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MEMORANDUM

TO: David Lombardero
FROM: Ronald Weich ^{RW}
RE: Criminal Livelihood Guideline (§4B1.3)
DATE: March 23, 1988

This memorandum presents the findings and conclusions of the Criminal Livelihood Working Group you established in January. The group consists of myself, Charles Betsey, Candy Johnson, Candace McCoy, Gary Peters, Andy Purdy, and Sylvia Voreas.

The Criminal Livelihood guideline¹ has engendered considerable hostility during the training period.² The three major areas of concern are as follows:

¹§4B1.3. Criminal Livelihood.
If the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, his offense level shall be not less than 13. In no such case will the defendant be eligible for a sentence of probation.

²In addition, at the Commission's March 22 public hearing, testimony critical of §4B1.3 was offered by Judge Becker, Samuel Buffone (American Bar Association) and Barry Portman (Federal Defender's Advisory Committee).

1. The Criminal Livelihood guideline is difficult to apply because the terms of the guideline are insufficiently defined by the commentary accompanying §4B1.3.
2. The Criminal Livelihood guideline will have an unintended, disproportionate impact upon lower-income, petty offenders. Congress and the Commission had hoped to target the 'professional offender,' but other provisions of the guidelines act to place those offenders above offense level 13 before Criminal Livelihood is calculated, so §4B1.3 does not affect them. It is argued, therefore, that the guideline is unnecessary, unfair, and perhaps unconstitutional.
3. Criminal Livelihood is calculated after Acceptance of Responsibility (§3E1.1). As a result, a defendant who fears that he may fall within the Criminal Livelihood guideline has no incentive to accept responsibility for the offense. The two-level reduction the defendant receives for Acceptance of Responsibility is negated by the application of Criminal Livelihood.

In response to these criticisms, you formed the Criminal Livelihood Working Group. We have examined §4B1.3 from several different perspectives. We have examined the legislative history of Criminal Livelihood, its interaction with other provisions in the Guidelines, the constitutional issues it raises, the field

experience with the guideline, and a body of research data concerning the guideline.

Based upon our examination of the provision, the Criminal Livelihood Working Group concludes that the widespread criticism of §4B1.3 is justified. We recommend that the Commission consider the following proposed amendments to Criminal Livelihood:

1. Calculate Criminal Livelihood before Acceptance of Responsibility.
2. Define 'pattern of criminal conduct' with greater specificity.
3. Incorporate an objective monetary standard in the Criminal Livelihood guideline.
4. Make the Criminal Livelihood offense level consistent with the money table in §2B1.1.
5. Standardize or eliminate the use of the defendant's income as a factor in calculating Criminal Livelihood.

These proposals are discussed in greater detail in Section VI, infra.

Alternatively, the Group recommends that the Commission consider repealing §4B1.3. The arguments in support of the guideline's repeal are also discussed in Section VI.

I. Legislative History of Criminal Livelihood

The Sentencing Commission created the Criminal Livelihood guideline in response to what it perceived to be the Congressional directive in 28 U.S.C. § 994(i)(2). That statutory provision directs the Commission to "assure that the Guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant . . . (2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income."

The Senate Report accompanying the Sentencing Reform Act reveals that §994(i)(2) was derived from the Dangerous Special Offender sentencing provisions of 18 U.S.C. § 3575. S. Rep. No. 225, 98th Cong., 1st Sess. 175-76 (1983). In effect, §994(i)(2) replaced §3575. Much of the language used to define a "special offender" in §3575 was transplanted from §3575 to §994(i)(2), and §3575 was repealed on the effective date of the Sentencing Reform Act. Congress apparently viewed §994(i)(2) as an instruction to the Commission to include the goals of the Dangerous Special Offender provision in the Guidelines. It is instructive, therefore, to examine §3575 to determine which categories of criminals it targeted.

The Dangerous Special Offender provision was enacted as Title X of the Organized Crime Control Act of 1970. The stated purpose of the legislation was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." S. Rep. No. 617, 91st Cong., 1st Sess. 2 (1969).

