the "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," does not refer to the statutory maximum for the underlying offense, but rather to the maximum penalty that could be imposed if the juvenile were being sentenced under the sentencing guidelines. Juvenile cases in the federal system primarily involve Native American children on reservations, and occasionally involve children of military personnel living on base. Since such cases arise infrequently in the federal system we do not feel that further comment by the Commission on the holding in R.L.C. is necessary.



Amendment 4  
(§ 2A4.2. Demanding or Receiving Ransom Money)

Amendment 4 would add a specific offense characteristic, a cross reference, a special instruction, and additional commentary to U.S.S.G. § 2A4.2. The proposed specific offense characteristic would increase the offense level using the table in U.S.S.G. § 2B3.1(b)(6) if the amount of ransom exceeded \$10,000. The cross reference would require the application of U.S.S.G. § 2A4.1 (kidnapping) if the defendant was a "participant" in the kidnapping offense. The special instruction would require application of U.S.S.G. 2X3.1 (accessory after the fact) if the defendant's conduct was "tantamount to that of an accessory after the fact to the kidnapping or ransom demand offense."

We oppose this amendment. The amendment attempts to make U.S.S.G. § 2A4.2 a "real offense" guideline. In formulating the guidelines, the Commission found that there was no practical way to construct a pure "real offense" system, and instead "moved closer to a charge offense system." U.S.S.G. Ch. 1, Pt. A(4)(a). This decision is partly reflected by the requirement that the sentencing court apply the offense guideline for the offense of conviction -- not for the acquitted or dismissed counts. The proposed cross reference and special instruction would make this guideline a mere conduit to U.S.S.G. § 2A4.1 and U.S.S.G. § 2X3.1. A person convicted of receiving ransom money, but found not guilty of kidnapping (or who had a kidnapping charge dismissed), would nevertheless be sentenced under the kidnapping guideline. As we

discuss later in connection with amendment 28(C) (pp. 44-46), we oppose the ad hoc creation of a real offense sentencing system.

Amendment 5  
(§§ 2B1.1 et al. Theft, Fraud, and Tax)

Amendment 5 would revise the treatment of loss in certain theft, fraud, and tax guidelines, and the treatment of the specific offense characteristic for "more than minimal planning," and use of "sophisticated means to impede discovery" in those guidelines. The amendment would delete the two specific offense characteristics and would gradually incorporate their enhancements into the loss tables for the affected guidelines.

We support the deletion of the specific offense characteristics, especially more than minimal planning. To begin with, the term "more than minimal planning" is not well-defined. Commentary to U.S.S.G. § 1B1.1 states that the term "means more planning than is typical for commission of the offense in a simple form." What is the "simple form" of mail theft in which a defendant takes mail from several mail boxes in an apartment building? What is the standard for comparison, thefts generally, mail thefts, or mail thefts from apartment buildings? The commentary makes matters worse by stating that "more than minimal planning is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." If the defendant took mail on two occasions, the first and fifteenth of the month (when social security checks are scheduled to arrive), has there been more than minimal planning, or were the thefts "purely opportune?"

Last year the Commission noted that the more than minimal planning enhancement "has proven difficult to apply consistently in practice."<sup>2</sup> We agree. In many districts, the enhancement is routinely applied, especially if there was more than one act. We support deletion of the specific offense characteristics and the gradual incorporation of the enhancements into the loss tables.

It is difficult to evaluate the revised loss tables in amendment 5. We do not know the consideration that led the Commission to establish the levels in the current tables, and we do not know the considerations that led to the revised table. It appears to us that the biggest problem with the loss tables is the proliferation of levels at low amounts -- i.e., the range in amounts at the lower end of the tables is too small. The result is that a relatively small loss yields too great an increase in the offense level. The tables proposed in amendment 5 are a step towards alleviating that problem. We prefer the tables that the Commission had under consideration last cycle, especially the table in option 1 of amendment 5.<sup>3</sup>

In the alternative, if the Commission decides not to revise the tables, we believe the Commission should clarify the definition of the term "more than minimal planning." A simple change that would improve the definition would be to delete the sentence in U.S.S.G. § 1B1.1, comment. (n.1(f)) that states that "more than

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<sup>2</sup>57 Fed. Reg. 90, 94 (1992) (amendment 5 reason for amendment).

<sup>3</sup>See Id. at 95.

minimal planning is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." The more than minimal planning enhancement seems aimed at defendants whose modus operandi indicates that some degree of sophistication of planning was necessary to carry out the offense. Engaging in more than one act does not invariably mean that the defendant's planning was more than minimal. Similarly, we do not believe that the commentary in U.S.S.G. § 1B1.1 should assert that "this adjustment will apply especially frequently in property offenses." If that statement is a factual assertion, we believe that the statement should be deleted because the Commission does not have any data indicating that property offenses are committed in other than a "simple form" any more frequently than are other types of offenses. If that statement is an attempt to encourage courts to apply the enhancement, we believe that it is inappropriate for the Commission to do so.

**Amendment 6, 7, 37, and 65  
(§§ 2F1.1 et al.)**

Commentary to the fraud guideline suggests that an upward departure may be warranted when the fraud loss table "does not fully capture the harmfulness and seriousness of the conduct". Amendment 6 would revise that commentary to state that an example of such a case is where "the fraud caused substantial non-monetary harm." Amendment 6 would also add an example of substantial nonmonetary harm. Amendment 7 invites comment on whether to amend the commentary to U.S.S.G. §§ 2B1.1, 2B1.2, and 2F1.1 to suggest that an upward departure may be warranted when some of the harm

caused was nonmonetary; "the offense caused particularly significant emotional trauma to, or consciously or recklessly endangered the solvency of, one or more victims;" knowingly or recklessly endangering the health or safety of one or more persons; and the offense involved the risk or death, or the knowing or reckless risk of serious bodily injury or death to more than one person. Amendment 37 invites comment upon whether the commentary to U.S.S.G. § 2B1.1 should be "conformed" in three respects to the commentary to U.S.S.G. § 2F1.1. Amendment 65 invites comment upon whether U.S.S.G. § 2F1.1 should be amended to include risk of loss "when the amount at risk is greater than the amount of the actual or intended loss."

We do not believe that amendment 6 is necessary, although we do not oppose it. If amendment 6 is adopted, the example should be dropped. It is not clear how the failure to preserve a particular donor's blood might cause substantial nonmonetary harm, and no example is preferable to an unclear example.

We oppose amendment 7 to the extent that it involves modifying the commentary to U.S.S.G. § 2F1.1 beyond the modification of amendment 6. There is no evidence of problems with departures under U.S.S.G. § 2F1.1, and in any event a number of the suggested departure grounds are already covered elsewhere in the Guidelines Manual. If a victim suffers extreme psychological injury, U.S.S.G. § 5K2.3 suggests that a departure be considered. Similarly, U.S.S.G. § 5K2.5 suggests considering a departure if the offense caused property loss not covered by the guidelines.

We believe that the goals of amendment 37 can be achieved through adoption of amendment 28(G). We comment on amendment 28 at pp. 44-47.

We oppose amendment 65. Using a loss-risked approach makes determination of the loss speculative, and in any event, in the absence of any indication that the present guideline is producing unjust results, there is no substantial reason to modify the guideline.

**Amendments 8, 9, 39, 48, and 60  
(\$ 2D1.1. Drug Trafficking)**

Amendments 8, 9, 39, 48, and 60 concern a problem that we raised last year -- inappropriately high offense levels for persons who are minimal or minor participants in drug offenses. We support amendment 48 and oppose the other amendments.

Amendment 48

Amendment 48 deals most directly with the problem of the over-punishment of defendants who play a small role in drug trafficking offenses. Amendment 48 would place a cap on offense levels, and the level of the cap would depend upon (1) the type of controlled substance involved in the offense and (2) whether the defendant was a minimal or a minor participant.

Because U.S.S.G § 2D1.1 is quantity-driven, the offense level for a defendant who plays a small role is often so high that the adjustments authorized by U.S.S.G § 3B1.2 do not adequately reduce the offense level to reflect a defendant's lesser role. The Commission's recent amendment to the relevant conduct guideline may

help to some extent to alleviate the over-punishment problem, but the problem should also be addressed more directly.

Amendment 48 reflects the distinctions made by the Commission between types of drugs and type of role. The Commission does not equate heroin and marijuana; distribution of 500 grams of heroin produces an offense level of 28, but distribution of the same amount of marijuana produces an offense level of eight. To maintain the consistency of the guidelines, the cap must maintain the distinction between types of drugs. In addition, the Commission has authorized a greater adjustment for minimal participants (four levels) than for minor participants (two levels). Again, to maintain the consistency of the guidelines, the cap must maintain the distinction between minimal and minor participants.

Amendment 48 maintains both distinctions. Thus, there will be a higher cap for a minor participant in a cocaine offense than for a minimal participant in a cocaine offense. There will also be a higher cap for a minimal participant in a heroin offense than for a minimal participant in a marijuana offense.

#### Amendment 8

Amendment 8 would provide a single cap of 32 without regard to whether the controlled substance involved was heroin or marijuana. In addition, amendment 8 would also make the cap provision inapplicable to a defendant who "possessed a firearm, had ready access to a firearm, or directed or induced another participant to

possess a firearm in connection with the criminal activity."<sup>4</sup> Amendment 8 also sets forth several options that would preclude couriers and mules from receiving a mitigating role adjustment. We oppose amendment 8.

A single cap will introduce unwarranted disparity into the guidelines. A minor participant in a marijuana offense will be treated the same as a minor participant in a heroin offense, even though heroin offenses are treated more severely in all other respects. This approach is inconsistent with the structure of the guidelines.

We do not believe that the Commission should take a categorical approach to precluding a mitigating role adjustment. A defendant's role in an offense turns upon the specific facts of the case. A defendant who possessed a gun may nevertheless have been a minor participant. The defendant's possession of the gun, moreover, has already been factored into the defendant's offense level because U.S.S.G. § 2D1.1(b)(1) calls for a two-level enhancement if a firearm was possessed. Whether a defendant possessed a firearm, or directed another participant to possess a firearm, are appropriate factors to consider, along with the other facts and circumstances of the case, in determining whether a

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<sup>4</sup>There appears to be a problem in proposed new application note 2, which states that "this section" does not apply to the certain defendants. The referent for "this section" would have to be U.S.S.G. § 2D1.1, but that would not make sense because then the drug trafficking guideline would not apply. The apparent intent seems to be to preclude certain mitigating-role defendants from benefitting from the cap, so we read the term "this section" as meaning "the proviso of subdivision (a)(3)."



defendant qualifies for a mitigating role adjustment. Those factors, however, should not be dispositive, and we oppose making them so.

We also oppose any provision that would limit consideration of a mitigating role adjustment for couriers and mules. Such a categorical approach would view transportation of the drugs in isolation from the rest of the entire offense, thereby ignoring the role of the "kingpin", the person who owns the contraband. This would mean that a courier who is paid \$1,500 to transport \$125,000 worth of cocaine is as culpable as the person who would receive and distribute the cocaine. The Commission has determined that specific offense characteristics and chapter three adjustments are to be made on the basis of relevant conduct. No good reason has been shown to abandon the relevant conduct concept for applying the mitigating role adjustment when the defendant is a courier or mule.

#### Amendment 9

Amendment 9 would revise the drug trafficking guideline by (1) revising subsection (b)(1) to increase the gun enhancement if a firearm was discharged or a substantial risk of death or serious bodily injury was created (six levels) or if a dangerous weapon was otherwise used (four levels); (2) adding an enhancement based upon the number of participants; (3) adding a downward adjustment of four levels "if the defendant did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills;" (4) revising the drug quantity table so that the highest offense level provided

in the table is level 36; and (5) adding a cross-reference subsection calling for the use of the appropriate chapter two guideline "if the offense resulted in death or bodily injury" and if the resulting offense level is greater than the offense level determined under U.S.S.G § 2D1.1. We oppose amendment 9.

No evidence of problems with the current gun enhancement has been presented. Unless there is evidence that the circumstances described in proposed new subsections (b)(1)(A) and (B) cannot be dealt with by departing, or that departures are frequent and result in disparate punishment, we see no need to amend present subsection (b)(1).

We oppose an enhancement based upon the number of participants. To begin with, the number of participants can trigger an aggravating role adjustment for defendants who are organizers or managers. Some drug offenses simply require more participants than others in order to distribute the same quantity. A marijuana offense typically requires more participants than a cocaine offense, for example. This proposed provision would disproportionately increase offense levels in marijuana offenses. We do not believe that the number of participants reliably helps to indicate the seriousness of the offense.

We do not support amendment 9's revision of the drug quantity table. The drug quantity table, as originally promulgated, ended at level 36. The Commission, effective November 1, 1989, increased the top of the table to level 42 because the Commission found under the original table that there was an increasing number of offenses

involving quantities substantially in excess of the quantity that called for level 36. The Commission sought to achieve consistency in the treatment of those large quantities by raising the top of the table to level 42. In light of that, we do not think that restoration of the original drug quantity table is justified. We do, however, support a revision of the drug quantity table as proposed in revised amendment 39.

We also oppose the new cross reference. There is no evidence that the cross reference is needed, and we oppose the ad hoc creation of a real offense sentencing system.

#### Amendment 39

The Practitioners Advisory Group, at whose request amendment 39 was published, has revised amendment 39. Revised amendment 39 would provide a cap of 32 for heroin and controlled substances of equivalent seriousness, and a cap of 24 for other controlled substances, most notably marijuana. Revised amendment 39 would also provide a four-level enhancement if the defendant, or someone directed or induced by the defendant, "actually used" a firearm. Revised amendment 39 would amend the drug quantity table so that the highest offense level provided would be level 38, and would add commentary to the mitigating role guideline, U.S.S.G. § 3B1.2, that would preclude a defendant from a mitigating role adjustment if the defendant was a courier, sold the contraband, had an ownership interest in any of the contraband, or financed any aspect of the criminal activity.

We support revised amendment 39's approach to caps. It maintains the distinction between heroin and marijuana, as well as the distinction between minimal and minor participants. Our only objection to revised amendment 39 is that the caps are set too high.

Because there is no evidence of any problem with the current gun enhancement, we oppose expanding it. Unless there is evidence that courts are frequently departing for gun use, and those departures are resulting in disparate punishment, or evidence that the circumstances covered by the proposed new enhancement do not provide a basis for a departure, we see no need for revising the gun enhancement.

We would support reducing the top level of the drug quantity table to level 38. At present, a kingpin in a very large scale drug offense has little, if any, reason to accept responsibility. For example, a leader of a level 42 drug offense has an offense level of 46 (offense level of 42 enhanced four levels under U.S.S.G. § 3B1.1). If the defendant does not accept responsibility, life imprisonment is required in all criminal history categories. If the defendant accepts responsibility, life imprisonment is still required in all criminal history categories because the defendant's offense level would be reduced to level 43. However, if the top of the table were reduced to level 38, that same defendant would have an adjusted offense level of 42, which could be reduced to level 39 by acceptance of responsibility.

Level 39 yields a guideline range of 262-327 in criminal history category I and 360-life in criminal history category VI.

We oppose revised amendment 39's changes in the commentary to the mitigating role guideline, for reasons set forth above in our discussion of amendment 8 (see pp. 15-17). Whether a defendant qualifies for a mitigating role adjustment should depend upon all of the facts or circumstances of the case. The Commission has determined that specific offense characteristics and chapter three adjustments are to be made on the basis of relevant conduct. No good reason has been advanced that would justify abandonment of the relevant conduct concept when dealing with a courier.

Amendment 60

Amendment 60, proposed by the Department of Justice, would revise the mitigating role guideline, U.S.S.G. § 3B1.2, to preclude application of the guideline to "a defendant whose offense level is determined in part by reference to the drug quantity table . . . where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession." We oppose this amendment, for the reasons set forth above in the discussion of the courier and mule provision of amendment 8.

**Amendments 10 and 49  
(§ 2D1.1. Drug Trafficking)**

Amendment 10 would revise the commentary to the drug trafficking guideline to state that the term "mixture or substance" does not include

uningestible, unmarketable portions of drug mixtures; i.e., materials that have to be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the creme liqueur in a cocaine/creme liqueur mixture, fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statute, and waste water from an illicit laboratory used to manufacture a controlled substance.

Amendment 49 is similar but would revise the commentary to refer to "portions of a mixture that are uningestible or unmarketable, or that have to be separated from the controlled substance before the controlled substance can be used."

We support both amendments, but prefer amendment 49.<sup>5</sup> The circuits are split in their treatment of materials covered by amendments 10 and 49.<sup>6</sup> We believe that the Commission should resolve the split among the circuits in a way that is consistent with common sense and a rational sentencing system.

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<sup>5</sup>There would seem to be a typographical error in amendment 10. The comma after "uningestible" should probably be replaced by "or".

<sup>6</sup>The following cases have not counted materials that are uningestible or unmarketable or that have to be separated from the controlled substance before the controlled substance can be used: United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992) (mixture of cocaine and liqueur); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992) (cocaine and boric acid); United States v. Jennings, 945 F.2d 129, 135-37 (6th Cir. 1991), modified in other respects, 966 F.2d 184 (6th Cir. 1992) (waste products from manufacture of methamphetamine); United States v. Robins, 967 F.2d 1387 (9th Cir. 1992) (cornmeal and cocaine); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) (waste products from cocaine). The following cases have counted such material: United States v. Mehecha-Anofre, 936 F.2d 623 (1st Cir.), cert. denied, 112 S.Ct. 648 (1991) (cocaine bonded to acrylic and shaped into attache case); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992) (cocaine in creme liqueur); United States v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 110 S.Ct. 517 (1989) (waste product from manufacture of methamphetamine containing some methamphetamine); United States v. Dorrough, 927 F.2d 498 (10th Cir. 1991) (waste product from manufacture of P2P containing some P2P).

The drug offenses and the guidelines both call for using the weight of "a mixture or substance containing a detectable amount of" a controlled substance. Legislative history indicates that Congress believed that "the federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). Consequently, the drug penalties are based on "quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing or distribution chain." *Id.* at 12. In our opinion, the decisions that exclude the weight of uningestible or unmarketable substances are more consistent with this legislative intent.

[U]nder a broad application of Chapman, if one could "float a few kilograms of cocaine across the ocean" and "extract the cocaine from the ocean," the weight of the entire Atlantic Ocean would be used to compute that defendant's base offense level. Including [unusable and uningestible substances] in this case as a measure of punishment is no more rational than including the weight of the Atlantic Ocean in sentencing the hypothetical ocean smuggler.

United States v. Salgado-Molina, 967 F.2d 27, 29 (2d Cir. 1992).

**Amendment 11**  
**(§ 2D1.1. Drug Trafficking)**

Amendment 11, which would revise the manner in which the drug trafficking guideline deals with determining quantity in cases involving a series of drug transactions, sets forth two options. Option 1 would limit the computation of the offense level to the

largest single quantity with which the defendant was involved at any one time, except in cases where any single quantity rose to level 32 or greater. Option 2 would limit the offense level "by the amount with which the defendant was involved at any thirty-day period, using the thirty-day period that results in the greatest offense level," except in cases where "any single amount with which defendant was involved corresponds to offense level 32 or greater."<sup>7</sup>

Both options address the potential for unfairness and lack of uniformity in sentencing that may occur when government agents purposefully delay making an arrest to increase the quantity involved and thereby raise the offense level. Both would help alleviate the lack of proportionality that may occur in cases involving a series of transactions. For example, when authorities delay making an arrest of a street dealer who sells relatively small amounts of drugs on any given occasion, the current method calls for cumulating amounts over a period of time to arrive at an offense level. This can result in a habit-supporting street dealer who makes a number of small sales over an extended period of time receiving the same sentence as a dealer who regularly sells that amount at one time. We realize that it can be necessary to delay making an arrest of a small-time dealer in attempt to get closer to the person's supplier. This understandable law enforcement strategy, however, does not justify one sentence for the small-time

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<sup>7</sup>Presumably, the thirty-day period would be continuous rather than thirty non-consecutive days compiled together in one group.



dealer who is arrested immediately and a much heavier sentence for the small-time dealer whose arrest has been delayed because of law enforcement needs unrelated to the defendant's culpability.

We believe that either option would improve the guideline. We prefer Option 1 because it would provide a more accurate reflection of the extent of a defendant's culpability and would more effectively discourage sentencing manipulation by law enforcement officers.<sup>8</sup> This method of computation would not hinder law enforcement investigations that may require the delay of an arrest.

In our judgment, the thirty-day approach of option 2 would not prevent potential sentencing manipulation and unequal sentences as well as option 1. The proposal's requirement of "any thirty-day period" to define what conduct to take into consideration for determining quantity does not prevent manipulation and lack of uniformity as effectively. Further, the defendant who sells a certain amount of drugs on one occasion cannot be deemed as culpable as an individual who sells the same amount through a number of transactions over a thirty-day period.

**Amendment 12**  
**(§ 2D1.1. Drug Trafficking)**

Amendment 12 would revise application note 12 to the drug trafficking guideline. As revised, application note 12 would state that when the quantity is based upon a negotiated amount, the

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<sup>8</sup>See United States v. Barth, 788 F. Supp. 1055 (D. Minn. 1992) ("the Commission has failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest").

sentencing court is to exclude any amount that the court determines the defendant was not reasonably capable of producing, or otherwise did not intend to produce. We support this amendment, which will clarify application of the guideline and ensure a more accurate determination of the actual severity of the offense.