Although Title X created three categories of special offenders, one each for the habitual offender, the professional offender, and the organized crime offender, it is clear from the legislative history that the overriding goal of the legislation was to target organized crime defendants. Rep. David Dennis of Indiana lauded the Act as a "long-overdue legislative attempt to deal with the important problem of successful prosecution of organized crime . . ." H.R. Rep. No. 1549, 91st Cong., 2nd Sess. 4073 (1970). The Senate Judiciary Committee relied upon a study of the average criminal career of "La Cosa Nostra members" in concluding that "existing [sentence] maximums in many cases are insufficient and ineffective when applied to habitual, professional or organized criminals." S. Rep. 91-617 at 85.

Under the Act, a defendant found to be both "dangerous" and a "special offender" as those terms are defined in Title X, may be sentenced to a term of imprisonment in excess of what would

otherwise be the maximum sentence for the offense of conviction. The maximum sentence which may be imposed under §3575 is 25 years unless the offense of conviction carries a greater maximum sentence.

The language from Title X that has now become the basis of the Criminal Livelihood guideline is contained in §1001(e)(2) of the Act (18 U.S.C. § 3575(e)(2)). Under that prong of the definition, a defendant is a special offender if he "committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise." The statute subsequently defines "substantial source of income" as "a source of income which for any period of one year or more exceeds the minimum wage . . . and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income . . ." 18 U.S.C. § 3575(e). Significantly, the enhancement provision only becomes operative if the court also makes a finding that the defendant is "dangerous," to the extent that "a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." §3575(f).

The section-by-section analysis in the Senate Report accompanying the Organized Crime Control Act specifies that §3575(e)(2) was designed to target the "professional offender":

The circumstances of the conduct itself must demonstrate that the offender is a professional possessing special skill or expertise, from which it may be inferred, for the purpose of 'dangerousness,' see subsection (f), that subsequent use of that skill is likely. The phrase 'skill or expertise' is meant broadly and would include, for example, knowledge of established channels for fencing stolen property or forming alliances with accomplices . . . Finally, the pattern must be a substantial source of the defendant's income, from which it may be similarly inferred that such conduct will continue in the future. In making these determinations, the court may consider the defendant's unexplained wealth or income.

S. Rep. 91-617 at 164-65. See also, U.S. v. Burt, 802 F.2d 330, 332 (9th Cir. 1986) (§3575(e)(2) targets the 'professional offender')

Three important differences between §3575(e)(2) and §994(i)(2) are readily apparent. First, the definition in §994(i)(2) is broader than the definition of the professional offender in §3575(c) because the §994(i)(2) definition does not include the "special skill or expertise" component. Second, §3575 is a discretionary provision. It is triggered by the prosecutor's discretionary decision to file a notice under §3575, and serves only to provide the court with the discretion to impose a sentence in excess of the statutory maximum. Third, the consequence of being adjudicated a dangerous special offender under §3575 is greater than the consequence of satisfying the

definition of §994(i)(2). The latter provision does not authorize a sentence in excess of the statutory maximum.³

Despite these differences, there is nothing in the legislative history of the Sentencing Reform Act which suggests that Congress intended §994(i)(2) to apply to a type of criminal other than the professional offender against whom §3575(e)(2) was directed. Instead, the differences between the two provisions indicate that Congress no longer wanted a handful of professional offenders to be singled out, at the discretion of prosecutors and judges, for extremely harsh punishment. Section 994(i)(2), in effect, directs the Commission to authorize consistently severe punishment for all professional offenders.

The Commission's attempt to implement this policy, however, may inadvertently stray from the legislative intent. By failing to provide objective standards by which to measure whether criminal proceeds constitute a "substantial portion" of a defendant's income, the Criminal Livelihood guideline has the unintended effect of punishing petty, low-income criminals with disproportionate force. If two individuals each steal \$1,000, the variable which will determine whether the stolen money constitutes a substantial portion of the defendant's income is the size of the defendant's income. The smaller a defendant's

³A fourth difference between the two provisions is insignificant. While §3575(c) refers to a "substantial source" of the defendant's income, §994(i)(2) uses the term "substantial portion." In this context, "source" and "portion" are essentially synonymous.

income, the more likely it is that he will qualify for the Criminal Livelihood provision.