**Amendment 13**  
**(§ 2D1.1. Drug Trafficking)**

Amendment 13 invites comment on whether § 2D1.1 should be amended to address the calculation of weight under negotiation in those situations when the government sells a controlled substance to a defendant at a price substantially below the market value (a "reverse sting" operation). We would support an amendment to adjust the calculation of weight to reflect the quantity that the defendant could have obtained at the market price to determine the offense level. Such an amendment would promote a more accurate measure of the seriousness of the defendant's crime. Further, by removing the incentive to escalate a defendant's offense level, the amendment would discourage questionable law enforcement activity.

**Amendment 14**  
**(§§ 2K1.3 and 2K2.1)**

Amendment 14 would amend the commentary to the guidelines covering firearms and explosives possession offenses to state that the number of qualifying prior convictions is to be determined by application of the career offender guideline's standards. We believe that the amendment will clarify the guidelines, and we therefore support it.

**Amendment 15**  
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 15 revises the commentary to U.S.S.G § 2K2.1 to expand the definition of the term "firearm listed in 26 U.S.C. § 5845(c)." In addition, amendment 15 makes a conforming change to U.S.S.G § 7B1.1.

Because the revised definition tracks the statutory language, we consider this amendment to be clarifying and therefore support it.

**Amendment 16**  
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 16 would revise the commentary to the firearms possession guideline to state that the enhancement of subsection (b)(4) ["if any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels"] is applied as a matter of strict liability. We oppose the amendment because we do not believe that those who are ignorant or negligent should be treated the same as those who are deliberate or willfully blind.

**Amendment 17**  
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 17 invites comment on whether the commentary to U.S.S.G. § 2K2.1 should be revised to clarify whether a departure could be considered based upon "the type or nature of the firearm (e.g., semiautomatic, military-style assault weapon)." Application note 16, which currently addresses this matter, states that an upward departure may be warranted for "multiple National Firearms Act weapons . . . military type assault rifles, [and] non-detectable ('plastic') firearms . . . ."

We believe that the present commentary is adequate and that it unnecessary to amend the commentary at this time.

**Amendment 18**

**(§ 2K2.4. Use of a Firearm in Relation to Certain Crimes)**

Amendment 18 invites comment upon whether the proviso in application note 2 to U.S.S.G. § 2K2.4 is too complicated and confusing. The explanation in the proviso is, of necessity, technical. We do not find it to be confusing or too complex, however. Absent any specific proposed replacement language to evaluate, we do not support revising the proviso.

**Amendment 19**

**(§ 2K2.5. Federal Facilities and School Zones)**

Amendment 19 invites comment upon whether the offense levels of six and eight for violations of 18 U.S.C. § 922(q) (possession of firearm in school zone) and 18 U.S.C. § 930 (possession of dangerous weapon in federal facility) in U.S.S.G. § 2K2.5 are adequate relative to the offense level 12 provided under U.S.S.G. § 2K2.1(a)(7) for certain nonregulatory firearms offenses, or to the offense level six provided under U.S.S.G. § 2K2.1(a)(8) for most regulatory firearms offenses.

We do not believe that any change in U.S.S.G. § 2K2.5 is warranted at this time. That guideline covers a wide variety of conduct. A school teacher who carries a pistol in her car for self-protection purposes is covered,<sup>9</sup> as is a gang member who keeps

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<sup>9</sup>The Washington Post recently reported that a forty-eight year old school teacher in Fairfax, Virginia who carried a pistol in her car for self-protection (legal in Virginia), was arrested and charged with a felony when the pistol was found on the floor of the back seat of her car. The car was parked in a school zone, and

a gun in his locker. The guideline contains a cross reference to deal with cases where the defendant possessed the weapon in connection with another offense, or an attempt to commit another offense. We believe that, absent a showing that there is a need -- and a satisfactory method -- to distinguish among the various ways in which offenses covered by this guideline are committed, the Commission should not act to revise the guideline.

**Amendments 20 and 58**  
**(§§ 2S1.1, 2S1.2, 2S1.3, 2S1.4. Money Laundering)**

Amendment 20 would revise the money laundering guideline by combining present U.S.S.G. §§ 2S1.1 and 2S1.2 into a new U.S.S.G. § 2S1.1, and by combining present U.S.S.G. §§ 2S1.3 and 2S1.4 into a new U.S.S.G. § 2S1.2. Proposed U.S.S.G. § 2S1.1, which deals with the more serious offenses, would link the base offense level to the underlying conduct that was the source of the funds. Proposed subsection (a) would direct the sentencing court to use the greatest base offense level from among three alternatives. Proposed subsection (a)(1) uses the base offense level from the underlying offense that was the source of the funds, if the defendant committed that offense and the offense level for that offense can be determined. Proposed subsection (a)(2) calls for a base offense level of 12 plus the number of levels from the fraud loss table corresponding to the value of the funds, if the

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suddenly Ms. Boley, a veteran teacher of 21 years, was faced with a possible maximum term of five years in prison. Wash. Post, Nov. 19, 1992. The Commonwealth of Virginia recognized the absurdity of prosecuting such a case, and permitted Ms. Boley to plea to a misdemeanor, which the court then agreed to dismiss in six months if Ms. Boley stayed on good behavior. Wash. Post, Dec. 2, 1992.

defendant knew or believed that the funds were proceeds of an unlawful activity involving drug trafficking. Proposed subsection (a)(3) calls for a base offense level of eight plus the number of levels from the fraud loss table corresponding to the value of the funds.

Proposed U.S.S.G. § 2S1.1 has two specific offense characteristics. The offense level would be increased two levels if the defendant knew or believed that the transaction were designed, at least in part, to disguise the proceeds of criminal conduct, or that the funds were to be use to promote further criminal activity. If the defendant knew the transactions were designed to disguise the proceeds, an additional two levels are added if the offense (A) involved placement of funds into, or movement of funds from, a company outside of the United States, or (B) otherwise involved the use of a sophisticated form of money laundering.

Proposed U.S.S.G. § 2S1.2 has three alternative base offense levels, directing the use of the alternative that yields the greatest offense level. Proposed subsection (a)(1) calls for a base offense level of eight plus the number of levels from the fraud loss table corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of unlawful activity. Proposed subsection (a)(2) calls for a base offense level of six plus the number of levels from the fraud loss table corresponding to the value of the funds, if the defendant knew or believed that the funds were proceeds of unlawful activity.

Proposed subsection (a)(3) calls for a base offense level of six. Proposed U.S.S.G. § 2S1.2 also has a cross reference that calls for the offense level from the appropriate tax guideline if the offense was committed to evade taxes and if the resulting offense level is greater than the offense level determination under proposed U.S.S.G. § 2S1.1.

Amendment 58, proposed by the Department of Justice, would consolidate present U.S.S.G. §§ 2S1.3 and 2S1.4. This would be accomplished by adding to the present U.S.S.G. § 2S1.3 an additional base offense level of nine, "for a willful failure to file," and an additional specific offense characteristic. The new specific offense characteristic would increase the offense level by four levels (or to level 13 if the resulting offense level was less than 13) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

We support amendment 20 because it improves the present money laundering guidelines. Our experience has been that prosecutors often use the money laundering offenses to get higher sentences than they would get if they prosecuted for the underlying criminal activity. For example, a \$20,000 theft with more than minimal planning yields an offense level of 12 under U.S.S.G. § 2B1.1. If the defendant is charged under 18 U.S.C. § 1956, however, the offense level under present U.S.S.G. § 2S1.1 is 20. Under proposed U.S.S.G. § 2S1.3, the defendant's offense level is 12. Amendment 20 would not entirely eliminate the prosecutor's ability to

manipulate punishment by what is charged, but it would certainly curtail that ability.

We oppose amendment 8 because it fails to address the problem of prosecutorial manipulation of charges to get harsher sentences. We also question the assessment of seriousness in amendment 58. An accountant who has a client structure an \$18,000 payment into two payments would have an offense level of 13. Another accountant who receives an \$18,000 payment and willfully fails to report it would have an offense level of nine. We do not view the first accountant's offense as nearly fifty percent more serious than the second accountant's.

**Amendments 21 and 41  
(SS 2T1.1 et al.)**

Amendment 21 would consolidate four tax guidelines and adopt a uniform definition of tax loss. In addition, amendment 20 would create two rebuttable presumptions. First, if a return was filed, the tax loss is presumed to be 28% (34% for a corporation) of the unreported gross income (plus 100% of any false credits claimed), or 28% (34% for a corporation) of the amount improperly claimed deductions. Second, if a return was not filed, the tax loss is presumed to be 20% (25% for a corporation) of the gross income, less any tax withheld or otherwise paid.

Amendment 41, drafted by the Internal Revenue Service, would also consolidate four tax guidelines, establish a uniform definition of tax loss, and create rebuttable presumptions. The definitions and presumptions are based upon the tax rate applicable to the defendant.



We support amendment 21 and oppose amendment 41. We find the consolidated guidelines established by amendment 21 clearer and simpler to apply than the consolidated guidelines established by amendment 41. In addition, amendment 41 would increase penalties. For example, under present U.S.S.G. § 2S1.1, an evasion of \$2,500 yields an offense level of seven. Under amendment 41, the offense level would be ten. There is no evidence that the punishment presently called for by the tax guidelines is inadequate. Absent such evidence, there is no justification for an increase.

**Amendment 22**  
**(§ 2X1.1. Attempt, Solicitation, or Conspiracy)**

Amendment 22 would consolidate the specific offense characteristics of U.S.S.G. § 2X1.1(b)(1), (2), and (3) into a single specific offense characteristic. We believe that the amendment simplifies the structure of the guideline, making it more comprehensible, and we support it.

**Amendments 23 and 46**  
**(§ 3B1.3. Abuse of Position of Trust)**

Amendment 23 would revise U.S.S.G. § 3B1.3, which provides for a two-level enhancement if a defendant "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." Amendment 23 would amend the guideline to require that the defendant abuse a position of "special trust" and would revise the commentary to clarify what "special trust" means. Amendment 23 also invites comment on an alternative to revising U.S.S.G. § 3B1.3 which would add a specific offense characteristic to U.S.S.G. § 2B1.1 and U.S.S.G. § 2B1.2 to

enhance a sentence for abuse of trust in embezzlement cases. When the specific offense characteristic for abuse of trust is applied, there would be no enhancement under U.S.S.G. § 3B1.3. In addition, the example of the ordinary bank teller in the commentary to § 3B1.3 would be deleted.

Amendment 46, drafted by the United States Postal Service, would amend the commentary to U.S.S.G. § 3B1.3 to increase penalties for postal service employees convicted of specified offenses. As revised by this amendment, application note 1 would state that "[t]his enhancement applies to all employees in respect to the following offenses: theft or obstruction of United States mail (18 U.S.C. §§ 1703, 1709); embezzlement of Postal Service funds (18 U.S.C. § 1711); and theft of Postal Service property (18 U.S.C. § 641)."

The present guideline is difficult to apply consistently because neither the guideline nor the commentary defines with enough precision what constitutes an abuse of trust. We support amendment 23, which will clarify what constitutes abuse of trust and revise the commentary to set forth factors that would appropriately describe the kind of relationship necessary to justify a two-level enhancement. This amendment will promote more uniform application of this guideline.

We do not support amending U.S.S.G. § 2B1.1 and U.S.S.G. § 2B1.2 to provide an enhancement for abuse of trust in embezzlement cases. That approach does nothing to clarify what "abuse of trust" encompasses. Indeed, if the "ordinary bank teller" example is

deleted, the enhancement would routinely be applied in every embezzlement case and be nothing more than an increase in the base offense level for embezzlement cases -- even though there has been no showing that the present offense levels are inadequate. Further, this approach would not address the problems that make the abuse of trust enhancement difficult to apply.

We do not support Amendment 46, which would require an abuse of trust enhancement if the defendant is a postal worker convicted of one of the specified offenses, even if no abuse of any trust were involved in committing the offense. For instance, under the proposed amendment, a postal worker convicted of hot-wiring and stealing a mail truck parked on a public street would get the enhancement, while anyone else who did the same thing would not. The proposed amendment is not specific enough to explain why a theft of postal property by a postal employee that did not involve any special access by virtue of the postal employee's position mandates a higher offense level than the same theft committed by someone other than a postal employee.

Amendment 46 raises other problems. There is no meaningful distinction between postal workers and other government workers to justify a blanket application to one group of employees and not to the other. We believe it would be unwise for the Commission to require application of the abuse of trust enhancement based solely on who employs the defendant. To determine whether there should be a two-level enhancement, the focus of inquiry should be on whether there was a unique fiduciary-like relationship as a result of the

defendant's position that substantially facilitated the commission of the offense.

Amendments 24, 31, and 47  
(\$ 5K1.1, p.s. Substantial Assistance to Authorities)

Amendments 31 and 47 would each remove the requirement of a government motion for downward departures under U.S.S.G. § 5K1.1, p.s. in all cases and would authorize a defendant to move for such a departure. Amendment 24 invites comment on whether to permit the sentencing court, sua sponte, to depart downward for substantial assistance if the defendant were a first-time offender convicted of an offense that did not involve violence. We support the proposed amendments.

To comply with 18 U.S.C. § 3553(a), the sentencing court must consider the defendant's "history and characteristics" when imposing sentence. Section 5K1.1, however, purports to limit the sentencing court's consideration of one aspect of the defendant's history and characteristics -- whether the defendant has assisted law enforcement authorities -- by requiring a government motion before the court can depart. While 18 U.S.C. § 3553(e) requires a government motion before the court can impose a sentence below a minimum term required by statute, 28 U.S.C. § 994(n) does not mandate such a requirement when the departure is below the guideline range but not below the statutory minimum. The Commission, however, determined that U.S.S.G. § 5K1.1, p.s. would call for a government motion. The Commission has never explained why it took this approach, so it is unclear why the Commission does not trust federal judges to determine if a defendant has

substantially assisted authorities absent a motion by the prosecutor.

The government motion requirement creates unfairness. If there is a dispute between the government and the defendant as to the nature and extent of the defendant's cooperation, the government can foreclose the resolution of that dispute by a neutral third party -- the court -- by failing to make the necessary motion.

The available data suggests that the problem of fairness is more than theoretical because of the increase in the number of substantial assistance departures. Indeed, departures under U.S.S.G. § 5K1.1, p.s. have become the growth industry of the Guidelines. The Commission's data indicates that the substantial assistance departure rate in FY 91 (11.9%) was nearly fifty-percent greater than that rate in FY 90 (7.5%). U.S. Sentencing Com'n, 1991 Annual Report table 56; U.S. Sentencing Com'n, 1990 Annual Report table C-5. More recent Commission data indicates that the rate has continued to climb and is presently at about 15.1%. The national data reveals significant variance among federal judicial districts. In FY 91, in 15 districts, the rate of substantial assistance departures was less than half the national rate, and in two districts there were no substantial assistance departures at all. U.S. Sentencing Com'n, 1991 Annual Report table 56. In six districts, the rate in FY 91 was more than twice the national rate (the rate was 41% in the Eastern District of Pennsylvania). Id. The rate can vary quite substantially between adjacent districts.

For example, the rates in the Northern and Middle Districts of Florida are 36.3% and 20.4%, respectively, while the rate in the Southern District of Florida is 8.2%. Id. The Commission's most recent data indicates that this variance between districts continued through FY 92.

In addition, conduct that would qualify a defendant for a government motion in one district may be insufficient in another. For example, in the Central District of Illinois, it appears to have been the policy of the United States Attorney to move under U.S.S.G. § 5K1.1, p.s. only if the defendant agreed to go undercover with a wire. See United States v. Curran, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989), rev'd sub nom United States v. Spears, 965 F.2d 262 (7th Cir. 1992). If two defendants provided equally substantial assistance in that district, only the one who wore a wire would be eligible for a government motion under U.S.S.G. § 5K1.1, p.s.

The policy in the Central District of Illinois, however, does not appear to be the policy in the Eastern District of Virginia, see United States v. Campbell, 704 F. Supp. 661, 663 (E.D. Va. 1989), or in the District of Columbia, see United States v. Roberts, 726 F. Supp. 1359, 1375-76 (D.D.C. 1989), rev'd sub nom United States v. Doe, 934 F.2d 353 (D.C. Cir.), cert. denied, 112 S.Ct. 268 (1991).

Because there are no nationwide standards that govern the exercise of prosecutorial discretion under U.S.S.G. § 5K1.1, p.s. the potential for disparity cannot be adequately controlled.

Further, prosecutorial decisions are generally considered unreviewable, so uniform national standards, were they to exist, would not guarantee consistent applications anyway. See United States v. Chotas, 913 F.2d 897, 905 (5th Cir. 1990) (Clark, J., concurring and dissenting) ("it seems to me to be grossly inconsistent with the goal of reducing sentencing disparity to remove sentencing discretion from the judge and place it with the prosecutor whose decisions are not reviewable"), cert. denied, 111 S.Ct. 1421 (1991).

In addition to the lack of uniform standards, the Commission's study of mandatory minimum sentencing provisions raises the possibility of racial discrimination in the applications of U.S.S.G. § 5K1.1, p.s. The Commission's data suggests that racial discrimination infects prosecutorial decisionmaking with regard to mandatory minimums and substantial assistance departures.<sup>10</sup>

If the government-motion requirement reflects a concern about prolonging sentencing hearings because of substantial assistance claims, that concern may already be realized. In addition to litigating whether the prosecutor has acted in bad faith, a defendant can litigate whether the prosecutor has unconstitutionally withheld a motion. Wade v. United States, 112

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<sup>10</sup>The substantial assistance departure rate for whites, where there was a five year mandatory minimum, was 19.9%. The rates for blacks and hispanics was 13.8% and 6.8%, respectively. Where the mandatory minimum was ten years, the substantial assistance departure rates were: whites, 25%; blacks, 18.3%; and hispanics, 11.8%. U.S. Sentencing Com'n, Mandatory Minimum Penalties in the Federal Criminal Justice System 81 (Tables 23A-23E, 24A-24E) (Aug. 1991).

S.Ct. 1840 (1992). Indeed, in Wade, the government conceded that a defendant would be entitled to relief if a prosecutor's refusal to file a motion under U.S.S.G. § 5K1.1, p.s. was not "rationally related to any legitimate Government end . . . ." Id. at 1844.

The removal of the government motion requirement would allow sentencing courts to focus on the relevant issue of whether the defendant provided substantial assistance to authorities. This would eliminate collateral litigation as to whether a prosecutor's decision to refrain from filing the motion was based on an unconstitutional motive or whether the prosecutor was acting in bad faith.

We believe that federal judges can be trusted to decide fairly and justly, and without a government motion, whether a defendant has substantially assisted authorities. We therefore support amendments 31 and 47 which, if adopted, will make the focus of the inquiry whether the defendant actually provided substantial assistance and will eliminate peripheral litigation on why the government did not file a motion.

While we believe that the government-motion requirement should be eliminated altogether, we would support the adoption of the proposed language in amendment 24 if neither amendment 31 or 47 were adopted. Because a provision like that in amendment 24 would apply only in a limited number of cases, adopting amendment 24 would enable the Commission to test the effect on sentencing proceedings of removal of the government-motion requirement.



Amendments 25 and 36  
(§ 6B1.2, p.s. Standards for Acceptance of Plea Agreements)

Amendment 25 would revise U.S.S.G. § 6B1.2, p.s. by adding commentary recommending that the government disclose to the defendant information known to the government that is relevant to application of the guidelines "in order to encourage plea negotiations that realistically reflect probable outcomes." Option 1 of amendment 25 would encourage disclosure during "plea discussions." Option 2 would encourage disclosure "prior to the Rule 11 colloquy." Amendment 36 is similar, except that disclosure would be encouraged prior to the "entry of a guilty plea."

We favor option 1 of amendment 25. To make a knowing and intelligent waiver of a trial and plead guilty or nolo contendere, a defendant should be fully aware of the sentencing consequences of the plea. In a guideline sentencing system, those consequences are capable of reasonably accurate determination. At least, the areas of disagreement can be identified so that a defendant can reasonably assess the consequences of a plea.

Because of the scope of the relevant conduct rule, as well as the sentencing court's ability to depart from the guideline range on the basis of factors not adequately accounted for in the guidelines, it is important to know before a plea what matters the government will be bringing to the court's attention. Without such information, a defendant may enter a plea expecting a certain range of punishment and then be confronted with a fight to prevent that range from increasing.

There are benefits to the courts if this amendment is adopted. Sentencing disputes could be identified early on and resolved, or the issues narrowed. Presentence reports could be completed more quickly, and sentencing hearings would go more smoothly, with counsel able to focus on matters in dispute. There would be fewer motions to withdraw pleas and 2255 motions based upon ineffective assistance of counsel. Finally, there would be a greater appearance of fairness, which would enhance the federal criminal justice system not only in the eyes of the defendant but also in the eyes of the public.