This is surely not the result Congress anticipated. In fact, immediately after a provision directing the Commission to consider what relevance, if any, should be attributed to a defendant's "degree of dependence upon criminal activity for a livelihood," there appears the following command: "The Commission shall assure that the Guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d)(11) (emphasis added). The Senate Report explains that:

The Committee added the provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training. Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training.

S. Rep. 98-225 at 171, text and fn. 410 (emphasis added).

The legislative history of the Criminal Livelihood guideline may be summarized as follows: Congress replaced a portion of the Dangerous Special Offender provision with a direction to the Commission to assure that offenders who earn a criminal livelihood will be incarcerated. The Commission's literal implementation of §994(i)(2) is not faithful to the history and purpose of the Dangerous Special Offender provision. As a

result, it fails to provide objective standards which would enable courts to identify and incarcerate professional offenders. The current guideline merely disadvantages lower-income defendants and thereby runs afoul of a separate statutory directive.

II. Constitutional Concerns

It may be argued that the Criminal Livelihood guideline is not merely unfair to lower-income defendants, but unconstitutional as well. The Working Group has not attempted to resolve the Equal Protection question posed by the guideline, but a brief summary of the argument is warranted.

Defendants will argue that the Criminal Livelihood Guideline treats similarly situated individuals differently. Two individuals are convicted of precisely the same crime--stealing a sum of money--but they are assigned different offense levels because of a single variable: the size of each defendant's income. Indeed, the defendant with the lower income is subject to mandatory imprisonment if the guideline is applied.

Whether a classification will be deemed to violate the Equal Protection clause depends largely on the level of scrutiny which the court applies to the regulation. Courts strictly scrutinize classifications which burden a suspect class or which infringe on a fundamental right. Wealth itself is not a suspect classification. Maier v. Roe, 432 U.S. 464 (1977); Reproductive Health

Services v. Freeman, 614 F. 2d 585 (8th Cir. 1980). It may be argued, however, that blacks and other minorities are disproportionately represented in the class of individuals to whom the Criminal Livelihood guideline will apply. Race is, of course, a suspect classification. It is more likely that strict scrutiny will be applied to the Criminal Livelihood guideline because it infringes on a fundamental right, the right to liberty. See generally, U.S. v. Berry, 670 F. 2d 583, 590 (5th Cir. 1982).

An analogous principle may be extracted from Supreme Court cases which hold that it is unconstitutional to imprison a defendant solely because he is unable to pay a fine immediately. Williams v. Illinois, 399 U.S. 235 (1970); Morris v. Schoonfield, 399 U.S. 508 (1970); Tate v. Short, 401 U.S. 395 (1971). Applying these cases, the Fifth Circuit granted the habeas corpus petition of a Georgia prisoner who had violated his probation because he was unable to pay a fine. The court held that regardless of whether wealth is a suspect classification, "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws." Barnett v. Hopper, 548 F. 2d 550 (5th Cir. 1977).

Equal protection claims prompt courts to inquire if a legislative classification could have been tailored more narrowly to achieve the governmental interest. Courts which examine the

legislative history of Criminal Livelihood will correctly conclude that the governmental interest at stake is enhanced punishment for the professional offender. Courts may well conclude that this goal could be achieved with a more narrowly tailored guideline. For example, incorporating an objective definition of the term "substantial portion" (see discussion of proposals, infra at 21) would sharpen the focus of the provision on the professional offender and would limit its inadvertent impact upon the low-income, petty thief.

For these reasons, the Working Group envisions serious challenges to the Criminal Livelihood guideline on Equal Protection grounds.⁴

III. Field Experience

Phyllis Newton and Rusty Burress report that public reaction to the Criminal Livelihood guideline in the training sessions has been exceedingly unfavorable. They believe that §4B1.3 is one of the most controversial provisions in the Guidelines.