**Amendment 26  
(Carjacking)**

Amendment 26 invites comment, first, on the most appropriate guideline for the recently-enacted armed carjacking statute, 18 U.S.C. § 2119, enacted by the Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 101, 106 Stat. 3384 (1992). Amendment 26 also invites comment on whether the offense levels in §§ 2B1.1, 2B1.2, and 2B6.1 should be raised for offenses involving stolen vehicles to reflect the increase in the statutory maximum from five to ten years under sections 102 and 103 of the Anti Car Theft Act of 1992.<sup>11</sup>

We believe that the robbery guideline, U.S.S.G. § 2B3.1, is the most appropriate guideline. At common law, robbery required the trespassory taking of property, by force or fear, from the

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<sup>11</sup>The Notice of Proposed Amendments in the Federal Register refers to "\$ 2B1.6." The reference is probably a typographical error, and the correct reference should be § 2B6.1.

person or presence of another, with intent to steal the property. See 2 W.R. LaFave & A.W. Scott, Substantive Criminal Law § 8.11 (1986). Those elements are present in the other offenses covered by U.S.S.G. § 2B3.1. Hobbs Act robbery, for example, is defined as

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. 18 U.S.C. § 1951(b)(1).

The definition of carjacking in 18 U.S.C. § 2119(a) contains the elements of common-law robbery and is similar to the other robbery offenses covered by U.S.S.G. § 2B3.1. We therefore believe that U.S.S.G. § 2B3.1 is the appropriate offense guideline.

We do not believe that the offense levels of U.S.S.G. §§ 2B1.1, 2B1.2, and 2B6.1 should be increased for offenses involving stolen vehicles simply because the Anti Car Theft Act of 1992 increased the maximum penalty for such offenses from five to ten years. We do not believe that an increase in a statutory maximum requires an increase in the offense levels of the applicable offense guideline. A statutory maximum sets an appropriately severe penalty for the most aggravated form of the offense. An increase in the statutory maximum means Congress believes the most aggravated form of the offense should be treated more seriously, but does not necessarily mean that the heartland form of the offense should be treated more severely.

**Amendment 27  
(Chapter Two)**

Amendment 27 would consolidate several chapter two offense guidelines with other offense guidelines that cover similar offense conduct and that have identical or very similar characteristics. We do not perceive any policy changes in the consolidation. Because this amendment will simplify the guidelines, we support it.

**Amendment 28  
(Miscellaneous Sections)**

Amendment 28 would make substantive and technical amendments to numerous sections. We oppose amendments 28(A), 28(C), and 28(F). We do not oppose the other parts of amendment 28.

Amendment 28(A)

Amendment 28(A) would revise the commentary to the first degree murder guideline, U.S.S.G. § 2A1.1, to eliminate a discussion of 18 U.S.C. § 1111 (first degree murder within the special maritime and territorial jurisdiction of the United States). The background note simply states that (1) the discussion in application note 1 regarding downward departures applies to 18 U.S.C. § 1111 only if section 1111 does not mandate life imprisonment, and (2) whether section 1111 mandates life imprisonment is a matter to be resolved by the courts. The background note discussion is accurate and pertinent, and we see no reason to delete it.

Amendment 28(C)

Amendment 28(C) would add real-offense cross-reference provisions to four guidelines, U.S.S.G. § 2A3.1 (criminal sexual

abuse), U.S.S.G § 2B3.1 (robbery), U.S.S.G. § 2B3.2 (extortion by force), and U.S.S.G § 2E2.1 (making or financing an extortionate extension of credit). We have previously expressed our concern that the Commission, apparently inadvertently, is changing the nature of the guidelines from charge-offense with real offense elements, to real offense. Under the mixed system adopted by the Commission, U.S.S.G. § 1B1.2 directs the use of the offense of conviction to determine the applicable offense guideline in chapter two of the Guidelines Manual, and U.S.S.G. § 1B1.3 directs the use of the real offense conduct to determine the base offense level and specific offense characteristics under the offense guideline, as well as the adjustments to that guideline under chapter three of the Manual.

As the Commission itself has indicated, in drafting the initial set of guidelines,

one of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).<sup>12</sup>

The Commission first attempted to draft a set of guidelines incorporating a pure real offense system. The Commission found, however, that a real offense system was impractical and "risked return to wide disparity in sentencing practice".<sup>13</sup> The Commission

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<sup>12</sup>U.S.S.G. Ch. 1, Pt. A(4)(a), at 4.

<sup>13</sup>Id. at 5.

then opted for the present system, one based on the offense charged but with "a significant number of real offense elements".<sup>14</sup>

Amendment 28(C) would alter that system for four guidelines by rendering meaningless the direction in U.S.S.G. § 1B1.2 to use the offense of conviction for determining which chapter two offense guideline to use. We believe that this approach is wrong. The Commission, for good reasons, has rejected a comprehensive real offense system and should not, ad hoc, abandon that decision. If the Commission wants to make a fundamental alteration of the present system, the Commission should tackle the issue head-on and across-the-board. The problems that the Commission identified when it rejected a comprehensive real offense system are only magnified by the creation of a real offense system ad hoc.<sup>15</sup>

Amendment 28(F)

Amendment 28(F) invites comment upon whether U.S.S.G. § 2A6.1 (threatening communications) should be amended to preclude grouping together multiple threatening communications to the same victim on different occasions. We do not believe that such a change is

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<sup>14</sup>Id. See also W. Wilkins and J. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 497-500 (1990) ("The Commission ultimately settled on a system that blends the constraints of the offense of conviction with the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.")

<sup>15</sup>We are not endorsing a real offense system. Indeed, we have strong reservations about a system in which the charge that the government has proved beyond a reasonable doubt would serve only to set a maximum and otherwise would be virtually irrelevant to determining punishment. Rather, we are suggesting that a major alteration of the guideline system ought to be undertaken directly and comprehensively, not inadvertently and on an ad hoc basis.

warranted. In our experience, the vast majority of persons who are prosecuted for sending threatening communications are mentally unbalanced and have no intention of carrying out their threats. There is no evidence that the guideline presently produces sentences for such people that are too lenient. If the defendant took any action indicating an intention to carry out a threat, subsection (b)(1) increases the base offense level by 50%. Absent any evidence that the present guideline produces inappropriate results, we oppose any modification of U.S.S.G. § 2A6.1 along lines suggested in amendment 28(F).

**Amendment 29**  
**(Chapter 5, Part H. Specific Offender Characteristics)**

Amendment 29, proposed by the Criminal Law Committee of the Judicial Conference, would amend the introductory commentary to Chapter 5, Part H, by adding language stating that a court may depart from the guidelines when factors not ordinarily relevant to a departure decision "are present to an unusual degree and are important to the sentencing purposes in the particular case."<sup>16</sup> We support this amendment. The Commission, in Chapter Five, has specified a number of factors that are "not ordinarily relevant" to determine whether to depart. It follows that there are some situations in which such a factor is relevant, and one of those

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<sup>16</sup>There appears to be a typographical error in the amendment, which refers to "the Introductory Commentary to § 5H1.1". The introductory commentary is to Chapter 5, Part H, and applies to all of the policy statement in Chapter 5, Part H -- not just to U.S.S.G. § 5H1.1. The reference in the amendment should probably be to "the Introductory Commentary to Chapter 5, Part H", the reference used in the synopsis of the amendment.

situations would seem to be when that factor is present with other factors that also are "not ordinarily relevant." The Judicial Conference language would make this logic explicit in the commentary and prevent any misunderstanding.<sup>17</sup>

**Amendment 30**  
**(Chapter One, Part A(4)(b). Departures)**

Amendment 30 invites comment on whether the language in Chapter One, Part A(4)(b) can be read as overly restrictive of a court's ability to depart. We believe that certain language in Chapter One, Part A(4)(b) can be, and has been, read as overly restrictive of a court's ability to depart. Thus, for example, the Eighth Circuit has stated that "[t]his circuit has determined that departures pursuant to section 3553(b) were intended by the Commission to be allowed only in rare cases." United States v. Johnson, 908 F.2d 396, 399 (8th Cir. 1990). Similarly, the Third Circuit has concluded that "the Guidelines, commentaries and policy statements clearly indicate that departures should be rare." United States v. Uca, 867 F.2d 783 (3d Cir. 1989).

Congress viewed departures as a way to avoid mechanistic sentences,<sup>18</sup> and therefore, departures must be based on the

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<sup>17</sup>For an example of such misunderstanding, see United States v. Sigwart, 916 F.2d 916 (4th Cir. 1990) (case remanded to sentencing judge who mistakenly interpreted U.S.S.G. § 5H1.1 to prohibit departures based on factors deemed "not ordinarily relevant").

<sup>18</sup>"The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983).



particular facts of the case. Further, it is through departures that the Commission is able to refine and improve the guidelines. As the Commission itself has stated, "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted." U.S.S.G. Ch. 1, Pt. A (4)(b), at 6. Given these concerns, the Commission should scrupulously avoid discouraging departures.

We recommend the following modification to Chapter One, Part A(4)(b). On page six, paragraph two, delete "Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because" and insert in lieu thereof "Second,". On page six, paragraph four, delete "In its view, however, such cases will be highly infrequent."

**Amendment 32  
(First Offender Sentencing Options)**

Amendment 32 invites comment on whether the Commission should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a nonviolent or otherwise nonserious offense. If so, amendment 32 invites comment upon whether that objective should be achieved by (A) providing an additional ground for departure in Chapter Five, Part K or (B) increasing the number of offense levels in Zone A in Criminal History Category I.

A major problem with the guidelines, in our opinion, is that they produce overly-harsh punishment, particularly in Criminal History Category I. We therefore encourage the Commission to take steps to allow courts to impose a sentence other than imprisonment in the case of a first offender or an offender with a minor criminal record.

Last cycle, we proposed that the Commission adopt a modified version of one of the amendments then under consideration. We again recommend that proposal, which would enlarge Zone A in Criminal History Category I to level nine. We would not distinguish among various types of offenses because, by definition, all level four offenses, for example, are of the same severity. The violence factor is accounted for in the determining the base offense level.

In order to accommodate our recommendation, the range in offense level nine would have to be changed to 0-6. In addition, the range in other offense levels would have to be modified somewhat in order to address disproportionate increase ("cliff") concerns. The following table indicates how those concerns would be addressed in light of the Commission's modification of Zone A last cycle:

Offense Level	Present Range	Recommended Range
9	4-10	0-6
10	6-12	4-10
11	8-14	6-12
12	10-16	9-15
13	12-18	10-16
14	15-21	14-20
15	18-24	18-24
16	21-27	22-28
17	24-30	26-32
18	27-33	28-34

Last cycle, the commission proposed an amendment that would expand Zones B and C (options 2 and 5 of last cycle's amendment 29).<sup>19</sup> We supported that proposal then, and we continue to support it. That proposal would have expanded Zone B to cover offense levels where the bottom of the range is ten months or less (a two-level expansion for Category I through IV and a one-level increase for Category V and VI). Such a change would be technical in nature, because there is little practical difference between a sentence of probation with a confinement condition and a split sentence. Defendants who would be made eligible for probation with a confinement condition if Zone B were expanded, are presently eligible for a split sentence.

The proposal last cycle also would have expanded Zone C to authorize a split sentence if the bottom of the guideline range was 12 months or less. Such a change would expand Zone C by one offense level at each Criminal History Category, but would not affect a substantial number of people.<sup>20</sup> The type of person

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<sup>19</sup>57 Fed. Register 90, 109 (1992).

<sup>20</sup>Commission date indicates that had this provision been in place in fiscal year 1990, an additional 248 persons would have been in Zone C under Criminal History Category I. P. Martin *et*

picked up by expanding Zone C, moreover, is not likely to be the sort of person for whom the Commission would think a split sentence is inappropriate.<sup>21</sup>

**Amendment 33  
(Sentencing Options)**

Amendment 33 invites comment upon whether the Commission should increase the availability of the type of sentences provided for in Zones A and B of the sentencing table to more offense levels within all Criminal History categories.

We would support such an amendment for the reasons set forth in our discussion of amendment 32.

**Amendment 38  
(§ 2B1.1. Theft)**

Amendment 38 invites comment upon whether the theft guideline should contain downward adjustments if the defendant did not personally benefit from the theft, and whether offense levels should be capped for minimal and minor participants. We believe that the Commission should study both matters. That study would enable the Commission to determine whether there are sufficient instances of a defendant who does not personally profit from the offense to warrant drafting a special offense characteristic for

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al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 10, (Oct. 23, 1991).

<sup>21</sup>In fiscal year 1990, there were no homicide, kidnapping, or robbery cases in offense levels 8 through 14, under all criminal history categories. Id. at Table 11. There were 94 drug cases, 21 sex offense cases, and 98 firearms cases in those offense levels, under all criminal history categories, in fiscal year 1990. Id. There were 20,171 cases sentenced in fiscal year 1990. Id. at Table 10.

U.S.S.G. § 2B1.1, and whether the aggregation problems of the drug guideline also infect the theft guideline. In the meantime, we suggest that the Commission add language to the commentary making clear that the heartland of the guideline encompasses personally profiting from the offense, and that consideration a departure would be warranted if the defendant did not personally profit from the offense.

Amendment 40  
("Cocaine Base")

Amendment 40 invites comment on whether the Commission should ask Congress to "modify or eliminate the provisions that distinguish between punishment for powdered cocaine and cocaine base (crack) at the quantity ration of 100 to 1." We believe that the Commission should request that Congress eliminate this distinction.

The stark fact is that crack offenses are committed overwhelmingly by African-Americans and that powdered cocaine offenses are committed primarily by whites. The Commission's own data shows that from April 1, 1992 through July 31, 1992, African-Americans comprised 92.6% of the defendants sentenced for drug offenses involving crack, and non-blacks accounted for 70.3% of those defendants sentenced for powdered cocaine.

There is no rational basis for differentiating penalties. Indeed, there is no objective scientific data to show that crack is more dangerous than cocaine powder, particularly to the extent Congress has decreed. The disparate levels of punishment only cast doubt on the fairness of the federal criminal justice system and

are inconsistent with the goals of eliminating unwarranted sentencing disparity.

The disparate treatment evidenced, by the Commission's own data, raises constitutional problems as well. Indeed, the Minnesota Supreme Court struck down a similar state penalty provision. *State v. Russell*, 477 N.W. 886 (Minn. 1991). The Minnesota Supreme Court held that the statute violated equal protection because of the lack of a "genuine and substantial" basis for the distinction. We ask the Commission to urge Congress to act promptly to repeal this discriminatory distinction.

**Amendment 42**  
**(§§ 3D1.3, 2D1.1, and 2S1.1)**

Amendment 42, drafted by the Internal Revenue Service, offers two options for increasing offense levels for drug trafficking and money laundering offenses. Option 1 -- which would affect all offenses, not just drug trafficking and money laundering offenses -- would amend the grouping rules to call for a two-level increase when offenses are grouped together under U.S.S.G. § 3D1.2(c) and the count with the specific offense characteristic that requires such grouping has a lower offense level than the offense level applicable to the group. Option 2 would amend the drug trafficking and money laundering guidelines to call for a two-level enhancement if the defendant failed to report income from drug trafficking in excess of \$10,000 in any year or if the defendant failed to report income in excess of \$10,000 in any year.

We oppose both options. The Internal Revenue Service has not produced any evidence suggesting that punishment under the drug

trafficking or money laundering guidelines is inadequate. Because people who engage in criminal activities rarely report to the IRS that they earned money illegally, and the amount of such money, the IRS proposal amounts to nothing more than an across-the-board increase in offense levels for the drug trafficking and money laundering guidelines.

**Amendment 43**  
**(§ 3D1.4. Determining the Combined Offense Level)**

Amendment 43, drafted by the Internal Revenue Service, would revise the counting of units for purpose of the grouping rules. At present, U.S.S.G. § 3D1.4 does not assign any unit, or fraction of a unit, to a group that is nine or more offense levels less than the highest offense level of the groups. Amendment 43 would require assigning one-half unit to such a group.

We oppose amendment 43. The Internal Revenue Service has not presented any evidence of the need for a revision. It is not clear why the Commission should require that a defendant whose offense level under U.S.S.G. § 2D1.1 is 32 should receive a two-level increase in that offense level because the defendant is convicted at the same time of a level four trespass. Absent any evidence of a need to revise, we do not believe that the Commission should further increase the complexity of the grouping guidelines.

**Amendment 44**  
**(§ 2B1.1. Theft)**

Amendment 44, drafted by the Postal Service, would amend the theft guideline by (1) adding a two-level enhancement if undelivered mail was taken and (2) requiring an offense level of at

least 14 if the offense involved "an organized scheme to steal undelivered United States mail." We oppose both parts of the amendment.

The Postal Service has presented no evidence to suggest that present penalties for theft of undelivered mail are inadequate. The second part of the amendment, moreover, would mean that an organized scheme to steal undelivered mail is equated with a loss of at least \$70,000.<sup>22</sup> The Postal Service has given no rationale for treating such a scheme as equivalent to a loss of at least \$70,000.

**Amendment 45**  
**(Chapter 3, Part A. Victim-Related Adjustments)**

Amendment 45, proposed by the Postal Service, would add a new guideline calling for an increase in the offense level "if the offense affected more than one victim." We oppose the amendment.

There has been no evidence presented that there is a need for such an enhancement. While the proposed enhancement might seem straight-forward, there are problems in application. For example, if a thief steals a bundle of 200 Sears catalogs addressed to "occupant," is there one victim (Sears), 200 victims (the "occupants" at the addresses on the catalogues), or 201 victims (Sears plus the 200 "occupants") -- or some lesser number that

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<sup>22</sup>Under U.S.S.G. § 2B1.1, the base offense level is four. Because there is an organized scheme, the two-level enhancement of subsection (b)(5) would apply, yielding an offense level of six. To get to level 14 requires an eight-level enhancement, which in turn requires a loss in excess of \$70,000.



accounts for those "occupants" who do not want the catalog, do not care if it is delivered, or throw it away immediately upon receipt?

Amendment 50  
(§ 2D1.1. Drug Trafficking)

Amendment 50 would revise the commentary to the drug trafficking guideline, U.S.S.G. § 2D1.1, by adding language to the asterisk footnote to the drug quantity table to specify that the weight of LSD means the "actual weight of the LSD itself", and excludes the weight of any carrier. We support amendment 50.

LSD, unlike marijuana, for example, is sold by the dose, not by weight. The weight of the typical dose of LSD, as set forth in the commentary to the drug trafficking guideline, is 0.05 milligrams. In other words, one gram of LSD will produce 20,000 doses.

Because the typical dose of LSD is minuscule almost to the point of invisibility, the dose must be consumed with the aid of a carrier, typically a paper called "blotter paper." The weight of the blotter paper is more than 100 times the weight of the LSD it contains.<sup>23</sup> If the carrier is something other than blotter paper, such as a sugar cube, the weight differential can be even greater. Thus, in an LSD case, the defendant's offense level will be driven

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<sup>23</sup>The Seventh Circuit calculated that blotter paper with 100 doses of LSD weighs about 110 times the weight of the LSD alone. United States v. Marshall, 908 F.2d 1312, 1315 (7th Cir. 1990), aff'd sub nom Chapman v. United States, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1919 (1991).

mainly by the weight of the carrier medium, not by the weight of the LSD.<sup>24</sup>

The vast disparity between the weight of the carrier and the weight of the LSD produces results that are inequitable, incompatible with the purposes of sentencing, and inconsistent with a market-oriented approach to drug penalties.<sup>25</sup> A drug manufacturer who makes enough LSD for 10,000 doses and is apprehended with the LSD in liquid form, before it is inserted into a carrier, will have an offense level of 20 because the weight of the LSD is 500 milligrams. A defendant with 100 doses in blotter paper -- one percent of the number of doses that the manufacturer's LSD would produce -- would also receive an offense level of 20. As Judge Posner has observed, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."<sup>26</sup>

Congress has decided, for purposes of determining criminal liability and maximum punishment, that the weight of a "mixture or

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<sup>24</sup>For example, 100 doses of liquid LSD weighs five milligrams and carry an offense level of 12. Using the Seventh Circuit's formula, 100 doses of LSD on blotter paper weigh about 550 milligrams and carry an offense level of 20. See n. 23 supra. If sugar cubes are used for the carrier, 100 doses of LSD weigh about 225 grams and carry an offense level of 36.

<sup>25</sup>The Attorney General's designee on the Commission has agreed that there is potential for disparity if the carrier is weighed. See R. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50, 56 n.19 (1990).

<sup>26</sup>United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner, J., dissenting), aff'd sub nom Chapman v. United States, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1919 (1991).

substance containing a detectable amount of" LSD should be used. See 21 U.S.C. § 841(b). The Commission has adopted this approach in U.S.S.G. § 2D1.1 for purposes of determining the relative severity of offenses,<sup>27</sup> and the Supreme Court has affirmed that 21 U.S.C. § 841(b) and U.S.S.G. § 2D1.1, as presently written, call for counting the weight of the carrier medium.<sup>28</sup>

Congress, however, has not mandated that the Commission require counting the weight of the carrier. The Commission is free to use a different method. The weight of the LSD itself not only is a better measure of offense seriousness than the combined weight of the LSD and the carrier, but is also more consistent with a

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<sup>27</sup>The asterisk footnote to that table states that "unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."

<sup>28</sup>Chapman v. United States, \_\_\_\_ U.S. \_\_\_\_, 111 S.Ct. 1919 (1991).

market-oriented approach to drug penalties.<sup>29</sup> We urge the Commission to adopt amendment 50.

Amendment 51  
(§ 2D1.1. Drug Trafficking)

Amendment 51 would revise the asterisk footnote to the drug quantity table to specify that the term "cocaine base" means "the lumpy, rock-like form of cocaine base usually prepared by processing cocaine HCl and sodium bicarbonate. 'Crack' is the street name for this form of cocaine base." We support the amendment.

All forms of cocaine derive from the cocoa plant, which is grown mostly in South America. The leaves of the cocoa plant are mashed together to form a paste, which is treated with chemicals to form cocaine base. The cocaine base is then usually transported to Columbia, where it is refined, using acetone and hydrochloric acid,

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<sup>29</sup>In Chapman v. United States, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1919, 1925 (1991), the Supreme Court stated that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence". The purity of LSD is not affected by the carrier, whether it be blotter paper, a sugar cube, or a glass of orange juice. The carrier serves only to make it possible to consume a dose of LSD. While one carrier (say, a sugar cube) may be more appealing than another (say, blotter paper) on grounds of taste, the carrier does not dilute or weaken the LSD. As Judge Posner has observed, counting the weight of the carrier "would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer." United States v. Marshall, 908 F.2d 1312, 1332 (7th Cir. 1990) (Posner, J., dissenting), aff'd sub nom Chapman v. United States, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1919 (1991).

into cocaine hydrochloride, an acid. This acid, when dried, is the white powder form of cocaine.

"Crack" is made by converting the acid form into a base form. That is accomplished by dissolving the powder in water and baking soda (or ammonia) and heating the solution. After the acid is removed, the substance is hardened into a block, which can be broken into smaller pieces for sale to the consumer. Because the crack form of cocaine has a significantly lower melting point than the powder form, the crack form can be smoked.

Smoking gets the cocaine absorbed into the blood stream faster than snorting. Crack produces a shorter, more intense high than cocaine powder.<sup>30</sup>

Congress has established a 100 to one ratio between "cocaine base" and cocaine.<sup>31</sup> The Commission's drug quantity table is based upon this statutory ratio.<sup>32</sup>

While Congress used the term "cocaine base" in the statutory language, the legislative history indicates that Congress was concerned with "crack", the street term for the rock form of

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<sup>30</sup>For a general description of the differences among cocaine powder, cocaine base, and crack, see S. Henegan et al., Report of the Drugs/Role Harmonization Working Group 22-24 (Nov. 10, 1992); Drug Enforcement Administration, U.S. Dep't of Justice, *Drugs of Abuse* 37-40 (1988 ed.).

<sup>31</sup>While distribution of five kilograms of cocaine is required to trigger a ten-year mandatory minimum term of imprisonment, distribution of only 50 grams of "cocaine base" will trigger the ten-year mandatory minimum. 21 U.S.C. § 841(b)(1)(A)(ii), (iii).

<sup>32</sup>R. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50 (1990).

cocaine base that can be smoked, and not with other forms of cocaine base. See, e.g., 132 Cong. Rec. S27180 (daily ed. Sept. 30, 1986) ("title I addresses the widespread emergence of crack cocaine in this country . . . . I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride . . . ." (remarks of Sen. Chiles). Certain characteristics of crack were seen as justifying greater penalties: Crack's rock-like form makes it marketable in small quantities at a relatively low price and therefore more attractive to purchasers. Crack's high purity and method of ingestion (smoking) produces a more intense high and was perceived to make crack more addictive than the powder form of cocaine. See, e.g., 132 Cong. Rec. S14822 (daily ed. June 20, 1986) ("Because crack is so potent drug dealers need to carry much smaller quantities of crack than cocaine powder") (remarks of Sen. D'Amato).

A consequence of Congress' use of the term "cocaine base" instead of the street term "crack" is that courts have wrestled with the question of whether forms of cocaine base other than "crack" should receive the greater penalties applicable to "crack." See, e.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991) (enhanced penalties apply only to "crack"); United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992) (enhanced penalty applies to cocaine base that was not crack and that was bonded to suitcase). The legislative history behind the enactment of enhanced penalties for "cocaine base" indicates that Congressional concern was focussed on the rock form of cocaine base -- "crack". The

Commission, too, seems to be concerned with crack because the drug equivalency table in U.S.S.G. § 2D1.1, comment. (n.10), provides that "1 gm of Cocaine Base ("Crack") = 20 kg of marihuana". Amendment 51, therefore, will bring the guidelines closer to what Congress intended, and we urge the Commission to adopt it.

**Amendment 52**  
**(§ 5B1.1. Imposition of a Term of Probation)**

Amendment 52 would revise U.S.S.G. § 5B1.1 to require the sentencing court, if a defendant is eligible for straight probation, to impose a nonincarcerative sentence unless the court finds that imprisonment is necessary to serve the purposes of sentencing. In addition, amendment 52 would revise U.S.S.G. § 5B1.1 to require the sentencing court, if a defendant is eligible for probation with a confinement condition, to impose the minimum period of confinement permitted unless the court finds that a greater period is necessary to serve the purposes of sentencing.

We support amendment 52, which will implement the Sentencing Reform Act's mandate to sentencing courts to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. This provision also carries out the Act's directive to the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" in the guidelines, and the directive to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or other serious offense."

Amendment 53

(§ 4A1.2. Definitions for Computing Criminal History)

Amendment 53 would amend the related case rule in U.S.S.G. § 4A1.2 to require the court to count sentences separately if the offenses from which the sentences resulted were separated by an intervening arrest, and to count them as one sentence if they were not separated by an intervening arrest. We believe that the amendment will simplify the guideline, making it easier to apply, and we support the amendment.

The criminal history score does not measure the number of prior convictions, and was not intended to do so, see U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987). Criminal history points are assigned for other than prior convictions (for recency of release from imprisonment, U.S.S.G. § 4A1.1(e), for example), and some prior convictions are not counted at all (stale convictions, see U.S.S.G. § 4A1.2(e), for example).

The basic rule is that, for purposes of assigning criminal history points, "prior sentences imposed in unrelated cases are to be counted separately." U.S.S.G. § 4A1.2(a)(2). Prior sentences are unrelated "if they were for offenses separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2, comment. (n.3). Prior sentences for related offenses "are to be treated as one sentence" for assigning criminal history points. U.S.S.G. § 4A1.2(a)(2). When sentences are related, the court is to use the longest term of imprisonment if the sentences



were concurrent and the aggregate term of imprisonment if the sentences were consecutive. Id.

The related case doctrine as presently formulated not only is complicated and difficult to apply, but it also produces unjustifiably disparate treatment of similarly-situated defendants. For example, a defendant steals goods from a parked truck on day one, passes a forged check on day two, steals a car on day three, and is arrested for the three offenses on day four. If all three offenses were committed in one jurisdiction, the cases against defendant usually are consolidated for trial and sentencing. Assuming that the defendant is sentenced to concurrent 18 month terms of imprisonment, the defendant will receive three criminal history points. If the defendant commits the offenses in three different jurisdictions (Virginia, Maryland, and the District of Columbia, for example), the cases cannot be consolidated for trial or sentencing. If each jurisdiction sentences the defendant to 18 month terms of imprisonment, to run concurrently, the defendant will receive nine criminal history points (because there is no single common scheme or plan). The difference between three and nine points is two criminal history categories. Thus, defendants with the same prior criminal conduct receive substantially disparate criminal history scores, and the only reason is the artifact of where they were prosecuted.

The related case doctrine, when parsed, really turns on whether there was an intervening arrest. The same-occasion provision is unnecessary because, by definition, offenses occurring

on the same occasion cannot be separated by an intervening arrest and will therefore always be related. The single common scheme or plan provision is overridden by the intervening arrest provision. Even if the offenses were part of a single common scheme or plan, the sentences are counted separately if there was an intervening arrest. The related case doctrine can be simplified and made easier to apply -- and disparate counting reduced -- by adoption of amendment 53.

**Amendment 54**  
**(§ 4A1.2. Definitions for Computing Criminal History)**

Amendment 54 would amend the commentary to U.S.S.G. § 4A1.2 to clarify the meaning of the term "instant offense." We support the amendment.

A defendant is assigned criminal history points for a prior sentence only if the sentence results from a conviction "for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). To avoid double counting, and to insure consistency with the multiple count rules of U.S.S.G. § 5G1.3, the term "instant offense" has to include "relevant conduct". Cf. U.S.S.G. § 4A1.1, comment. (n.4) (the term "instant offense" in U.S.S.G. § 4A1.1(d) includes "any relevant conduct"). The Fifth Circuit, however, adding an unnecessary level of complexity to the guidelines, has held that the inquiry is not whether the prior sentence is for conduct that is "relevant conduct", but rather "whether the prior conduct constitutes a 'severable, distinct offense' from the offense of conviction." United States v. Thomas, 973 F.2d 1152, 1158 (5th

Cir. 1992). We believe that the Commission should clarify the matter by adopting amendment 54.

**Amendment 55**  
**(§ 4B1.1. Career Offender)**

Amendment 55 would amend the career offender guideline to require the court, if the defendant is found to be a career offender, to impose a sentence that is at the top of the guideline range for Criminal History Category VI and the offense level otherwise determined. We support the amendment.

The Sentencing Reform Act requires the Commission to assure that certain career offenders receive a sentence "at or near the maximum term authorized". 28 U.S.C. § 994(h). The Sentencing Reform Act also amended 18 U.S.C. § 5037(c)(1)(B) to authorize a court to sentence a juvenile to the "maximum term that would be authorized if the juvenile had been tried and convicted as an adult". The Supreme Court has held that this phrase in section 5035(c)(1)(B) refers to the maximum sentence that the juvenile could have received by application of the sentencing guidelines. United States v. R.L.C., 112 S.Ct. 1329 (1992). We believe that the strikingly similar language of 28 U.S.C. § 994(h) should be interpreted similarly, i.e., to refer to the maximum of the applicable guideline range.

**Amendment 56**  
**(§ 1B1.10, p.s. Retroactivity of Amended Guideline Range)**

Amendment 56 would revise U.S.S.G. § 1B1.10, p.s., which, implementing 18 U.S.C. § 3582 (c)(2), provides that a court may reduce a sentence of a defendant sentenced to imprisonment if the

guideline range applicable to the defendant has been reduced, after defendant was sentenced, as a result of an amendment listed in subsection (d) of the policy statement. Amendment 56 would add amendment 459 to the list of amendments in subsection (d) and also would revise subsection (a) to provide that the court, when the reduction is due to an amendment not listed in subsection (d), can reduce the defendant's sentence if the court finds that such a reduction would be consistent with the purposes of sentencing.

We support the amendment. Under 18 U.S.C. § 3582(c)(2), a court can resentence a defendant based upon a subsequently-lowered guideline range "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The Commission, in U.S.S.G. § 1B1.10, p.s. has indicated that a court may reduce a defendant's sentence only if the reduction in the guideline range is the result of a guideline amendment specified in subsection (d) of that policy statement. The Commission has specified eleven numbered amendments in subsection (d).

We believe that amendment 459, which revised the acceptance of responsibility guideline, should be added to the list in subsection (d). That amendment affects a considerable number of persons, and at a time when prison resources are stretched to the maximum, it would be desirable, as well as fair, to authorize the courts to adjust sentences of persons sentenced under the former acceptance of responsibility guideline.

We also believe that the sentencing court should be able to modify the sentence of a defendant when the guideline range has

been reduced because of an amendment other than an amendment listed in subsection (d), if the reduction would serve the ends of sentencing. Such a provision would implement the Sentencing Reform Act's directive in 18 U.S.C. § 3553(a), which requires the court to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

**Amendment 57**  
**(§ 4A1.2. Instructions for Computing Criminal History)**

Amendment 57, drafted by the Department of Justice, would revise the commentary to U.S.S.G. § 4A1.2 that addresses collateral attacks on prior convictions. The amendment would delete, "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." The amendment would also add language stating that "The Commission does not intend this guideline or commentary to confer any right to attack collaterally sentencing a prior conviction or sentence beyond any such right otherwise recognized in law . . . ."

We oppose this amendment. The present language makes clear the Commission's intention, and there is no evidence that courts have misunderstood the language. Absent such evidence, we do not believe any change is called for.

**Amendment 59**  
**(§2F2.1. Computer Fraud and Abuse)**

Amendment 59, proposed by the Department of Justice, would add a complex new guideline to Chapter Two, Part F to deal with computer fraud and abuse. We oppose amendment 59.

We are unaware of very many prosecutions for computer fraud and abuse. Because a court can depart from the fraud guideline if the monetary loss "does not fully capture the harmfulness and seriousness of the conduct," U.S.S.G. § 2F1.1, comment. (n. 10), there is no urgent need for a separate guideline to cover a handful of cases. Given the complexity of the proposed guideline, we suggest that the Commission set up a working group to study whether the Commission should take action.

**Amendment 61**

**(§ 4B1.2. Definitions of Terms Used in Section 4B1.1)**

Amendment 61, proposed by the Department of Justice, would expand the definition of crime of violence to include possession of a firearm by a felon and nonresidential burglaries. We oppose this amendment because it would dramatically increase the number of defendants who will be sentenced as career offenders, when there has been no demonstration that the present definition is inadequate.

The Commission consciously chose to limit the definition of the term "crime of violence" for purposes of the career offender guideline to include those crimes that have as an element "the use, attempted use, or threatened use of physical force against the person of another." In 1991 and again in 1992, the Commission specifically excluded from the definition of the term "crime of violence," the unlawful possession of a firearm by a felon, a possessory offense that does not present the same risk of harm as crimes of an assaultive nature. We see no reason for the Commission to reverse its two previous determinations.

Similarly, by specifying that burglary of a dwelling is a crime of violence, the Commission determined that nonresidential burglaries should not be considered as a "crime of violence" for determining career offender status. A nonresidential burglary does not present the same level of risk to another person that residential burglary presents. Equating the two would mandate identical punishment for a defendant who had broken into an occupied home and a defendant who had broken into an unoccupied car.

**Amendment 62**  
**(§§ 2B1.1 et al. Theft, Bribery, and Fraud)**

Amendment 62, drafted by the Department of Justice, invites comment on whether theft, bribery, and fraud guidelines should be revised to require a four-level enhancement for all offenses involving a financial institution. We oppose the amendment.

We perceive no reason to increase the offense level simply because a financial institution is involved. The Justice Department's rationale is that in recent years Congress has increased the maximum term of imprisonment for financial institution offenses.

We disagree with the Justice Department's unstated premise that any increase in a statutory maximum requires an increase in the offense levels of the applicable offense guideline. A statutory maximum sets an appropriately severe punishment for the most aggravated form of the offense. An increase in the maximum means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily

mean that Congress believes that the heartland form of the offense should be treated more severely.

We believe that in enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the financial institutions provisions of the Crime Control Act of 1990, Congress was concerned with high level officials -- such as chief executives and controlling investors -- who caused substantial losses to the institutions that they directed or controlled. Under amendment 62, the theft, fraud, and bribery guidelines would provide four-level enhancements whether the loss to the financial institution was \$10,000 or \$10,000,000. We do not believe that Congress substantially increased penalties in the Financial Institutions Reform, Recovery, and Enforcement Act and in the financial institution provisions of the Crime Control Act of 1990 so that tellers who embezzle a few thousand dollars could be punished more severely. The obvious Congressional concern was with the directors and senior officials of financial institutions who caused enormous losses to the institutions with which they were associated.<sup>33</sup>

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<sup>33</sup>For example, Congress directed the Commission to "promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(m), 103 Stat. 501 (emphasis added). To comply with that directive, the Commission added what is now subsection (b)((7)(A) of U.S.S.G. § 2B1.1. U.S.S.G. App. C (amend. 317).

Similarly, Congress in 1990 directed the Commission to act to make sure that the guidelines ensured that a defendant convicted of any of the above offenses receive an offense level under chapter 2 of not less than 24 "if the defendant derives more than \$1,000,000



Congressional attention was not directed at low- and mid-level officials whose crimes involved relatively modest sums of money, and whose punishment would be substantially increased by amendment 62.

**Amendment 63**  
**(§ 2D1.1. Drug Trafficking)**

Amendment 63, submitted by the Department of Justice, requests comment upon whether the caps on base offense levels for distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants should be removed or raised so that violations involving very large quantities of these drugs will result in greater sentences. Because there has been no showing that the present guidelines call for inappropriately low sentences for offenses involving those controlled substances, we do not believe that an amendment by the Commission concerning those controlled substances is called for.

The amendment also invites comment upon whether the definition of a "unit" of anabolic steroid in the last paragraph of U.S.S.G. § 2D1.1 should be changed from "a 10 cc vial of injectable steroid or fifty tablets," to "a one cc vial of injectable steroid or five tablets," and whether "fewer" than five tablets should be equivalent to a one cc vial of injectable steroid. The recommended changes would result in a substantial increase in the base offense level for persons charged with trafficking in anabolic steroids.

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in gross receipts from the offense." Crime Control Act of 1990, Pub. L. No. 101-647, § 2507, 104 Stat. 4862 (§ 2507 is captioned "Increased Penalties in Major Bank Crime Cases").

The provision on steroids took effect only 17 months ago<sup>34</sup> and was the result of careful study by the Commission. The Justice Department has given no rationale for the proposed change, and there is no evidence to indicate that the current provision results in unjustifiably low sentences. We do not believe that the Commission should amend the steroid provision.

**Amendment 64**  
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 64, drafted by the Department of Justice, invites comment upon seven proposals for revising offense levels under U.S.S.G. § 2K2.1: (1) increasing from 18 to 22 the base offense level for offenses involving National Firearms Act firearms; (2) increasing from 12 to 22 the offense levels for offenses involving semiautomatic firearms; (3) increasing by four levels the base offense level for offenses involving prohibited persons; (4) increasing from 18 to 22 the minimum offense level for possession or use of a firearm in connection with another felony; (5) deleting the level 29 cap on the offense level for adjustments under subsections (b)(1) through (b)(4); (6) increasing from 12 to 16 the base offense level for distributing a firearm to a prohibited person; and (7) increasing more rapidly the enhancement under subsection (b)(1) for the number of firearms.

We do not believe that the significant increase in offense levels called for by amendment 64 is warranted. The Commission substantially increased offense levels under U.S.S.G. § 2K2.1 in

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<sup>34</sup>U.S.S.G. App. C (amend. 369).

two consecutive years, 1990 and 1991. We are unaware that the impact of those changes has been measured; indeed, given the ex post facto clause, it is unlikely that the impact can be measured yet. Until the impact can be measured, we think Commission action would be premature.

**Amendment 66  
(Gang-related Crime)**

Amendment 66, proposed by the Department of Justice, invites comment on whether the guidelines should provide for a four-level enhancement for "felonies committed by a member of, on behalf of, or in association with a criminal gang." The proposed amendment would define a criminal gang as "a group, club, organization, or association of five or more persons whose member [sic] engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses."

We believe the Commission should not provide such an enhancement. The report of the Commission's own working group on violent crime reveals the many difficulties involved in establishing suitable definitions of "gang"<sup>35</sup> and "gang-related crime." Neither the law enforcement nor the academic communities have reached a consensus about how to define those terms. The difficulty in coming up with a definition may explain why not one

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<sup>35</sup>"For example, someone, somewhere, would have to decide whether a group 1) had an identifiable leadership; 2) claimed control over a particular territory; 3) recognized itself as a 'denotable group'; 4) was a distinct aggregation; or 5) had been involved in a sufficient number of unlawful activities to create a consistent negative response from the community." S. Winarsky et al., Violent Crimes/Firearms/Gangs Working Group Report 52 (Oct. 14, 1992).

of the twenty-one states surveyed by the working group presently has gang affiliation or related activity as a specific factor in its sentencing guidelines.

The difficulty in coming up with a definition is compounded by the proof problems that would arise from trying to apply the definitions of "gang" and "gang-related."<sup>36</sup> As the working group points out, "[i]dentifying a crime as a 'gang crime' may require subjective judgments regarding crucial issues such as motivation of the perpetrator."<sup>37</sup> Experts do not agree on the extent of the connection between gang membership and violence, and "some researchers have found spurious relationships between the two."<sup>38</sup>

The proposed definition has not overcome the difficulties. It would allow for a gang enhancement for simple membership in a group that happened to have members who had committed "a series" of violent crimes or serious drug offenses. This definition would seem to cover a member of the Roman Catholic Church because there are other members of the church who have committed violent crimes or serious drug offenses. The proposed definition would require that a sentencing court impute knowledge of the other group members' activities. Indeed, the larger the group and the more diverse its membership, the more likely the group would be

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<sup>36</sup>"Even if a definition of gang could be agreed upon, some system of accurately operationalizing the criteria (e.g., determining that wearing colors is an accurate indicator of collective identity) would have to be developed." Id. at 52.

<sup>37</sup>Id. at 53.

<sup>38</sup>Id. at 54.

considered a "gang" under the suggested definition. Applying such a broad definition poses serious constitutional problems as well.<sup>39</sup>

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<sup>39</sup>The working group report discusses three of these problems, including conflicts with the "void for vagueness" doctrine, the "overbreadth" doctrine and unconstitutional restrictions of the right of freedom of association. Id. at 58.







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Statement of  
Rabbi Moshe C. Horn, J. D.

on behalf of the  
ALEPH INSTITUTE

before the  
UNITED STATES SENTENCING COMMISSION

Washington, D.C.

March 22, 1993

*"You shall do no unrighteousness in judgement"  
Leviticus 19:15*

*"A judge should always envision himself as having  
a sword hanging just overhead . . . when rendering judgement"  
Talmud*



Good morning honorable commissioners.