⁴Section 4B1.3 will also be challenged on void-for-vagueness grounds. The void-for-vagueness doctrine, generally stated, "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (emphasis added). A provision which does not comply with this requirement violates the Due Process Clause.

This memorandum does not include a void-for-vagueness analysis of §4B1.3. It is the view of the Working Group that the compelling policy arguments for providing workable definitions of the terms in the guideline (if the guideline is not simply repealed) renders the constitutional analysis superfluous.

The response to the recently completed training survey supports this impression. Of the 121 respondents, 68.5 percent reported problems in applying the Criminal Livelihood guidelines.⁵ Ten of the 21 judges responding to the survey believed that the guideline created a problem. Seven judges considered the problem minor, and three found that the guideline presented serious problems. Of the 100 probation officers responding to the survey, 73 percent considered §4B1.3 to be problematic. Of probation officer respondents, 44 percent termed the problems minor, while an additional 29 percent of them anticipated serious problems. A chart setting forth these statistics is presented in Appendix One.

Written comments about §4B1.3 from both judges and probation officers explain the nature of the problems encountered. The complaints largely fall into two categories. First, the guideline is considered too vague to apply with any degree of consistency. Second, numerous practitioners note the disparate impact the guideline will have upon low-income defendants. A set of written comments pertaining to the Criminal Livelihood guideline is presented in Appendix Two. Rusty and Phyllis agree that the two complaints they hear most often about Criminal Livelihood are that it is vague and unfair. Practitioners have also noted that calculating Criminal Livelihood after Acceptance

⁵The respondents were the judges and probation officers who had participated in the Commission's "train-the-trainer" program. Their responses were based upon the experience of teaching guideline application to judges and probation officers in their districts.

of Responsibility leaves defendants little incentive to plead guilty in cases in which Criminal Livelihood may apply, but Rusty and Phyllis do not regard this as the focus of the Criminal Livelihood controversy.

At this point, information about the application of §4B1.3 in actual cases is limited and largely unavailable to the Commission. The Commission's Technical Assistance Service (the "Hotline") provides some anecdotal evidence that practitioners are having difficulty applying the Criminal Livelihood guideline. Callers have asked what the Commission means by the term "substantial portion" in §4B1.3 and what is meant by the commentary: "This guideline is not intended to apply to minor or petty offenses." One caller asked if a defendant's "income" includes his spouse's income. Another asked if unemployed defendants would automatically qualify for Criminal Livelihood. These questions demonstrate the extent to which vague, undefined terms in the Guidelines can lead to unwarranted disparity in application.

The Hotline experience is also disturbing because it reveals that a literal reading of §4B1.3 results in the application of Criminal Livelihood to defendants who are, in no sense of the term, "professional offenders." Two cases are illustrative.

In the Southern District of New York, a grocery store owner pleaded guilty to the crime of illegally purchasing a license to

redeem food stamps. The probation officer who discussed the case on the Hotline concluded that the defendant qualified for Criminal Livelihood because food stamp purchases constituted a substantial portion of the grocery store's business. The officer noted that this offense would have typically resulted in a sentence of probation before the guidelines, but application of Criminal Livelihood results in a guideline range of at least 12-18 months.

A senior probation officer from Oregon called the Hotline to discuss the applicability of §4B1.3 to a 21-year-old defendant convicted of breaking into a car and stealing government property valued at over \$100. The defendant is a homeless individual with a history of psychiatric hospitalization. The proceeds of the instant crime and his prior misdemeanor theft convictions might indeed be a "substantial portion" of the defendant's income last year because the defendant was only employed for 3 weeks of the year.

IV. Is the Criminal Livelihood Guideline Necessary?

Criticism of the Criminal Livelihood guideline would be irrelevant if the guideline were necessary to implement the mandate of the enabling legislation. In fact, §4B1.3.1 is not a necessary component of the Guidelines. Other guidelines fulfill the statutory mandate to insure that professional offenders receive substantial prison terms.

Among the many guidelines which directly or indirectly target the professional offender are the following:

- a. Money and Drug Tables (e.g., §§ 2B1.1; 2B2.1; 2B3.1; 2F1.1; 2S1.1; 2T4.1).

The size of a defendant's illegally derived income is used in both the Dangerous Special Offender provision and the Criminal Livelihood guideline as a means of ascertaining if the defendant is a professional offender. If that correlation is appropriate, many of the offense guidelines, including theft, robbery, burglary, and fraud already target the professional offender because the offense level for those crimes rises as the size of the defendant's criminal income increases.

For example, a defendant who engages in a scheme to defraud more than one victim and thereby steals or intends to steal between \$50,000 and \$100,000 may be one of the professional offenders targeted by the Dangerous Special Offender provision and Criminal Livelihood guideline. Due to the operation of the money table in §2F1.1, that defendant is at offense level 13 even before Criminal Livelihood is calculated. He is not adversely affected by §4B1.3. Criminal Livelihood would adversely affect someone who stole less money, and was therefore assigned an offense level lower than 13, but who had an income so insubstantial that the theft would be considered a "substantial portion" of the defendant's income.

b. Relevant Conduct (§1B1.3).

The relevant conduct guideline permits the court to base the defendant's sentence upon all conduct in furtherance of the offense of conviction, §1B1.3(a)(1), and, with respect to aggregatable offenses such as theft and drug offenses, all conduct which was part of the same course of conduct or common scheme or plan as the offense of conviction, §1B1.3(a)(2).

This provision captures the professional offender by ensuring that the full measure of his criminal activities will contribute to the calculation of his offense level. Indeed, the "same course of conduct or common scheme or plan" component of Relevant Conduct overlaps substantially with the "pattern of criminal conduct" component of Criminal Livelihood. If Criminal Livelihood were repealed, Relevant Conduct would still ensure that the offense level captures the full scope of the defendant's conduct. In the case of the true professional offender, the offense level is likely to be 13 or above in any event.

It may be argued that Relevant Conduct does not encompass, for example, a series of separate robberies, while Criminal Livelihood explicitly does (§4B1.3, Application Note 1), but this is an empty distinction because the base offense level of robbery is 18 (§2B3.1). Criminal Livelihood will not adversely affect the defendant convicted of robbery.

c. Criminal History (Chapter Four).

The Commission has promulgated detailed guidelines to assure that a defendant's criminal history is reflected in the guideline sentence range. Under the sentencing table, a defendant with a significant criminal record will likely receive a term of imprisonment for all but the most minor offenses.

Chapter Four may be said to target the professional offender simply because a professional offender is likely to have a criminal record. A defendant who does not have a criminal record but who is demonstrably a professional offender may qualify for upward departure under the policy statement in which the Commission invites such departure when "the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." §4A1.3.

Chapter Four generally, and §4A1.3 in particular, ensure that appropriately severe punishment will be imposed upon the professional offender.

- d. Aggravating Role in the Offense (§3B1.1); Use of Special Skill (§3B1.3); More than Minimal Planning (e.g., §§ 2A2.2; 2B1.1(b)(4); 2B1.2(b)(2)(B); 2B2.1(b)(1)); Organized Criminal Activity (§2B1.1(b)(6)).

Each of these guidelines leads to enhanced punishment when a particular sentencing factor is present. It can be expected that one or more of these sentencing factors will be present in the

case of a professional offender. Use of Special Skill, for example, was one component of the definition of the professional offender in the Dangerous Special Offender statute. More than Minimal Planning, as that term is defined in Application Note 1(f) of §1B1.1, will almost always result in an enhanced sentence for the professional offender.

- e. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations (RICO) (§2E1.1); Continuing Criminal Enterprise (CCE) (§2D1.5).

RICO and CCE and criminal statutes specifically enacted to ensure severe punishment for the professional offender. The Commission has been faithful to this legislative intent by assigning high offense levels for these crimes. RICO convictions result in a base offense level of 19 or the offense level for the underlying racketeering activity, whichever is greater. CCE convictions result in a base offense level of 32 for the first CCE conviction and 38 for the second and subsequent convictions.