I am before you today representing the Aleph Institute. A non-profit organization which for the past twelve years has been working with federal and state inmates throughout the country. Our programs are ecumenically based and include in-prison counseling and religious services as well as intensive retreats and educational lectures and presentations. We work with offenders at all stages of criminal proceedings both pre-sentence and post conviction. We thank G-d for our success in offering federal courts and correctional agencies community based punishment programs for sentenced offenders. The alternative programs incorporate community service projects designed to sensitize the offender of their societal duties and includes rigorous instruction in doctrines dedicated to moral and ethical behavior.

I am the Prison Program director and General Counsel for the organization for the past four years. Each year I work with hundreds of offenders and their families. I help them cope with the trauma of their prosecution and subsequent punishment. I also foster their realization that they are fortunate to be punished; they develop a resolve to become a better individual from their experience and help others to stay on a proper societal path. I stand before this prestigious Commission to offer a hindsight view of the effect the Federal Sentencing Guidelines has had on our criminal justice system. A view not ordinarily entertained by my honored colleges of the many legal associations present today. All of us as members or officers of the legal profession have a duty to the citizens of this country to protect their welfare by punishing criminals in a manner that effects retribution and deterrence. But, we must not lose sight of the fact that we have a duty to the offender who is a human being and also a component of the community, he deserves a some iota of respect surely more than being classified as an integer on a chart.

The U.S. Sentencing Commission is charged in its establishing policies and practices for the federal Criminal Justice System to "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process . . ." 28 USC § 991 (b)(1)(c).

For every offender in prison there are family members, dependents, employees and many other individuals who suffer also. Our communal duty extends to these victims also. I appeal to the honorable commissioners to take a more active role in bringing the human element back into sentencing. As it states in the Talmud, "one who destroys the life of another is as if he destroyed the entire world; one who saves the life of another is as if he had saved the entire world" (Tractate Sanhedrin 37a)

The many offenders I meet are disoriented by the amorphous style of sentencing we have developed. Any sentencing goal trying to be relayed in practice simply flies over the heads of offenders when their individuality is bypassed to detach them from the actions they performed.

The comments on the amendments herein presented are focused toward a more balanced administration of justice which is based on the premise that the federal Sentencing Guidelines are designed to guide a federal judge's authority and not

usurp it.

**Re: Amendments 1, 34, & 35**

In the pursuit of justice one should not put the defendant in a position that condemns them without examining the totality of the circumstances. Criminal conduct should be in the purview of the court which is empowered to fully investigate the matter as provided by the constitutional provisions insuring fair adjudication. To bring past conduct for which a defendant was acquitted into an unrelated sentencing proceeding is shocking to the conscience. Therefore, it is urged that option one of amendment 35 of the proposed amendments from the Practitioners Advisory Group be adopted in accordance with the constitutional provisions of due process and prevention of "double Jeopardy" claims. Furthermore, amendment 34 relating to past conduct that was admitted by a defendant should likewise not be considered under Guideline §1B1.3 unless independent elements are established to substantiate the conduct is relevant to the instant case before the court. The Commission must bear in mind that an overwhelming majority of cases involve defendants who are advised to plead guilty in the interests of expediting the administration of justice. If conduct a defendant pleads guilty to can automatically be held relevant, then a chilling effect on guilty pleas will be effected forcing many cases to trial which could have been summarily disposed. This will create a burden on an already overburdened criminal justice system.

**Re: Amendments 8, 9, 39, 48, & 60**

It is urged that the commission reexamine the substantial reliance on the factual conduct used to determine the applicability of a minimal role adjustment. The mens rea and/or foreseeability of the defendant regarding the parameters of the criminal activity is a critical factor for the court to examine. There are cases where the overt acts of a defendant indicate a minimal role in the offense but evidence of the defendant's intent to be a ready, willing and able participant in the future management or execution of the criminal scheme should surely prevent delegating the defendant a mitigating role. Similarly, if the facts place the defendant in a more accountable role his inability to foresee the full consequences of his actions should be a factor to consider. Therefore, we recommend that within amendment 8, the commentary note 3 should be merged with note 6 and the language in note 3, "in addition, although not determinative . . ." should be stricken. This will make the critical factor, "a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity . . ." a characteristic that is ordinarily associated with a mitigating role. It is also recommended that option two, within note 7, should be adapted. This will reflect a proper understanding that the defendant's factual interest in an outcome may illustrate they are not culpable for the full accountability of the offense.

**Re: Amendments 24, 31 and 47**

Ordinarily, within Jewish Law there is a negative view on informers and informing ("You shall not go about as a talebearer" Leviticus 19:16). However, that applies to

providing false information or information that serves no purpose of protecting others from harm. There is an obligation on every person, especially within the Jewish faith, to "eradicate the evil from thy midst" and bring to the attention of authorities any danger to the welfare of the community. (see *People v. Drelich* 506 N.Y.S. 2nd 123 where a Rabbi heard a confession of a murderer from his congregation and was compelled by Jewish Law to testify against the individual at subsequent proceedings in accordance with Judaic doctrines, Clergy privilege held not to apply.) We must not deter an individual's unfettered adherence to values he holds dear when he punishes evil and eradicates violent crime through their unilateral assistance to the governmental authorities. I as a rabbi and member of the Jewish faith find it reprehensible that criminal proceedings center on criminal agents drafted by the prosecution and guided by them to decide what form and manner their societal duty will be manifest. §5K1.1 assistance letters and information should not be vested only in the prosecutor but there should be provisions which allow law enforcement officers to summarily submit an evaluation to the court, relaying a more an objective view on the value of the assistance. Clearly, a judicial authority is in a better position to differentiate between assistance rendered due to ethical and moral beliefs as opposed to assistance rendered due to personal motives and gains. Evidence from law enforcement officials will tend to show the candor and sincerity of assistance rendered as opposed to solely relying on the prosecutor who has the dual interest of convicting the defendant and obtaining evidence for other convictions.

Allow me to take this opportunity to appeal to the Commission to take action and reiterate to the Congress their long standing position calling for the repeal of mandatory minimum sentences. 'Equal justice for all' never meant to apply to equalizing all crimes but to equalizing the judicial treatment of all individual criminals who require special attention to their needs and circumstances. We can not uniformly categorize crimes without suffering a severe inequality of justice. "The uniformity produced . . . would not conform to most understandings of equal justice. Equality does not mean sameness . . . treating unlike cases alike - can violate rather than promote equality." Alschuler, Albert W. *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, University of Chicago Law Review. Vol. 58 Num. 3 (Summer 1991)

#### **Re: Amendments 25 and 36**

Standards of fairness dictate that the prosecutor should disclose all relevant facts, circumstances and characteristics which apply to the application of the sentencing guidelines. Such is in conformance with constitutionally accepted principles of due process and ethical behavior of a prosecutor (which includes a duty to the welfare of the defendant) as has been held in *Brady v. Maryland* and *US v. Rosa*

#### **Re: Amendments 29 and 30**

It is important to recognize that every defendant presents a unique set of characteristics tending to show any criminal disposition, ability to rehabilitate, and propensity to be a law abiding citizen. It is critical that a court examine the character of the defendant very carefully (see *US v. Duarte* 901 F2nd 1498 where the Ninth

Circuit held the District Court erred in ignoring the contents of character letters "for purposes of determining the appropriate sentence within the applicable guideline range." *Id.* at 1501). Although §511.1 - 12 indicate specific offender characteristics which are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range . . ." (emphasis added) The language not ordinarily relevant has been construed to hold "that the guidelines do not categorically prohibit a judge from departing on the basis of offender related characteristics, whether enumerated in the guidelines or not." *US v. Mogel* 956 F2nd 1555, at 1561 (11th Cir. 1992).

The statutory purpose of the sentencing guidelines is to "[maintain] sufficient flexibility to permit individualized sentences when warranted by mitigating . . . factors not taken into account in the establishment of [the guidelines]" 28 USC § 991 (b)(1)(b). It has always been the congressional intent to vest wide discretion to a sentencing judge in fashioning a sentence (see Senate Report no. 225, 98th Cong. 2d. Sess. 52). Amendment 29 should be revised to include language instructing a court to openly examine offender characteristics and render discretionary decisions as to the role each characteristic should or should not have in the sentencing process. The Commission should foster the execution of judicial discretion and clarify that it was never the Commission's intent to fossilize judicial practice. (see *US v. Concepcion* 795 FSupp 1262 (EDNY 1992) where the Honorable Judge Weinstein did not engage the "temptation [to] simply skirt these underlying [sentencing] concerns and entrust the task of punishment to the federal Sentencing guidelines . . . Congress has directed the federal courts to impose penalties 'not greater than necessary' to achieve the the statutorily defined purposes of sentencing. 18 USC §3553 (a)(2). *Id.* at 1296

The Commission should not limit this amendment to the sole factors enumerated in §511 but should consider adding language which takes into account post crime rehabilitation, family dependence and impact, illness of the defendant and various other factors traditionally envisioned as mitigating factors in sentencing. The fact that irreparable harm may occur to the defendant if incarcerated is also a critical factor of sentencing. Clarification within §511 is required to include cases where the socio-economic condition should be a factor in sentencing; because it is a stressing environment, in some cases amounting to duress. It is amazing to many individuals such as myself, who work with offenders, to note that the Guidelines completely ignore post ameliorative conduct on the part of the offender. Rehabilitation should be introduced as accepted terminology in the sentencing process and a more enlightened approach to criminal justice should be formulated. As one guiding factor a federal judge introduced, "a defendant's commitment to religious study and moral improvement may appropriately be taken into account in deciding whether to depart from the guidelines." Weinstein, J. "Alternative Punishments Under the New Federal Sentencing Guidelines," 1 Fed. Sent. Rep. 96, at 101 (1988)

The guidelines language in Chapter One, Part A, 4(b) contains language in the third paragraph which solely focuses on the characteristics of the offense and not the offender. This paragraph should be revised to be in tandem with the previous paragraph that a sentencing court may find the circumstances of the offense relative to the offender may require a departure given the facts of a particular case.

**Re: Amendment 52**

This amendment fails to take into account a stated purpose of sentencing, namely "to provide the defendant with needed educational and vocational training, medical care or other correctional treatment in the most effective manner." 28 USC §3553 (a)(2)(D). The amendment should be revised to take into account alternative modalities of punishments such as boot camps, house arrest, community service, and other punitive measures which capitalize on the productive potential of the offender and eases the burden society has to bear for the costs of incarceration. "A sentence of imprisonment 'is not an appropriate means of promoting correction and rehabilitation . . .' 18 USC§3582 (a); S. Rept. 98-225 at 76-77;119. and the commission is instructed to 'insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . .' 28 USC §994 (K)" Feinberg, K. "The Federal Guidelines and the Underlying Purposes of Sentencing," 3 Fed. Sen. Rep. 326 (May/June 1991)

Amendment 52 should be revised and expanded to reflect successful options developed by correctional institutions and those agencies working with judicial authorities to positively impact offenders. These proposed revisions would reflect the attitude of the newly appointed Attorney General Janet Reno who stated before her confirmation hearings that she will seek alternative modes of punishment for first time offenders. The three ranges of the sentencing table should be changed to include other options other than the draconian condition of confinement in order to reflect the modern trend.

**Re: Amendment 56**

We strongly urge adoption of this amendment as it encourages remorse and fosters a positive step towards contrition and repentance for past misdeeds.







**AMERICAN BAR ASSOCIATION**

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**STATEMENT OF  
STEVEN SALKY, CHAIRPERSON**

**COMMITTEE ON THE U.S. SENTENCING GUIDELINES  
SECTION OF CRIMINAL JUSTICE**

**On Behalf Of  
THE AMERICAN BAR ASSOCIATION**

**Before the  
UNITED STATES SENTENCING COMMISSION**

**Concerning  
SENTENCING GUIDELINE AMENDMENTS**

**March 15, 1993**



My name is Steven Salky. I appear before you today at the request of ABA President J. Michael McWilliams to convey the ABA's views on proposed amendments to the Sentencing Guidelines. I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States Sentencing Guidelines. Our committee is made up of professionals from every aspect of the criminal justice system - the federal judiciary, federal prosecution, private and public defense bar, law academia and criminal justice planning. We appreciate this opportunity to comment on the proposed 1993 amendments and issues for comment.

#### THE AMENDMENT PROCESS

As in prior years, we remain interested in the process by which amendments are developed and promulgated.

We once again commend the Commission for its willingness to publish all amendment proposals, including those submitted by parties outside the Commission. While this publication policy has been criticized as diverting the attention of the audience from those few amendment proposals that are being seriously considered, we believe the quality of the Commission's final deliberations will be enhanced by the diversity of viewpoints obtained from a liberal publication policy. Additionally, comments generated by proposals not presently being seriously considered may become useful in future amendment cycles.

We urge the Commission to continue publishing all amendment proposals that any one Commissioner supports. The Commission should, however, prioritize proposals. This could be accomplished in either one of two ways. The Commission could indicate in the

Federal Register which amendment proposals are being seriously considered for passage and which are unlikely to receive serious consideration. Alternatively, the Commission could initially publish all proposals and then grant "certiorari" and subsequently publish the fewer proposals that will be voted upon. Regardless of the method chosen, a priority system would continue to encourage public comment on a variety of matters, but would direct the energy of outside parties (and the Commission staff) to a limited number of proposals each year.

We also commend the Commission for continuing to rely in large part on the working group reports generated by its capable staff. We have encouraged the Commission over the years to act on the basis of empirical data and analysis, to the extent possible. Most of the working group reports submitted to the Commission this year contained recommendations based on an evaluation of the available empirical evidence. The working group reports are most valuable when they not only analyze the data generated from the case files submitted to the Commission, but also consider the manner in which the guideline in question is used in the plea bargaining and sentencing process. By determining how the guideline is applied in "real life," the working group reports can help the Commission and outside commentators fashion amendment proposals that make sense. The Commission carries out its statutory responsibilities most effectively when it carefully reviews such comprehensive working group reports before enacting amendments.

To commend the Commission for establishing working groups to study an area before it considers specific amendments is not to suggest that the Commission should never amend a guideline without a working group report. However, there should be a presumption against any substantive amendment that is not preceded by research and analysis that justifies an alteration.

Our praise should not overshadow our continued criticism of the fact that the amendments, either individually or as a package, do not include any assessment of prison impact. The Sentencing Reform Act explicitly requires that the Commission continually assess the impact of the Guidelines as a whole on the existing capacity of penal, correctional, and other facilities and services. The Sentencing Reform Act further requires that any guideline be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons. The projections in your 1991 Annual Report and the projections in your Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarcerations, and Prosecutorial Discretion and Plea Bargaining are for significant increases in the use of incarcerative sentences and in the average length of prison sentences. The Commission, however, continues to ignore its responsibility to evaluate the potential impact of any amendment on prison populations, despite the crisis in federal prison over-crowding. In our view, every working group report ought to contain a prison impact analysis. While the effect on the

rate of imprisonment may not be a basis to accept or reject a proposed amendment, it should be considered.

We continue to believe that the Commission should amend the Guidelines in accordance with pre-approved administrative rule-making procedures set forth in the Code of Federal Regulations, as was envisioned by the Sentencing Reform Act. Our Committee, in conjunction with the ABA Section of Administrative Law, is in the process of developing suggested rulemaking procedures for the Commission and we recommend that the Commission devote attention to this matter in the coming year.

Finally, we are concerned with a view we have heard expressed that no further amendments should be made to the Guidelines this year. While we have often in the past cautioned against over-amending the Guidelines, we think it equally indefensible to vote against a proposed amendment simply for the sake of avoiding changes to the Manual. Congress empowered the Commission to annually amend the Guidelines because it recognized that experience would constantly point out the need for refinement. While the Commission may one day amend the Guidelines to perfection, we do not believe that day has yet arrived. Especially while the Commission remains a full-time body, we think it important to vote on proposed amendments as if they matter. It would indeed be unfortunate if several of the worthy proposals in this year's amendment package failed because two or more Commissioners decide

simply to vote against all proposals. We urge you to vote on the merits of the amendment proposals.

#### THE AMENDMENTS

We support several important proposals in this year's package. As detailed further below, we are pleased that there are serious proposals, based upon working group reports, to revise the money laundering offense guidelines and the drug offense guidelines. If the Commission were to pass no other amendments this cycle, the passage of the proposals in these two areas, with modifications we address further below, would significantly enhance the fairness and even handedness of the Federal Sentencing Guidelines.

Before addressing these and other Commission generated proposals, I want to comment upon the one amendment and three issues for comment published at our committee's request.

Proposed amendment 31 would eliminate the requirement that the government make a motion before the court can consider a downward departure on the basis of a defendant's substantial assistance to authorities. The Sentencing Reform Act requires such a motion only in cases governed by a mandatory minimum statute. In our opinion, the Commission's enactment of §5K1.1 finds no support in the Sentencing Reform Act. Moreover, §5K1.1 allows government attorneys, not Article III judges, to exercise critical sentencing authority in a significant number of cases. We recognize that the government attorney is in the best position to advocate to the court whether a defendant's cooperation is deserving of a downward

departure. However, to allow the government to control the court's ability to even consider a departure, completely reverses the normal division of authority and responsibilities between the executive and judicial branches.<sup>1</sup>

As expressed in issue for comment 32 and 33, the ABA continues to support the fundamental principle of parsimony in punishment. Sentences authorized by the Guidelines and sentences imposed by judges ought to be no more severe than necessary to achieve the purposes of sentencing. We continue to believe that imprisonment should not be the sanction of choice for all offenders and that alternative sanctions ought to be imposed in a greater percentage of cases in the federal system. While reasonable people can disagree about the proper severity of sanctions to be imposed at various levels within the guideline grid or table, the current Guidelines result in the imposition of imprisonment on more offenders and for greater periods of time than has been the case in the pre-guideline system. We would advocate expansion of the use of alternative forms of punishment.

The issues we propose for comment in Amendments 32 and 33 are not designed, however, to define which offenders should be sentenced to imprisonment and which should be sentenced to

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<sup>1</sup> The limited repeal of the government motion requirement in cases involving first time non-violent offenders, as proposed in Amendment 24, appears to be based solely on political considerations. There is no principled distinction between first time non-violent offenders and other offenders with regard to the government motion requirement.

probation. Rather, we advocate that the Commission focus on whether to increase the availability and imposition of non-incarcerative sentences by, on the one hand, providing an additional ground for departure or, on the other hand, increasing the number of offense levels within Zone A and/or Zone B. Increasing offense levels within Zone A or Zone B will preserve uniformity, but may result in certain advantages to white-collar offenders. Authorizing additional grounds for departure may result in more alternative sentences, but increase unwarranted disparity. Our point is to encourage the Commission to seriously consider for future amendment cycles the correct mechanism for decreasing the use of prisons in federal sentencing.

In proposal 34, we encourage the Commission to seriously re-evaluate the initial policy decision it made to require judges to base sentences on the so-called "real offense conduct", instead of conduct that either is admitted by the defendant in a plea or constitutes the offense for which the defendant was convicted after trial. We recognize this is a critical issue that was decided by the Commission at the outset of its tenure. However, after long and serious debate, the ABA, in producing a third edition of its Sentencing Standards, recently resolved that the severity of sentences imposed should be determined with reference to the offense of conviction and not the so called "relevant conduct," where different from the offense of conviction. We, therefore, continue to believe that the issue is worthy of re-evaluation.

We repeat below the current ABA Standard and the relevant portion of the Reporters Note that concerns this issue.

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

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

Reporters' Note:

This Standard endorses the "offense-of-conviction" approach to sentencing and disapproves of the practice of "real-offense" sentencing. Under offense-of-conviction systems, the basis for sentence is limited to the charge or charges of conviction, the defendant's history of prior convictions (see Standard 18-3.5), defined aggravating and mitigating factors associated with the current conviction (see Standards 18-3.2 and 18-3.3), and any personal characteristics of the defendant permitted to influence sentence determination (see Standard 18-3.4). . . .

The Standards take the view that conviction, by trial or plea, is a prerequisite for a criminal sanction based on alleged criminal conduct. In offense-of-conviction jurisdictions, sentence may not be based on charges of which defendants were acquitted, charges foregone pursuant to plea agreements, or other alleged offenses that have not culminated in convictions.

Our four proposals, as well as our comments on specific amendments, are informed by the recently promulgated ABA Standards



on Sentencing Alternatives and Procedures and ABA Standards on Appellate Review of Sentences ("Sentencing Standards"). These new Sentencing Standards, the Third Edition of the ABA Standards on these subjects, were recently approved by the ABA's Criminal Justice Section and by the ABA House of Delegates. These new standards are the culmination of several years of extensive work and debate by a balanced committee chaired by the Chief Justice of the Supreme Court of North Carolina, the Honorable James E. Exum, Jr. The Committee was made up of private defense counsel and public defenders, state and federal prosecutors, federal and state judges, respected criminal justice professionals, and distinguished law professors and academicians. While serving primarily as guidance for state legislatures and state policy making bodies, the Sentencing Standards were developed and debated within the "shadow" of the existing federal guidelines and contain standards which differ in significant respects from the current Guidelines manual. The Third Edition Standards represent the ABA's current thinking about critical issues facing this Commission, and we commend them to you for careful consideration. I have today provided your Chief Counsel and your Staff Director with copies of these newly approved Standards. We would be pleased at an appropriate time to meet or discuss with the Commission the significant differences between the system envisioned by the Standards and the current federal Sentencing Guidelines.

Turning now to our comments on several of the other proposed amendments, we set forth our thoughts below.