Professional offenders convicted of these offenses obviously will not be adversely affected by Criminal Livelihood, and will continue to receive substantial terms of imprisonment if §4B1.3 were repealed.

V. Data Pertaining to Criminal Livelihood

At the time the Commission produced its prison impact study last year, it generated a body of data predicting the effect of various guideline provisions. Working Group member Charles

Betsey recently extracted and summarized the data pertaining to Criminal Livelihood.

The data were generated by applying the Commission's prison impact model to 10,500 Federal Probation Sentencing and Supervision Information System ("FPSSIS") records. These records were augmented by a data collection form prepared by the Commission's research staff. The form included the following question designed to measure the impact of Criminal Livelihood: "Do you have reason to believe that the instant offense was committed as part of a pattern of criminal conduct from which the defendant derived a majority of his income?"⁶

The data generated from the augmented FPSSIS reports may overstate to some extent the impact of Criminal Livelihood, because the "reason to believe" standard in the research question is broader than the preponderance of the evidence standard courts will use to apply §4B1.3. Nonetheless, the data are instructive.

Of all the augmented reports analyzed, 33 percent of the defendants would be eligible for the Criminal Livelihood provision under the standard articulated in the data collection form. However, 69 percent of those eligible would not be

⁶It is interesting to note that the Commission's own researchers rejected the term "substantial portion" in favor of "majority," a word denoting a readily understood, specific standard. Bill Rhodes reports that the data collection form was pretested to find language which would yield consistent application.

adversely affected by Criminal Livelihood because their offense levels were at or above level 13 as a result of other provisions of the guidelines. Ten percent of all defendants would qualify for Criminal Livelihood and be adversely affected by it because they would otherwise have offense levels below 13.

The data also reveal how many defendants otherwise eligible for Criminal Livelihood would still qualify if eligibility were limited to those defendants whose criminal activity involved \$10,000 or more. Of all defendants, 11 percent would satisfy this more narrow criteria. Of these eligible defendants, 73 percent had offense levels equal to or greater than 13. Finally, 3 percent of all defendants would qualify for Criminal Livelihood under the revised criteria and be adversely affected because their offense levels were otherwise less than 13. A chart setting forth this data is presented in Appendix 3.

At least three important conclusions may be drawn from this data. First, it is obvious that a Criminal Livelihood definition which merely calls for a comparison between the amount of money involved in the offense and a defendant's income is overly broad. It cannot be true that one out of every three defendants is a 'professional offender' for whom a substantial term of imprisonment is warranted. The current guideline is not specifically targeting the professional offender.

Second, it is striking that a substantial majority (70% under the current standard; 73% under the revised standard) of defendants eligible for Criminal Livelihood are already at or above offense level 13. Other provisions of the guidelines are accomplishing the goal Criminal Livelihood was designed to accomplish. Criminal Livelihood is largely superfluous.

Third, revising Criminal Livelihood eligibility to filter out those defendants whose criminal activity involved less than \$10,000 would lower the offense levels for only 7 percent of all defendants.⁷ This is the "cost" of a more workable guideline better suited to target the professional offender.

VI. Proposals

A. Amendment of the Criminal Livelihood guideline

If the Commission opts to retain Criminal Livelihood, the guideline could be amended to remedy one or more of the provision's apparent flaws. A draft proposal setting forth the Commission's options is presented in Appendix 4.⁸ The Working

⁷Under the current definition, 10 percent of all defendants are both eligible for Criminal Livelihood and have offense levels less than 13, and are therefore adversely affected by §4B1.3. Under the revised definition, 3 percent of all defendants would be eligible and adversely affected. This figure would be different if the Commission lowered the Criminal Livelihood offense level, an option discussed in Section VI, infra.

⁸In addition to the policy choices discussed below, the Working Group also suggests that the guideline be amended to eliminate the unnecessary reference to probation in the last sentence of §4B1.3. The second sentence of §4B1.3 states that a defendant who qualifies for Criminal Livelihood will not be eligible for probation. This prohibition is unnecessary because the sentencing table already renders all defendants with offense

Group's recommendations with respect to the policy decisions presented by the proposal are as follows:

1. Calculate Criminal Livelihood before Acceptance of Responsibility.

The Working Group does not perceive a logical distinction between Criminal Livelihood and those provisions in Chapters Two and Three which serve to increase a defendant's offense level. Unlike Chapters Two and Three enhancements, however, Criminal Livelihood is calculated after Acceptance of Responsibility. It is unclear why the policy arguments which led the Commission to grant a two-level decrease for Acceptance of Responsibility do not apply with equal force to a defendant eligible for sentencing under §4B1.3.

The consequence of the Commission's decision is substantial. A defendant eligible for Criminal Livelihood has little incentive to accept responsibility for the offense. Indeed, the terms of §4B1.3 are so vague that many defendants will fear that they might be deemed eligible for Criminal Livelihood and will refrain from pleading guilty. The judicial resources required to meet the increased demand for jury trials will, in effect, be allocated to the least serious class of crimes, those crimes for which the offense level would be less than 13 but for Criminal Livelihood.

levels greater than 6 ineligible for probation. A court may depart from the guidelines to impose a sentence of probation, and the prohibition in §4B1.3 does not, of course, infringe upon the court's statutory right to depart from the guidelines.

Calculating Acceptance of Responsibility after Criminal Livelihood would be consistent with the philosophy of the Guidelines and would avoid a misallocation of judicial resources.

2. Provide a more precise definition of 'pattern of criminal conduct.'

Criminal Livelihood would be applied with more consistency if its terms were defined with greater specificity. In particular, the meaning of the phrase "pattern of criminal conduct" is unclear.

Currently, an application note accompanying §4B1.3 defines "pattern of criminal conduct" as "planned criminal acts occurring over a substantial period of time." This definition is incomplete because it does not include a meaningful temporal component. Reference to the period of time over which the criminal conduct occurred would seem to be essential in light of the legislative history of Criminal Livelihood; a defendant would not be a professional offender if he engaged in criminal activity over a very short period of time. The phrase "substantial period of time" is subject to as many varying interpretations as "substantial portion of income."

The Working Group recommends that the phrase "substantial period of time," in Application Note 1 of §4B1.3 be replaced with the phrase "period of at least one year." The latter standard is not unduly restrictive, but it ensures that only individuals who

engage in crime as a profession will qualify for Criminal Livelihood.

3. Incorporate an objective monetary standard in the Criminal Livelihood guideline.

The current Criminal Livelihood provision does not adequately target the professional offender. A defendant earning a small criminal income may be eligible under the guideline if his total income is also small. Commentary accompanying the current guideline is insufficient to disqualify the petty offender.

One solution to this problem is to incorporate in §4B1.3 a requirement that the defendant's criminal income exceed a particular sum of money. The Dangerous Special Offender statute included such a requirement. Eligibility for that statute was predicated upon a criminal income exceeding the hourly minimum wage multiplied by 2000 in any 12-month period (currently \$6700). While this standard may have been appropriate for an infrequently invoked enhancement provision such as §3575, it is too cumbersome for a guidelines system striving for simplicity. A simple numerical standard should be adopted. The Working Group suggests that a \$10,000 minimum criminal income requirement be incorporated in the Criminal Livelihood guideline.⁹

⁹The use of a \$10,000 threshold is preferable to the figure of \$6700 used in the Dangerous Special Offender law. Adopting a \$10,000 requirement would maintain consistency with the money tables in §2B1.1 and §2F1.1 and thereby avoid the creation of a new disputed sentencing issue. The money tables provide for an