## AMENDMENT 1

We endorse this amendment because it is consistent with the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures. As mentioned, Standard 18-3.6 provides that the severity of sentences imposed and the types of sanctions imposed should be determined with reference to offense(s) of conviction and not upon the so called "real offense", where different from offense of conviction. This Standard would prohibit the enhancement of sentences based on a finding by the court that, despite the defendant's acquittal, he or she committed additional offenses.

The critics of this amendment argue that because of the different standards of proof at trial and sentencing and because of different rules regarding the admissibility of evidence at the two stages, this amendment advantages defendants without justification. They also claim that the amendment will lead to disparity. We disagree. First, there is a compelling justification for prohibiting enhanced sentences based on acquitted conduct, *i.e.*, promoting fairness and respect for fairness in the sentencing process. In our view, the perceived and actual fairness of the criminal justice system is undermined if persons acquitted of crimes are nonetheless punished for having committed them. Second, it is the uneven consideration of acquitted conduct at sentencing that promotes disparity; the preclusion of its consideration may actually promote uniformity.

The amendment will, of course, affect only a very small number of cases, as it prohibits consideration of only "relevant conduct" for which the defendant "was acquitted after trial." According to the Commission's latest statistics, only a relatively small percentage of federal criminal cases go to trial. In a not insignificant percentage of those cases today, acquitted conduct is not considered at sentencing because: (a) the government cannot demonstrate post-trial that the defendant committed the "relevant conduct" by the requisite standard of proof (preponderance of evidence in most cases); (b) the acquitted conduct is not relevant conduct to the offense of conviction; and (c) the maximum penalty provided by statute for the offense(s) of conviction is lower than the guideline sentence. Thus, the amendment proposal will not, as some have posited, result in a radical shift in policy.

## AMENDMENT 2

The so called "one book" rule, Policy Statement §1B1.11, was promulgated during the last amendment cycle in the dead-of-night, without public comment, and without any apparent study. The adoption of the policy statement was indefensible as a matter of procedure. We oppose any amendment which seeks to extend the application of this Policy Statement.

#### AMENDMENT 5

We oppose this amendment for several reasons. First, the decision to sentence larceny and theft cases exactly the same as fraud and deceit cases is contrary to prior practice and increases disparity by treating dissimilar offenders in a similar manner. Second, the elimination of more than minimal planning (and the related increase in the theft and fraud loss tables) is at odds with the empirical analysis of pre-guidelines sentencing practices that recognized planning, independent of actual harm, was an important factor for judging relative culpability. See U.S.S.G. §2F1.1 comment (background). Indeed, the amendment encourages disparity by treating a sophisticated planned fraud that netted \$100,000 over a lengthy period the same as a single false statement that resulted in the same actual loss. The elimination of the "planning" variable eliminates the court's ability to rationally distinguish between offenders.

#### AMENDMENT 8

We support the basic thrust of this amendment. As we have argued in the past, the current guidelines for drug trafficking offenses overstate the importance of quantity and understate the importance of a defendant's role in the offense. This amendment would be a significant step toward correcting this imbalance.

There are, however, a few aspects of the proposed version of 3B1.2 that we believe are ill-considered. First, proposed application note 2 appears to us to be unnecessary. The fact that the defendant possessed or had access to a firearm is certainly an appropriate sentencing factor, but it does not necessarily speak to his or her role in the offense. A minor or minimal participant in the offense who possesses a firearm should receive the enhancement contained in 2D1.1, but should not be penalized by losing the offense level cap proposed in this amendment. Adoption of application note 2 would have the odd effect of punishing a minimal participant more harshly than a kingpin for having access to the same firearm.

Second, proposed new application note 7 would limit the court's ability to find that a courier or "mule" played a mitigating role in the offense. These are precisely the defendants who are receiving far too harsh sentences under the current guidelines. Applications notes 5 and 6 would establish appropriate criteria to determine whether a defendant is a mere courier (e.g., no ownership interest in the contraband), and anyone who satisfies those criteria should receive a minimal role adjustment. If the Commission insists on including application note 7, option 1 is preferable.

#### AMENDMENT 10

We applaud the Commission's effort to establish a common-sense understanding of the term "mixture or substance." A rigid interpretation of the relevant statute and guidelines has led to irrational and disparate sentences for many defendants. We regret that the Supreme Court did not resolve the statutory issue definitively in the Chapman case, but there is nothing in Chapman which prevents the Commission from establishing a rational definition of "mixture or substance" for guideline purposes. We therefore support this amendment.

#### AMENDMENT 13

Because we believe that quantity, especially where the quantity is controlled in whole or in part by government agents, is overvalued, we support an amendment addressed to reverse sting operations. To determine an appropriate amendment, it is necessary to realize that the problem is actually broader than stated by the request for comment. The problem exists not only where government agents set a below-market price, but whenever agents, in a reverse sting operation, create artificial market conditions that increase a defendant's purchasing power. Two recent cases reviewed in the comments of the Practitioner's Advisory Committee illustrate the problem.

In our opinion, the guidelines should provide that in a reverse sting case, where the government sets or agrees to artificial market conditions which have the effect of increasing the defendant's purchasing power, the court should determine the defendant's offense level on the basis of the amount of drugs that he or she could have actually purchased based on the agreement.

#### AMENDMENT 20

The ABA strongly supports the proposed amendments to §§ 2S1.1 and 1.2, pertaining to money laundering offenses and structuring violations.<sup>2</sup>

The most important aspect of the proposed amendments is that they remove the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially

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<sup>2</sup> The ABA opposes amendment 58 which would amend § 2S1.3. This proposal would significantly increase base offense levels for currency reporting violations. We believe the proposed changes would be inconsistent with the advances proposed in amendment 20.

the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

Although we support the amendment, we are concerned that the proposal does not address the pervasive use of government stings in money laundering cases. Sting operations provide continued opportunities for sentence manipulation. Under that section, the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. As in drug sting operations, the agents control the amount of money laundered. Accordingly, there is increased risk of prosecutorial manipulation of the guidelines by government agents increasing the amounts of tendered funds to increase the guideline range.

More importantly, in sting cases there will never be commission of the underlying offense by the defendant. Thus, under proposed § 2S1.1(a)(1), the defendant in a sting operation (who engages only in the laundering offense) will receive a potentially higher sentence than those defendants that both launder money and commit the underlying offenses. Accordingly, we recommend that the amendment be adopted with a lower base offense level for violations of 18 U.S.C. § 1956(a)(3).

#### AMENDMENT 21

Amendment 21 proposes a consolidation of the tax guidelines and a unified definition of tax loss. The guideline includes a rebuttable presumption of tax loss based on a percentage of the unreported gross income. The percentage varies depending on the type of tax offense involved. To our knowledge, this the only guideline that has sought to use a rebuttable presumption.

We believe that a rebuttable presumption improperly relieves the government of its burden to establish by at least a preponderance of the evidence that the guideline base offense level applies. While we know of no case specifically considering the validity of a rebuttable presumption in the sentencing context, we believe the presumption is misconceived. Criminal tax cases are complex in origin and often voluminous in their documentation. Documentation available to the government may not be released to the defense since, for example, in an evasion case the government

need not prove a specific dollar amount, but only a substantial additional tax due and owing. The probation officer is, even without the presumption, unlikely to "second guess" the government's tax computations. To increase the government's advantage by, in effect, totally relieving it of its burden of proof, is both unwise and unjustified.

AMENDMENTS 25 AND 36

The Sentencing Reform Act was designed in part to promote honesty in sentencing. The current guidelines often result in the opposite by requiring the court to consider "relevant conduct" beyond the offense of conviction without imposing any requirement on the government to honestly notify the defendant of the "relevant conduct" it will raise at sentencing. While the requirements of Rule 32 are a partial remedy, encouraging the government to disclose the "relevant conduct" earlier in the process will not only promote honesty, but will eliminate the litigation that inevitably results when the government seeks a sentence based upon relevant conduct not revealed prior to defendant's entry of a plea.





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AND ASSOCIATES

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By Federal Express

March 12, 1993

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

Attention: Public Information

Dear Commissioners:

On behalf of the Pennsylvania Association of Criminal Defense Lawyers, I offer the following comments with regard to the proposed amendments to the Sentencing Guidelines.

Our organization is opposed to any intrusion upon the discretion of the sentencing judge. However, given that the Sentencing Guidelines are a reality, we would urge the adoption of the following amendments thereto:

Amendment 1, excluding acquitted conduct as relevant.

Although the position of the PACDL is that that function of the jury within our system of criminal justice is evaded whenever any allegedly criminal conduct not the subject of conviction is utilized for purposes of sentencing, Amendment 1 would at least the ameliorative effect of eliminating conduct from consideration as to which a jury has actually rendered a verdict.

Amendments 8 and 9, placing an offense ceiling level for those defendants found to having a mitigating role, and reducing the upper limit of the Drug Quantity Table from 42 to 36.

The proposed change would better reflect the culpability of low level participants in a drug conspiracy whose knowledge of the scope of the conspiracy would otherwise increase their base offense level.

Amendment 20, tying the base offense levels for money laundering and structuring to the underlying conduct.

STEPHEN ROBERT LACHEEN  
AND ASSOCIATES

This amendment will eliminate the anomaly that results where there was either no illegal underlying activity or that activity had a base offense level lower than that prescribed for the structuring or money laundering.

Amendment 29, permitting departure where offender characteristics are present in an unusual degree and combined in ways important to sentencing.

The PACDL favors this amendment as allowing for greater discretion in the sentencing judge.

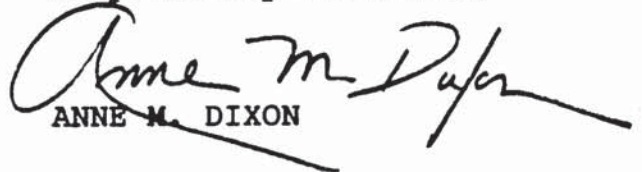
Amendment 47, eliminating the need for government motion under U.S.S.G. Section 5K1.1.

This amendment is favored insofar it will make the issue of whether there has been "substantial cooperation" one for resolution in the way the other factual disputes are resolved, i.e., by a court.

With respect to the issue for comment following proposed Amendment 5, the PACDL would urge that the best approach is to delete the reference to repeated conduct and to better define "extensive or sophisticated planning."

Thank you for your consideration.

Respectfully submitted,

  
ANNE M. DIXON

AMD/rab

cc: Joshua D. Lock, Esquire  
President, Pennsylvania Association  
of Criminal Defense Lawyers

STATEMENT OF STEPHEN ROBERT LaCHEEN, ESQUIRE

Before the United States Sentencing Commission

March, 1993

Ladies and Gentlemen:

It is an honor and a pleasure to have been afforded time to speak before you today in support of the proposal to amend the Money Laundering Guidelines, and in particular the Structuring Guideline, in accordance with the proposal of the Commission's Working Group. See 57 Fed.Reg. 62832, 62839 (Dec. 31, 1992). I am the senior partner of a private law firm in Philadelphia which conducts a large part of its practice in federal criminal defense. My immediate impetus for coming down to Washington today is my involvement in a case which I believe illustrates particularly well the need for an amendment of the kind proposed by the Working Group.

My client, Ronald P. Shirk, is a former police officer who went into the licensed gun dealer business in a rural area of upstate Pennsylvania. His business prospered and gradually became largely a wholesale operation. As you may be aware, many of those who buy and sell firearms legitimately are "rugged individualists" by nature, and many of them have a strong libertarian bent which makes them jealous of their privacy and suspicious of governmental involvement in the lives of individual Americans, as well as of established financial institutions.

Such people often deal in cash when the rest of us city types would not. This is also true to a great extent of those who choose to live in that part of central Pennsylvanian, far from either Philadelphia or Pittsburgh. Mr. Shirk, I would have to say, tends to share these tendencies.

I was therefore both interested and surprised to see the October 14, 1992, Working Group report on money laundering offenses, which states that "representatives of [the Department of Justice] reported [to the Working Group] that, as far as they knew, prosecutors did not bring cases involving structuring of lawfully derived funds." Report and Initial Findings of U.S. Sentencing Comm'n Money Laundering Working Group (Oct. 14, 1992), at 24. I know, from my representation of Mr. Shirk over the past several years, that that assurance is utterly false.

Mr. Shirk came under investigation several years back by the Internal Revenue Service on suspicion of tax evasion; I believe they thought he was skimming cash from the business and underreporting his income. In any event, those charges came to trial and with my help and that of an honest jury, he was acquitted of the tax charges. At the same time, however, he was convicted of structuring currency transactions. During the years in question, Mr. Shirk's business took in an average of several thousand dollars a day in cash, but not as much as \$10,000 per day. He accumulated these cash receipts (after removing the hundreds, which for his own reasons he "collected" in a safe) and then took them to the bank. The structuring charges were premised on an analysis of his banking records,

which showed that after his bank revoked a CTR exemption he had formerly enjoyed (in the mistaken belief that a CTR exemption was not available to a business which was primarily wholesale, not retail), the frequency of these banking trips increased from weekly to every few days, with the average size of the deposits kept below the reportable threshold.

The U.S. Court of Appeals for the Third Circuit recently upheld these convictions, on the theory that Mr. Shirk's intent to avoid the necessity of filing CTR's could be equated with the statute's prohibited intent to "evade" the bank's reporting requirement. Since the Third Circuit disagrees with the First on the question whether this conduct is even criminal, we are hopeful of being vindicated in the Supreme Court. But in the meantime, we are presented with the sentencing issue that is of interest to the Commission and which is the subject to the Working Group's recommendation: the appropriate punishment for "currency structuring" consisting entirely of the cash receipts of a legitimate business, involving no ulterior criminal intent, or at least none other than to facilitate tax evasion; that is, where the funds are not criminally derived.

I have no doubt in my own mind that such cases as ours do not fall within the "heartland" of what is currently classified under Guideline § 2S1.3 at offense level 13 (plus an enhancement when the total amount exceeds \$100,000). Thus, I certainly agree with the Working Group's conclusion that structuring, per se, is not an aggravating circumstance warranting that base offense level. Report and Findings, at 4. And I wholeheartedly

endorse the concern, in this context, that offense levels now demanded for structuring "lawfully derived funds" may properly be viewed as "not reasonable." Id. at 24. The change would assist judges in fulfilling their obligation to impose sentences which are not "greater than necessary" to achieve the statutory purposes of punishment. 18 U.S.C. § 3553(b). The comment appended to the proposed change, as published, correctly states that the amendment would "assure greater sensitivity to indicia of offense seriousness." Our trial judge, William W. Caldwell of the Middle District of Pennsylvania, agreed, and departed downward to a nine month sentence. The government appealed, however, and the Third Circuit reversed the departure, remanding for the imposition of a guideline sentence which would presumably fall in the range of 24 to 30 months.

Ironically, under the proposed amendment, the guideline sentence for Mr. Shirk's conduct would not exceed six months, with a sentence as lenient as straight probation being within the range. Thus, even the downward departure granted by Judge Caldwell would be classified as unduly severe. Again, there is perhaps some hope for Mr. Shirk on certiorari, or if we come up with a different departure theory at resentencing on remand. But the facts of this case -- and others like it around the country, where overzealous IRS agents find support in a Department of Justice that cannot resist the thought of demanding forfeiture of a multimillion dollar concern on the ground that the business itself was used to "facilitate" the offense --

demonstrate the inadequacy of relying on the departure mechanism.

For these reasons, I am in full support of the Working Group's conclusion that the guidelines must be amended to differentiate these cases of mere regulatory noncompliance (if that) from cases where the structuring of currency transactions is undertaken as a technique of money laundering. And when that amendment occurs, please do not forget to add it to the list in § 1B1.10(d), so that if the effective date comes too late to help Mr. Shirk at his resentencing, the cases of manifest injustice, such as ours, that may exist in the system as a result of the prior wording of the guideline may be corrected by a motion under 18 U.S.C. § 3582(c)(2) to reduce the sentence.

Respectfully submitted,  
STEPHEN ROBERT LACHEEN & ASSOCIATES

By:



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Statement of

**Michael P. Dolan**  
**Acting Commissioner**  
**Internal Revenue Service**

Before the

**United States**  
**Sentencing Commission**

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**Impact of Sentencing Guidelines**  
**On Tax Compliance**

March 22, 1993



UNITED STATES SENTENCING COMMISSION

TESTIMONY OF

MICHAEL P. DOLAN  
ACTING COMMISSIONER OF INTERNAL REVENUE

MARCH 22, 1993

Mr. Chairman and Members of the Commission, I am Michael P. Dolan, Acting Commissioner of the Internal Revenue Service. With me today is Acting IRS Chief Counsel David Jordan and Associate Chief Counsel (Enforcement Litigation), Patrick J. Dowling.

Before presenting my testimony today, I want to express my appreciation to the United States Sentencing Commission for the opportunity to appear at this hearing to discuss a major issue of concern to the Internal Revenue Service - the November 1992 amendments to the Sentencing Guidelines will adversely affect tax administration.

The Internal Revenue Service views this as an extremely vital issue as we address serious compliance problems that challenge the health of our voluntary tax system. The seriousness of the compliance problems facing the tax system and the impact that the 1992 amendments would have on

our compliance efforts resulted in correspondence to Senators Biden and Thurmond, the Chairman and Ranking Minority Member, of the Judiciary Committee. Our concerns were upheld by Senators Biden and Thurmond in letters to Judge Wilkins on September 18, 1992.

Our mission is, and will continue to be, to foster voluntary compliance. Yet, as we looked at events that were occurring in the tax system, we realized that change is needed in order to preserve the fairness and effectiveness of our voluntary assessment system.

The Sentencing Commission has historically supported the Service in addressing these concerns. In 1987, when the original Sentencing Guidelines were promulgated, the Commission noted in the Background Commentary to Section 2T1.1 the tax compliance need for increasing the number of prison sentences in criminal tax cases and highlighted this need by pointing out that "[c]urrent estimates are that income taxes are underpaid by approximately \$90 billion annually." Today, the underpayment of income taxes is estimated to range from \$110 billion to \$127 billion. The largest part of this income tax gap, and the most troublesome part in terms of our ability to collect it, is the reporting gap--the amount of tax liability not

voluntarily reported on returns. This accounts for \$113.7 billion or 89.5 percent of the \$127 billion estimate.

A tax gap also exists in areas besides income tax -- the Treasury is being denied billions of dollars in uncollected excise taxes, payroll taxes and estate and gift taxes.

Coupled with the growing tax gap is the fact that our enforcement activities have not kept pace with the growth in the number of returns filed and the increase in the complexity of those returns. In today's world, there are too many returns, too many complex laws and too few enforcement resources to permit us to continue "business as usual."

In an effort to respond to these problems, the Service spent a number of years formulating a new approach to tax administration. The Service has begun to implement its new approach which we call "Compliance 2000".

Compliance 2000 recognizes that a good part of what we call noncompliance with the tax laws is caused by taxpayers' lack of understanding of what is required in the first place. For these taxpayers, it makes good business sense to increase our efforts to help them comply

through outreach, education and burden reduction rather than using enforcement means. An example of this is our nationwide effort encouraging nonfilers to contact the IRS and receive assistance in returning to the taxpaying rolls.

Compliance 2000 also recognizes that, despite our most aggressive assistance and outreach efforts, some segments of the population will not voluntarily respond. In those cases, we will direct our enforcement resources and employ our traditional enforcement arsenal -- the examination of returns, the imposition of civil penalties, the filing of suits seeking injunctions, the collection of delinquent taxes using liens and levies and in particularly egregious cases, criminal investigations and prosecutions -- to obtain compliance. The success of our Compliance 2000 efforts will depend, in part, on the effectiveness of our tax enforcement efforts. By effectively identifying and dealing with intentional noncompliance we will be sending a message to every American -- that there are serious consequences to failing to voluntarily comply with the tax laws.

For example, one of the most serious challenges to voluntary compliance today are those taxpayers who do not file returns. To assure the continued well-being of the tax system, it is imperative that we bring the six

to nine million nonfilers into the system and keep them in the system. As part of Compliance 2000, we are educating nonfilers on the need to contact IRS and receive assistance in returning to the taxpaying rolls. But educating and assisting nonfilers is not enough. We expect to rely heavily on our tax enforcement efforts to bring in the nonfilers who will not return to the system voluntarily. In chronic and particularly flagrant cases we will need to resort to criminal prosecution, and in these cases the Sentencing Guidelines will have a significant impact on our ability to succeed in returning nonfilers to the system. Sadly, after the 1992 amendments, the Guidelines may actually impede our efforts.

Several statistics illustrate the focused role that criminal prosecutions and, more specifically, the Guidelines play in the overall tax enforcement effort. Last year, we processed 204 million returns; assisted more than 74 million taxpayers; and examined 1.3 million tax returns. Our Criminal Investigation function initiated roughly 5,500 investigations and in concert with the Justice Department obtained tax-related convictions in 2,651 cases, representing one conviction for every 76,900 returns filed and less than 4 criminal investigations for every 1,000 returns examined.

Criminal tax enforcement has always been small in comparison to our civil enforcement; but it is an important part of our overall tax compliance efforts. Criminal investigation and prosecution are reserved for only the most serious tax violations we uncover. We define the seriousness of a tax offense not simply in terms of the amount of taxes lost in a particular case, but rather in terms of the nature of the offense and the threat it poses to the integrity of the Federal tax system.

Those 2,651 criminal convictions are selected and brought to send a dual message. To the vast majority of Americans who voluntarily comply with the tax laws and pay their fair share, the message is one of fairness and equality -- that their Government will ensure that those who intentionally do not comply with the tax laws will be brought to Justice. To those who have committed tax crimes or who are contemplating doing so, the message is one of warning -- there will be severe consequences for their actions. To ensure that this message strikes home to virtually every individual and business in the country, our Criminal Investigation Program takes great care in ensuring that their investigations cover a wide spectrum of occupations, businesses, income brackets, regions of the country and types of violations.



What message is conveyed to taxpayers -- when, after we take care selecting a case and expending scarce enforcement resources, the violation is deemed minor enough to warrant a virtual certainty of probation for the offender? What does this tell honest taxpayers about the government's commitment to maintain the integrity of the tax system? What does it tell potential violators about whether it is worth risking prosecution to violate the revenue laws? The message conveyed can hardly be clear enough to serve a deterrent purpose.

Given their limited number, our criminal cases ought generally to hold out a high likelihood of incarceration, if only for a short period of time, in order to vindicate the honesty of most taxpayers and deter potential tax offenders. This Commission, indeed, once recognized as much, stating that "[u]nder pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as...tax evasion, that in the Commission's view are 'serious'". Yet, by contrast, the revised Sentencing Guidelines virtually eliminate the prospect of jail time for all but offenses involving the largest amounts of unreported tax.

As you know, under these guidelines, the recommended prison term is tied to the amount of the tax loss, i.e., the amount of tax that was intended to be evaded. Under the Sentencing Table amendments to the Guidelines which took effect in November 1992, the maximum amount of tax loss that could, with an acceptance of responsibility, result in a sentence of straight probation in an evasion case was increased from \$10,000 to \$40,000. This makes it unlikely that taxpayers with up to \$142,000 in unreported income will be incarcerated under the guidelines for tax evasion. But fewer than 8 percent of all individual taxpayers receive that much income in one year (and only 20 percent receive that much in three years), much less evade reporting it.

The result is even worse in a failure to file case. In failure to file prosecutions, the maximum tax loss that could, with an acceptance of responsibility, result in a sentence of probation was increased from \$20,000 to \$70,000. As a result, taxpayers who willfully fail to file tax returns and receive up to \$250,000 in income over a three-year period are unlikely under the guidelines to be incarcerated for their crimes. But only 6% of all taxpayers earn that much in three years and far fewer are able to earn that much in a single year. In sum, only a very small percentage of all taxpayers

who commit tax crimes face a certainty of some incarceration under the current guidelines -- no matter how short the period of confinement.

Another of many examples of challenges to the tax system involves the Service's electronic filing program, which has increasingly been the target of false filings and fraudulent claims for refund involving use of the earned income credit. These cases normally fall in the \$2,000 to \$3,000 range and, although considered small when measured under the "tax loss" standard of the guidelines, they are difficult to investigate and must often preempt other investigative work, because they involve direct losses to the Treasury.

The electronic filing program reduces the burden of filing for millions of taxpayers; helps honest taxpayers get their refunds promptly; and saves the Service the costs of storing and handling paper returns. But in spite of its value to the government and the taxpaying public, perpetrators of these crimes need only glance at the sentencing guidelines to know that if they commit an electronic filing offense and are caught, they will draw sentences in the 0 to 6 month range and are unlikely to face any period of confinement. For them, the risks may not outweigh the possible rewards of flagrant crime. Likewise, the investigators charged with protecting the

system are aware that when they select one of these cases for investigation their efforts are likely to do little more than publicize the low sentences produced by the Guidelines and that pursuing such investigation may actually have the unintended result of encouraging similar violations.

Nonfiling and electronic filing fraud are not isolated problems. We are faced with similar enforcement challenges involving employment and withholding taxes, fraudulent nonpayment of assessed taxes, and excise tax related violations, to name a few. Although many of these crimes may involve small tax losses, the tax system cannot withstand widespread abuses of this kind.

Our criminal investigation program plays an important role in Compliance 2000, our comprehensive strategy for reducing the tax gap and improving voluntary compliance over the long-run. We have spent a great deal of time structuring our criminal program to send a message to the American public that the tax system is fair and that tax crimes will not be tolerated. The current Guidelines send a very different message -- that tax crimes are not serious. This message is sent by a sentencing system which holds out the possibility of a purely probationary sentence, rather than certain incarceration, for almost all tax violators.

Deterrence has been and remains the primary reason we commence criminal tax investigations. The high likelihood of obtaining probationary sentences may actually deter criminal investigations and prosecutions and create a class of significant tax violations where the threat of criminal investigation and prosecution is practically nonexistent. As a result, a purely statistical analysis of historical sentencing patterns will not show the impact of predictably low sentences on the behavior of the broad range of potential tax violators whose crimes are likely to be sentenced in the 0 to 6 month range and who may, therefore, never be investigated or prosecuted.

We are cognizant that last year's change in the Sentencing Table was not prompted by a need to produce lower sentences for tax offenses but was actually motivated by concerns wholly apart from the sentencing of these cases. There was, in fact, no evidence prior to the 1992 amendments that guideline ranges in tax cases were too severe or otherwise in need of downward modification. But last year's Sentencing Table modifications, together with the contemporaneous implementation of Compliance 2000, prompted us to consider how the sentencing of tax crimes ought ideally to fit within our compliance efforts. As a result, rather than simply seek to recoup the two sentencing levels lost as a result of last year's amendment,

we proposed Amendment 41, which was published along with the Proposed Guideline Amendments for public comment.

Amendment 41 is designed to facilitate the primary goal of Compliance 2000 - to enhance voluntary compliance with the tax laws. It provides for certain confinement (without regard to possible adjustments and departures) of most tax violators whose crimes produce tax losses exceeding \$10,000. But the key feature of the proposal is the affirmative use of acceptance of responsibility to encourage those who generate tax losses of \$10,000 or less to reenter the tax system as a precondition to a sentence of probation.

For most tax offenses, Amendment 41 established a base offense level of 10, which applies to offenses generating a tax loss of \$10,000 or less. A violator at this level who receives a 2 level downward adjustment for acceptance of responsibility will fall into level 8 and be sentenced in the 0 to 6 month range. Thus, eligibility for straight probation would be contingent on the offender's willingness to accept responsibility. In tax cases, we contemplate that the courts would grant the downward adjustment for acceptance of responsibility both before and after a trial only when the offender acknowledges the violation and takes steps to reenter the tax system by filing correct amended returns and attempting to pay back taxes

or by disclosing all pertinent tax information to the Service and providing truthful financial information sufficient to establish the existence of a current inability to pay the taxes.

We recognize that this is a novel approach which differs from that used in sentencing under the Fraud and Theft Tables. But, tax fraud is different from other forms of fraud and theft directed against the Government. Virtually every individual, family, business, and organization in the United States and many foreigners come in contact with the internal revenue laws in one form or another. Consequently, every taxpayer, every year has the opportunity to either voluntarily comply with the law or to cheat the Government out of tax revenues. Deterrence is , therefore, crucial in tax cases, and when incarceration is inappropriate, it is essential that the sentencing system at least encourage the tax offender's honest reentry into the system.

We recognize that proposed Amendment 5 is also under consideration by the Commission and recognize that its adoption would alleviate most of the damage caused by last year's change in the Sentencing Table. It provides for an incarceration rate roughly in the range of Amendment 41 and is, in fact preferable to 41 in at least one respect, because it provides for

higher sentences in the very high tax loss ranges. Although we agree that this change should be made, we favor the concept behind Amendment 41, because it would eliminate the possibility that a tax offender could be sentenced to probation for committing the more serious tax crimes without having accepted responsibility or otherwise made an honest attempt to return to the tax paying rolls. By contrast, Amendment 5 admits to the possibility that some tax evaders -- potentially a very large class of them -- could, and in all likelihood would, be sentenced to probation without imposing upon them the need to make an effort to return to the tax system.

In addition, Amendment 5 eliminates the 2 level upward adjustment for sophisticated means. We do not favor this change, because it would eliminate the ability to distinguish defendants whose crimes are highly sophisticated or who go to greater lengths to conceal their wrongdoing. On balance, although we like some aspects of Amendment 5, we prefer Amendment 41 because it more closely supports the compliance philosophy behind Compliance 2000.

Members of my staff and the Office of Chief Counsel have had a number of promising discussions with the Commission's Staff concerning these issues, and I want to thank the Commission for the many courtesies

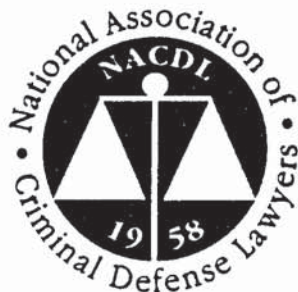


that have been extended to us. It is my sincere hope that our collective efforts can achieve sentencing guidelines for tax cases that reflect the breadth of the Service's investigative responsibility; the importance of deterring tax crimes; and the potential for using criminal sentencing to return tax offenders to the taxpaying rolls. Only through successful achievement of these goals will the health and well-being of our voluntary tax system be preserved.

Mr. Chairman, this concludes my testimony. I, or members of my staff, would be pleased to answer any questions you, or members of the Commission, may have at this time. Again, thank you for the opportunity to address the Commission this morning.







Statement of

**ALAN J. CHASET**

on behalf of the

**NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS**

before the

**UNITED STATES SENTENCING COMMISSION  
PUBLIC HEARING ON PROPOSED AMENDMENTS**

to the

**UNITED STATES SENTENCING  
COMMISSION GUIDELINES MANUAL**

*Washington, DC*

*March 22, 1993*

*Comments and remarks of Alan J. Chaset on behalf of the National Association of Criminal Defense Lawyers to be submitted to the United States Sentencing Commission concerning proposed Amendments to the Commission's Guidelines Manual*

March 22, 1993

Judge Wilkins and Members of the Commission:

My name is Alan J. Chaset and I am here today on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization whose membership is comprised of more than 6,000 lawyers and 25,000 affiliate members who practice in every state and federal district throughout the nation. As you know, NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for all persons accused of crime, to foster the independence and expertise of the criminal defense bar and to preserve the adversary system in the criminal justice arena. For the past five years, I have served as the Chairman or Vice Chairman of the NACDL Sentencing and Post-Conviction Committees and have had the opportunity and pleasure of working with members of the Commission and its staff on several matters including the drafting of proposed amendments and the training of various participants in the criminal justice system. I also have the distinct privilege of serving as a member of the Commission's Practitioner's Advisory Group.

As the Commission is most aware, NACDL has long been a vocal opponent of the sentencing guidelines as promulgated by this Commission. Whether in somewhat heated public exchanges or in the relative quiet of the Commission's conference room and offices, we have consistently taken the position that the guidelines as drafted are not working and not working fairly. And we have consistently argued that newly proposed amendments merely add to the confusion and disparity already created by prior versions. While the messenger appearing before you today may be different from years past, the basic message I bring is the same: we do not like the guidelines for a number of good and sufficient reasons, but mostly because we believe that they are unnecessarily harsh and inappropriately inflexible.

Having now repeated that position and without intending to abandon that stance, please permit me to offer both some general comments about the Commission and its guidelines as well as some specific responses and comments to some of the individual proposals before us today.

First, I do want to thank the Commission for its efforts to oppose the proliferation of criminal statutes that include mandatory minimum sentencing sanctions; NACDL shares many of the same concerns as the Commission in this regard. Next, I want to commend the Commission for recognizing that future training endeavors under the guidelines need to be focused more on the defense bar; NACDL shares the concern with this problem and has already noted its willingness to help address the solution. And I want to encourage the Commission to keep providing increased access to Commission working groups and draft proposals; NACDL recognizes the need to work with the Commission at all stages of the process, rather than just appearing here when the opportunities for further change have been significantly circumscribed. Finally, I want to applaud the Commission for its willingness to publish the proposed amendments submitted by various interested groups from outside the Commission; NACDL believes that the consideration of competing proposals, including those that call for somewhat radical changes, serves to inform both the current and future amendment cycles as well as current and future Commissioners.

In that last regard, NACDL recognizes that the composition of the Commission may well change over the coming months. Obviously, we will want to be active in the attempt to secure appointments (and re-appointments) of those who more closely share our views on some of the important issues here. Regardless of that effort and its outcome, however, NACDL believes that there remains a distinct need to insure that a representative of the defense bar serve in an *ex officio* capacity on the Commission similar to the designee of the Attorney General and the Chairman of the U.S Parole Commission. We would urge the Commission to lend its full support to the effort to secure such a position.

Turning now to the amendment package published by the Commission, please permit me to state several general principles with which we have approached each of the specific proposals. Articulating where we

stand on these basic points makes it easier for us to offer comments on the many and often very detailed proposals and should similarly facilitate the Commission's understanding of where we stand and the bases for those positions.

First, NACDL believes that the sentencing guidelines should focus initial attention on the decision as to whether or not an individual needs to be incarcerated for his/her offense: the "in-out" decision. Only after it is thus determined that some period of imprisonment is warranted would the incarcerative guideline calculations come into play. As a closely related corollary, we support the fundamental principle of parsimony articulated in the Sentencing Reform Act: that sentences ought to be the least severe necessary to achieve the purposes of sentencing.

Second, we believe that the guideline calculations should be based solely on the precise conduct for which the defendant has been found, or to which the defendant has plead, guilty. We are, therefore, supportive of changes that move the system to offense-of-conviction based sentencing and away from the "real offense" concept. Next, we believe that the current system significantly undervalues and dramatically overlooks a large variety of offender characteristics, matters that we view as most critical in the fashioning of an appropriate sentence. While we support the concept that similar offenders who commit similar offenses should be treated similarly, we do not feel that the system affords sufficient opportunity to highlight and weigh legitimate differences and dissimilarities.

Fourth, NACDL believes that trial judges should be generally provided with broader authority and greater discretion to depart from the calculated guideline range. That flaw in the current system is most blatant and the need for change most glaring in the area of substantial assistance and cooperation. We believe that each actor in the system should be able to initiate the consideration of a departure in this regard. By so amending, we believe that much of the real and perceived disparity concerning the operation of §5K1.1 can be dramatically lessened.

Additionally, we share the view of many that the current version of the guidelines overemphasizes drug quantities and dollar amounts and provides insufficient emphasis on who the offender is and what function he/she may have played in the offense. While we recognize the confounding impact of mandatory minimums at this juncture, we look for changes that might provide a better and fairer mechanism for rationalizing each of these competing matters.

And finally, we believe that there have been too many inappropriate changes to the guidelines over the very few years of their existence. While we remain advocates for some basic changes, NACDL believes that the need for any amendment to the system must be demonstrated and supported by empirical data and sound analysis and must be accompanied by an assessment of the potential impact that the change might have on the population of the Bureau of Prisons. As we move into a period of government downsizing, program elimination, and general austerity, the Commission must now undertake its statutory obligation to insure that the guidelines minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.

Turning now to the amendments and requests for comments as proposed, NACDL offers the following responses:

#### **AMENDMENT 1**

NACDL endorses the proposal to exclude acquitted conduct from the already overbroad scope of "relevant conduct." Whether viewed from our position regarding the offense-of-conviction/real offense rubric or considered on the basis of fundamental fairness and the appearance thereof, this amendment clearly warrants adoption by the Commission. Similarly, we are thus supportive of Option B under proposed Amendment 34 and Option 1 under proposed Amendment 35.

#### **AMENDMENT 2**

NACDL strongly opposes the attempt to expand the application of the Commission's significantly flawed "one book" policy to multiple count cases. We believe that §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing) is substantively violative of the *ex post facto* clause and that its adoption last cycle without opportunity for public comment is also procedurally defective.

## AMENDMENT 5

NACDL opposes the proposal to eliminate the “more than minimal planning” specific offense characteristic from several guideline sections and the related modification to the applicable loss tables. While we believe that the appropriate application of the concept of “more than minimal planning” could be benefitted by further discussion and more rational examples (including the removal of the “repeated acts” language in the Notes to §1B1.1), we see its elimination as inappropriately increasing the opportunity for dissimilar offenders to be treated similarly and for further incorrectly emphasizing the amount of money involved as the primary basis for length of punishment.

As to the other amendments related to fraud offenses, we oppose AMENDMENTS 6, 7 and Option C of AMENDMENT 37 as unnecessary. And, while we wish to de-emphasize the significance of dollar amounts in the determination of guideline ranges, we are supportive of those portions of AMENDMENTS 37 & 38 that tend to more rationally and fairly define and guide loss calculations.

## AMENDMENT 8

As stated above and as stressed in prior years’ testimony, NACDL believes that the drug guidelines overvalue quantity and undervalue role and do so most blatantly and most unfairly at the low end of the distribution chain. We believe that this amendment makes an attempt to begin to correct this imbalance, as do some of the proposals within AMENDMENTS 39 & 48. At this juncture, however, we merely want to reiterate our basic position on the general operation of the existing drug guidelines and on the need for significant recrafting.

## AMENDMENT 10

NACDL supports the effort to narrow the definition and scope of the term “mixture or substance” as used in determining drug amounts under the guidelines. While we would go further here, the thrust of this change and those reflected in AMENDMENTS 49 & 50 merit adoption by the Commission.

## AMENDMENTS 12 & 13

As part of our opposition to the overvaluation of drug amounts, NACDL has long shared the growing concern about the manipulation of guideline factors and ranges by government agents, particularly in reverse sting operations. While we feel that the Commission should address other abuses than just the setting of artificially low prices, we see this clarification and this potential addition as steps in the correct direction.

## AMENDMENTS 14 – 19

While offering no specific comment as to the substance of the proposals here, we would note our belief that there have been so many changes in these sections of the guidelines over the past few years that they have become some of the most difficult to follow and apply. We recommend, therefore, no additional changes here at this time.

## AMENDMENT 20

As regards the proposed changes to §§ 2S1.1 - 2S1.4, NACDL is most supportive of the removal of all opportunities for sentence manipulation that result from charging practices. We agree with the Commission’s Working Group here that the money laundering statute has been used often by prosecutors to “up the ante” despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. While approving much of the contents of this proposal, we share some of the same concerns expressed by the Practitioner’s Advisory Group and the ABA as regards the substitution of the fraud table as the standard measure here and as regards the factor manipulation potential in undercover/sting operations. Rather than repeat those most adequate remarks, I would merely make reference to same and note our basic agreement with the comments as written.

## AMENDMENT 23

NACDL is supportive of this amendment which appears to significantly narrow the existing 2 level adjustment for “abuse of trust” so that it applies only to abuse of “special trust,” a term accompanied with a definition that limits its application by stressing discretionary authority.

#### **AMENDMENT 24**

As noted above and in previous years' testimony, NACDL is strongly in favor of amending §5K1.1 to permit both the sentencing judge and the defendant to raise the issue of substantial assistance for consideration as a departure. While the concept addressed in this particular request for comment does not go far enough, it is clearly a step in the correct direction. In that latter regard, we believe that our basic position is better captured in AMENDMENTS 31 & 47 and commend those proposals for Commission adoption.

#### **AMENDMENTS 25 & 36**

NACDL has long sought to amend Rule 16 of the *Federal Rules of Criminal Procedure* to include the disclosure of sentencing relevant information and material. While we still believe that a change to the Rules is most appropriate, we support the recommended commentary here as suggested by the Commission and the Practitioner's Advisory Group as an effort to bring more "truth in sentencing."

#### **AMENDMENTS 27 & 28**

While NACDL believes that efforts to make the guidelines easier to use and apply are generally worthy of support, we are not convinced that the changes being proposed within these amendments are consequence neutral and otherwise benign. Before accepting such a long list of changes, we believe that more study and more data are needed.

#### **AMENDMENTS 29 & 30**

In line with our general comments about the need for the guidelines to place more emphasis on offender characteristics, we support the proposal of the Criminal Law Committee of the Judicial Conference of the United States to amend the introductory commentary to §5H1.1 so as to permit departures when those characteristics are present to an unusual degree and/or combined in ways important to the purposes of sentencing. We believe that that change is a step in the correct direction as would be other commentary tending to increase rather than restrict the court's ability to depart for these critically important characteristics.

#### **AMENDMENTS 32 & 33**

Consistent with our general position that the Commission should develop and implement some basic guidance as to an initial "in-out" decision before the calculation as to the amount of prison time is even addressed, we believe that these ABA proposals merit some study as a starting point or potential alternative vehicle for achieving some of the ends we seek. While we submit that the thrust of our position moves directly away from any reference to the sentencing table, given only the options suggested in these proposals, we would favor increasing the number of offense levels/criminal history categories cells where sentences other than imprisonment would be permitted. Similarly, we support the concept contained in the Federal Defenders proposal at AMENDMENT 52.

#### **AMENDMENT 40**

NACDL strongly supports and enthusiastically urges the Commission to lobby Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1. At the same time, we urge the Commission to similarly lobby Congress to modify or eliminate the provisions that equate the number of marijuana plants arbitrarily with certain weight equivalents.

#### **AMENDMENTS 53 – 56**

NACDL supports each of the amendments here as proposed by the Federal Defenders.

On behalf of the National Association of Criminal Defense Attorneys, I want to thank the Commission again for this opportunity to offer written comment and testimony on the set of guideline amendments and proposals. We look forward to working with the Commission in the future and pledge our best in the effort to enhance the defense bar's knowledge of and facility with the guidelines and their associated procedures.







Public Hearing Testimony

March 22, 1993

I am here today to have my voice heard regarding the proposed amendments of guidelines 2D1.1. The language of your proposed amendments should include the fact that the guidelines, as applied, do not reflect the intent of Congress with regard to illegal street drugs.

Congress specified that the total weight of any mixture or compound shall be used in determining a sentence level. However, the blanket application of this stipulation by the sentencing guidelines has failed to consider the intent of Congress and, therefore, resulted in penalizing inadvertently those not falling under that intent.

It would seem that Congress' intent in using the total weight is, in essence, a form of penalty enhancement for those who profit from the compounding and diluting of an illicit controlled substance with another (usually inert) substance. For example: if 100 grams of cocaine is mixed with another substance to yield a 1000 gram mixture, the final mixture is all sold as cocaine, and thus the original 100 grams yield a profit on 1000 grams.

The sentencing guidelines misapply the above rationale by including legally manufactured pharmaceutical, therapeutic agents. Medicinal pharmaceutical controlled substances are dispensed in dosages with a filler added to facilitate ingestion by the user, since the doses are usually too small to be taken alone. This is the result of a legitimate manufacturing process over which a defendant has no control. The size of the pills or capsules is arbitrary. A pill could have a 1 milligram dose in a 100 or 500 milligram total pill size. Furthermore, the purpose of the compounding is very obviously not the same as with street drugs, to enhance the profits from a given amount of an illegal substance. Therefore, in a case in which pharmaceutical controlled substances are involved, determining a sentence based upon the total weight of the tablets or capsules is illogical and not in keeping with Congress' intent regarding street drugs.

The following examples serve to illustrate the absurdity and injustice of such an application of the total weight rule to pharmaceutical agents.

- 2 -

In 1989, a West Virginia defendant was sentenced for selling 20,000 Tylox tablets. Tylox consists of 500 milligrams of Tylenol and 5 milligrams of Oxycodone, a narcotic. The total weight was 10,100 grams, of which 100 grams was narcotic. His sentence was calculated on the basis of the 100 grams of Oxycodone (which was converted to 50 grams of Heroin), and he received a level 20 baseline sentence. Had he been sentenced as in other cases, his sentence would have been based on converting 10,100 grams of Tylox to 5,050 grams of Heroin, i.e., 10,000 grams of Tylenol would have been converted to 5,000 grams of Heroin, surely a ridiculous proposition.

Another case involves a Maryland man who was also sentenced in 1989 on the basis of 66 tablets of Percodan. Percodan has 5 milligrams of Oxycodone and 550 milligrams of aspirin and filler. His sentencing memorandum erroneously claimed a total Oxycodone weight of (66 x 555 milligrams) 33.3 grams which was converted then to 16.5 grams of Heroin. His sentence was based on this calculation. In fact, the 66 pills had 310 milligrams of narcotic or 1/100 the claimed amount. These calculations and his sentence were never corrected.

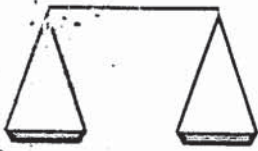
Finally, a physician wrote prescriptions for two controlled substances, Hydromorphone and Dolophine (methadone). The Hydromorphone dosage was 4 milligrams and the Dolophine dosage was 10 milligrams. The tablets issued by the pharmacist, from the manufacturer, weighed 90 milligrams for the Hydromorphone, and 250 milligrams for the Dolophine. Sentencing was not based on the total prescription dosages of 175 grams but on the total pill weight multiplied by 2.5 for the Hydromorphone and 0.5 for the Dolophine to convert them to Heroin. The total weight after Heroin conversion was 8059 grams. From 175 grams to 8059 grams! It boggles the mind! There was no Heroin in this case, and the physician had no control over the pill size. The sentence penalized the defendant for something he did not do (manufacture the pill or dilute a narcotic for profit enhancement) and for something that did not exist (Heroin).

My only purpose for being here is to ask that the guidelines reflect the truth. The guidelines should be retroactively (to 1987) amended to correct this inappropriate application of the total weight rule so that individuals are not penalized for legalistic fiction after a process of legislative alchemy.

Thank you



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TESTIMONY OF  
ERIC E. STERLING, PRESIDENT  
THE CRIMINAL JUSTICE POLICY FOUNDATION  
BEFORE THE  
UNITED STATES SENTENCING COMMISSION  
ON PROPOSED GUIDELINE AMENDMENTS  
FOR PUBLIC COMMENT  
MARCH 22, 1993

Judge Wilkins, members of the Commission, thank you very much for permitting me to testify before you today regarding the proposed guideline amendments for public comment that the Commission published at the end of 1992.

Background

I am Eric E. Sterling, the President of The Criminal Justice Policy Foundation. The Foundation is a four year old educational organization that works with policymakers and the public to advance innovation in approaching the problems of the criminal justice system. Prior to joining the Foundation in 1989, I served as counsel to the Committee on the Judiciary at the U.S. House of Representatives for nine years. For eight years, as counsel to the Subcommittee on Crime, I was the principal staffer on the Judiciary Committee for drug enforcement, gun control, money laundering, organized crime, pornography, arson and explosives, and other matters. I played a major role in the development of many provisions of the Comprehensive Crime Control of 1984, the Anti-Drug Abuse Act of 1986, and the Anti-Drug Abuse Act of 1988, as well as other public laws.

I hope my experience as the Committee counsel who staffed the development of the mandatory minimum sentence amendments to the Controlled

Substances Act in the Anti-Drug Abuse Act of 1986 will be of value to the Commission in these hearings.

#### History of the Anti-Drug Abuse Act of 1986

The Controlled Substances Act sentencing provisions were initiated in the Subcommittee on Crime in early August 1986 in a climate in the Congress that some have characterized as frenzied. Speaker O'Neill returned from Boston after the July 4th district work period where he had been bombarded with constituent horror and outrage about the crack cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House, by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. The Speaker set a deadline for the conclusion of all Committee work on this bill as the start of the August recess -- five weeks away.

The development of this omnibus bill was extraordinary. Typically Members introduce bills which are referred to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill, and amendments are offered to it. For this omnibus bill much of this procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill.

And unfortunately for the Democrats, their attempt to preempt the drug and crime issue was easily rebuffed by the Republicans who simply raised the stakes by offering amendments with longer sentences, in favor of the death penalty, for elimination of the exclusionary rule, and so forth.

#### Background to the Mandatory Minimum Sentence Provisions

Recognizing the intensity of the climate of legislative haste, it is testimony to the integrity of the Chairman of the Subcommittee on Crime, William J. Hughes, that the Subcommittee attempted to develop a new sentencing scheme for drug offenses in a rational manner. The Subcommittee determined that it wanted to create incentives for the Department of Justice to direct its "most intense focus" on "major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs."<sup>1</sup> The Subcommittee directed staff to consult "with a number of DEA agents and prosecutors about the distribution patterns of drugs which if

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<sup>1</sup> H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, pp. 11-12.



possessed by an individual would likely be indicative of operating at such a high level."<sup>2</sup> The Subcommittee "determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping pcpc (sic) in aluminum foil, and doing so in substantial street quantities."<sup>3</sup>

The concepts and details were developed during four meetings. The provisions regarding quantities of drugs were based, first upon calls to various individual law enforcement officers and reflected their personal experiences, and then upon adjustments to those quantities based on experiences in the various districts the Subcommittee members were from, rather than national standards, which tended to drive some of major level trafficker quantities in 841(b)(1)(A) down.

The Subcommittee did not make a determination about harmfulness of drugs, or more particularly develop a "harmfulness equivalent" concerning the quantities of drugs subject to the same level of punishment. Its punishment analysis was developed to direct prosecutorial resources to particular levels in the drug distribution bureaucracy, "major" traffickers, and "serious" traffickers. One problem with that analysis is that different drugs have differing distribution patterns. In the case of LSD, for example, the number of transactions between the chemist and the ultimate consumer is many fewer than the number of transactions between the heroin chemist and the heroin consumer. And it assumed that the high-level LSD distributor inflicts equivalent social harm as the high-level heroin, cocaine and PCP distributors.

The length of sentences originated without any advice or comment from the various agencies with relevant expertise, from the Judicial Conference, or from the public, **and without understanding of how it would affect the sentencing guideline structure under development by the Sentencing Commission.** The members were still operating in a mind-set of parole, and unfettered judicial discretion in sentencing.

The development of this bill was the sole instance during more than nine years with the Judiciary Committee that I did not see the usual procedure of hearings upon introduced bills followed. The terrible consequences of taking the approach of mandatory minimum sentences are now well known to this Commission, to the Judiciary, to the Bureau of Prisons, to the Bar, and to the nation at large.

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<sup>2</sup> Ibid. p. 12

<sup>3</sup> Ibid. p. 12

## Recommendations

### **AMENDMENT NO. 40**

Yes, the Commission should ask Congress to change the drug sentences.

**The Commission should regularly use its authority under 28 U.S.C 994(w) and 994(r) to analyze the grades and maximum penalties of offenses and make recommendations to Congress.**

Nobody is in a better position to make such recommendations than the commission. To achieve the purposes of the Commission in 28 U.S.C. 991(b) regarding certainty, fairness, avoiding unwarranted disparity, and "reflecting...advancement in knowledge of human behavior," **the invitation for comment is perhaps the most important proposal in this guideline amendment package, because it represents an inclination of the Commission to initiate correction of the legislative excesses of 1986.**

Regarding the 100:1 cocaine to crack ratio, it was originally a 50:1 ratio in the Crime Subcommittee's bill, H.R. 5394, and was arbitrarily doubled simply to symbolize redoubled congressional seriousness. Even the 50:1 ratio was too high. Cocaine had been the drug driving the violence in Florida that underlay the establishment of the Vice President's South Florida Task Force in 1982, and had long been regarded as a terribly serious component of the nation's drug problem. But it was the fearful image of crack in the popular consciousness that drove the legislative package. Some Members were warning that summer that 1000 new crack addicts were being created every day -- suggesting there would be a population of at least 3.6 million crack addicts at the end of the year. Yet by 1988, the estimate of the number of "frequent cocaine users" (use in the last week) was put at 862,000.<sup>4</sup> This number included the many snorters of cocaine, cocaine addicts of all descriptions, as well as the highly feared "crack" addicts. Many serious users of cocaine, upon using crack found it to be an intensely pleasurable, highly reinforcing, and deadly addictive drug. However, millions of Americans have in fact tried crack, they don't like it and don't use it.

The threshold quantities originally developed by the Subcommittee for the "serious level traffickers" who would be subject to the mandatory minimum of 5 years were one kilogram of cocaine and 20 grams of crack. The text of the "issue for comment" is incorrect in stating that the "legislative history of this section of the 1986 Crime Control Act (sic) indicates that the mandatory

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<sup>4</sup> National Drug Control Strategy, February 1991, p. 9. And by 1990, the Administration was proudly reporting that the number had gone down 23% to 662,000.

minimum was designed to target street level dealers who possess small quantities of cocaine base (crack).<sup>5</sup> The Crime Subcommittee's target for prosecution by the 1986 amendment to 21 U.S.C.841(b)(1)(B)(iii) for trafficking in 5 grams or more of cocaine base (crack) was not "street-level dealers."<sup>6</sup> The target for investigation and prosecution were "wholesale/major retail level traffickers".<sup>7</sup> The "[q]uantities are based on the amounts that would be

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<sup>5</sup> Proposed Guideline Amendments for Public Comment, U.S. Sentencing Commission, Jan. 1993, p.63. The 1986 Act, the "Anti-Drug Abuse Act of 1986", included many titles that had their own short titles, but none of them were known as the 1986 Crime Control Act. In 1988, Congress passed the "Anti-Drug Abuse Act of 1988." Subtitle L of Title VI (the "Anti-Drug Abuse Amendments Act of 1988") of that Act amended the simple possession provisions of the Controlled Substances Act to provide for mandatory minimum sentences for the possession of crack. Generally the maximum penalty for the possession of a controlled substance is imprisonment for one year. However, for first offense possession of more than 5 grams of crack, a mandatory minimum of 5 years imprisonment up to a maximum of 20 years shall be imposed.

<sup>6</sup> "Legislative history" is a term frequently used, but it is not synonymous with legislative intent. In the case of this legislation, it is hard not to be confused by both the "legislative history" and the "legislative intent."

It is often hard to ascertain Congress' "legislative intent." In trying to understand a particular provision, one should distinguish the "legislative intent" of the members of the Subcommittee who actually wrote the provision, and the "legislative intent" expressed in the blizzard of press releases that accompanied the debate on legislation by members who most likely never read the bill. The intent of such members regarding this legislation, so clear and pure that it was pungent, was to "send a message" to the voters that they were tough on drugs and should therefore be re-elected.

The intent of the authors of the provisions is often expressed in the Committee's report, and was so expressed in the case of this legislation.

<sup>7</sup> H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, p. 17, emphasis in the original. The subhead used in the report to explain these penalties was *Serious Trafficker Penalties*.

possessed by persons operating at the retail supervisory/wholesale level of distribution of the particular drug."<sup>8</sup>

The Subcommittee was concerned about the violence of the street markets in which crack was being sold. The Subcommittee believed that, rather than the "buy and bust" strategy of arresting street level dealers, the approach should be to prosecute the managers of the street level traffic.<sup>9</sup>

The 20 grams of crack was the minimum believed to be in the possession of such a manager in the course of his work.

**The U.S. Sentencing Commission, in order to reduce unwarranted sentencing disparity, should request a review by the National Institute on Drug Abuse in consultation with the National Academy of Sciences of the drug quantity structure to determine dosages and quantify relative dangerousness or harmfulness.**

**The Drug Quantity Table in Part D of the Sentencing Guidelines as well as the quantitative levels for offenses in 21 U.S.C. 841 and other drug mandatory minimum sentences do not reflect a scientific measurement of relative harmfulness.** Congress, in its arbitrary selection of equivalent punishments for varying quantities, created the appearance that it had studied or understood relative harmfulness. The arbitrary 100 to 1 ratio between cocaine and crack reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug. This problem exists for all of the drugs listed on the table. The crude quantitative approach is a decades-old artifact of the way that drug enforcement agents have measured their cases.

Any fair sentencing scheme based on drug quantities should rest upon an accurate understanding of "quantity harmfulness" and have an equivalence across drugs. **This quantitative factoring could be in terms of the chemical or physical/psychological harmfulness of the drug, or perhaps it could be translated into the actual market value of the quantity of drugs. An innovative approach to eliminate sentencing disparity in this area that the commission could consider would be to follow the models used in theft, fraud and tax violations, and use the value of the illegal transactions as the basis for sentencing.** The "harm" would be seen in terms of how "big" the

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<sup>8</sup> Ibid. p. 17

<sup>9</sup> The "buy and bust" enforcement strategy has been found to be unsuccessful and counterproductive and has been abandoned by the police in New York City and Washington, D.C.

trafficker was, as measured by the dollar volume, not the quantity. Congress has used dollar value in creating the highest level offenses in the Continuing Criminal Enterprise offense, 21 U.S.C. 848(b)(2)B).

In looking at the statutory mandatory minimum in 21 U.S.C. 841(b)(1)A), for example, is there any "harmfulness" basis for treating 1 kg of heroin, 5 kg of cocaine, 50 gms of crack, 100 gms of PCP, 10 gms of LSD, 400 gms of fentanyl, or 1000 kg of marijuana as equivalent? If pure, how many doses of the drug do these quantities represent? How do the costs of these different quantities compare? Quantity-based sentences for drug offenses should be imposed on the basis of a genuine dangerousness or harmfulness factor.

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[Amendment No. 40 was addressed out of order because of its saliency for sentencing reform.]

#### **AMENDMENT NO. 9**

This amendment is a good amendment in that it moderates the excesses of the 1986 Anti-Drug Abuse Act and focuses on the dangerous characteristics of an offender. It moves away from an excessive focus on weights regarding high-level offenders.

#### **AMENDMENT NO. 10**

This is an excellent amendment which will reduce unwarranted sentencing disparity.

The Los Angeles Times, in an article by Jim Newton, computed the sentences that now result under the guidelines by including the weight of the carrier.<sup>10</sup>

<u>Carrier</u>	<u>Weight of 100 doses</u>	<u>Guideline Range</u>
Pure LSD	5 milligrams	10 - 16 months (Level 12)
Gelatin Capsule	225 milligrams	27 - 33 months (Level 18)
Blotter paper	1.4 grams	63 - 78 months (Level 26)
Sugar cubes	227 grams	188 - 235 months (Level 36)

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<sup>10</sup> Jim Newton, "Long LSD Prison Terms -- It's All in the Packaging," Los Angeles Times, p. 1, July 27, 1992. See also, Dennis Cauchon, "Band's followers handed stiff LSD sentences," USA Today, p. 11A, Dec. 17, 1992.

**The U.S. Sentencing Commission, pursuant to 28 U.S.C 994(r),** should recommend to Congress that it eliminate the "detectable amount" standard entirely, since it, in conjunction with mandatory minimums is the primary source of the worst "unwarranted sentencing disparity" in Federal law. The Commission might recommend to Congress that it repeal the entire quantitative structure in the area of controlled substances offenses and leave the sentencing enhancements to the Commission and the Sentencing Guidelines.

#### **AMENDMENT NO. 11**

This amendment more accurately reflects the level of business of a drug trafficker. The U.S. Drug Enforcement Administration in its G-DEP classification of high level drug traffickers limits the quantitative factor for determining the class of drug trafficker to the quantities which are handled on a monthly basis.

However, the level 32 quantities of controlled substances are not very substantial as major traffickers. To move to aggregation of all quantities at such a trigger will not provide the remedy the amendment seeks. Setting the aggregation level at 34 or 36 more closely reflects the levels of substantial traffickers.

#### **AMENDMENT NO. 12**

This amendment accurately reflects the boasting nature of drug trafficking negotiations, and prevents unfairness and unwarranted sentencing disparity from resulting from unrealistic claims that a defendant might make.

#### **AMENDMENT NO. 13**

This proposal is worthy, but may not go far enough. Where a government agent has set up a reverse sting sale for a discount price, the Judge should be permitted to consider not only the practical limits of the defendant's financial resources, but also the extent to which the agent's discount pricing may have boosted the size of the deal within the defendant's financial resources but beyond his original disposition -- i.e. to determine how much of the quantity to be sold was the defendant's idea and how much was the agent's idea, and to sentence only on the basis of the former.

#### **AMENDMENT NO. 47**

The government routinely encourages defendants to cooperate with it in the investigation of crime. A great many defendants, in fact, in the hope of sentence mitigation provide assistance. In course of such cooperation, some defendants have reservations about informing against family members or long-

time intimate associates. Such reservations can cause the government's attorneys and investigators enormous frustration. In other cases, personality conflict may arise, or the government may disbelieve some declarations or denials by the defendant.

It is in the interest of fairness in sentencing to permit the court to make its own independent determination about a defendant's "substantial assistance" to avoid unwarranted government withholding of a motion for departure from the guidelines on the ground of substantial assistance.

#### **AMENDMENT NO. 48**

With over twenty million Americans using marijuana and other cannabis products annually, there are obviously a great many persons violating the Controlled Substances Act. There are millions of Americans who are on the outer-most fringes of criminal enterprises that supply the American demand for cannabis. If their participation in the criminal conduct was truly minimal, it does not offend one's conscience that their potential incarceration be set at a maximum of level 16, or roughly two years. And if their participation were truly minor, then a maximum level of 22, or roughly 4 years, does not seem to be too low a maximum.

#### **AMENDMENT NO. 49**

This amendment would not include in the weight of a mixture or substance the uningestible materials mixed with a controlled substance to facilitate the smuggling of the substance such as mixing the drug with fiberglass and molding it into a suitcase. One could understand the desire of the government to seek extra punishment for an especially clever or hard-to-detect means to smuggle drugs into the country. That issue should be addressed directly, and not through a manipulation of the mixture or substance weights.

This amendment would eliminate unwarranted sentencing disparity. That such an amendment has become necessary reflects the degree of illogic that has invaded some discussions of drug quantities, and the degree of extremism attached to the term "mixture or substance containing a detectable amount of..."

#### **AMENDMENT NO. 50**

This is a very worthy amendment. Perhaps the greatest contemporary example of sentencing disparity is to sentence people to prison for long terms for the weight of the paper or sugar cubes on which LSD is "carried" rather than on the basis of the prohibited drug itself.

## AMENDMENT NO. 51

This amendment, defining "cocaine base" as crack for the purposes of differentiating it from cocaine for sentencing purposes, accurately reflects the intent of the House Committee on the Judiciary when it used the cocaine base. In the Committee's report, it used the common term, "crack," when describing the types of offenders the new sentencing provision was designed to apply to.<sup>11</sup>

The Committee was aware of another meaning of cocaine base as an intermediate product in the processing of coca leaves into cocaine hydrochloride, but did not intend this definition or these penalties to be applied to criminal conduct such as the importation of that material.

## AMENDMENT NO. 63

Without undertaking a scientific study of the relative dangerousness of drugs, these proposed amendments are unwarranted. These proposals reflect the tendency to punish more harshly anabolic steroids, the drug du jour. There is no question that there are serious risks in the abuse of anabolic steroids. But just how widespread and how severe are those risks? The claim of a former NFL star that he believes his brain cancer was caused by his use of anabolic steroids does not make it so, nor does it suggest that the a risk of brain cancer from such drug use is high.

This amendment may be warranted. But the Commission cannot adopt this amendment without risking increased sentencing disparity in the absence of a comprehensive examination of relative drug harmfulness.

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<sup>11</sup> H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, p. 12