The Working Group recommends that a \$10,000 minimum criminal income requirement be incorporated in the Criminal Livelihood rather than the figure of \$6700 from the Dangerous Special Offender law. Adopting a \$10,000 requirement would maintain consistency with the money tables in §2B1.1 and §2F1.1. Those tables provide for an enhancement when the value of the stolen property exceeds, inter alia, \$5000 and \$10,000. Whether the defendant stole \$9500 or \$10,500 will already be an issue at sentencing. If the Commission were to provide an enhancement under Criminal Livelihood when criminal income exceeded \$6700, it would introduce a new issue of whether the defendant stole \$6000 or \$7000. If consistency with the money tables is desirable, the next question is whether the minimum criminal income should be \$5000 or \$10,000. Five thousand dollars is less than the annual minimum wage; a person who engaged in a pattern of criminal conduct from which he derived \$5000 is not the "professional offender" Congress targeted. Ten thousand dollars, on the other

enhancement when the value of the stolen property exceeds, inter alia, \$5000 and \$10,000. Whether the defendant stole, for example, \$9500 or \$10,500 will already be an issue at sentencing. If the Commission were to provide an enhancement under Criminal Livelihood when criminal income exceeded \$6700, it would introduce a new issue of whether the defendant stole \$6000 or \$7000. This is clearly undesirable. The remaining question is whether the threshold criminal income should be \$5000 or \$10,000. Five thousand dollars is less than the annual minimum wage; a person who engaged in a pattern of criminal conduct from which he derived \$5000 is not the "professional offender" Congress targeted. Ten thousand dollars, on the other hand, is an annual criminal income from which a defendant might support himself. For these reasons, \$10,000 should be the level of criminal income at which Criminal Livelihood eligibility is triggered. Some members of the Working Group believe that \$20,000 would be a more appropriate measure of Criminal Livelihood.

hand, is an annual criminal income from which one might support oneself.

4. Make the Criminal Livelihood offense level consistent with the money table in §2B1.1.

If the Commission amends Criminal Livelihood to incorporate an objective monetary standard of \$10,000, it should lower the Criminal Livelihood 'floor' from offense level 13 to offense level 11 to achieve consistency with the theft guideline. Under §2B1.1, if a defendant steals between \$10,000 and \$20,000, his base offense level is 9. If the offense involved more than minimal planning, as will often be true of offenses committed by the professional criminal, there is a two-level enhancement. Lowering the Criminal Livelihood 'floor' to level 11 is not, of course, necessary. The guideline could mandate an additional two-level enhancement for Criminal Livelihood. It is, however, desirable to lower the offense level for two reasons. First, an enhancement for Criminal Livelihood constitutes double-counting because the money table and the 'more than minimal planning' enhancement are already proxies for the professional offender. See Section IV, supra. Second, if the Criminal Livelihood 'floor' is consistent with the theft table, it would no longer be necessary to calculate Criminal Livelihood in theft cases; the enhancement for the professional thief would occur within the theft guideline. This same analysis applies to the fraud guideline in Part F of Chapter Two.

Criminal Livelihood would still capture the professional offender convicted of a crime other than theft, such as gambling, immigration, and environmental offenses. The offense levels for these crimes are not driven by the amount of money involved, but the professional gambler or the professional illegal alien smuggler would receive an enhancement for engaging in criminal activity as a profession.

5. Standardize or eliminate the use of the defendant's income as a factor in calculating Criminal Livelihood.

The current Criminal Livelihood guideline requires a court to compare the defendant's income with the amount of money involved in the criminal activity. This causes three problems. First, the guideline does not include a standard to guide the court's comparison. While 20 percent may be seen as a "substantial portion" by one court, another court might not consider 40 percent substantial. Second, the use of a defendant's income as a variable in the Criminal Livelihood calculation necessarily violates the statutory prohibition of socioeconomically biased guidelines. 28 U.S.C. § 994(d)(11). Third, the guideline is burdensome because it requires the court to calculate the size and nature of a defendant's income.

The Commission could address this problem in one of two ways. It could incorporate in §4B1.3 a standard by which courts will measure whether the defendant's criminal income is "substantial" in relation to his total income. Alternatively the

guideline could be amended to eliminate any consideration of the defendant's income.

The first alternative is the more narrow of the two proposals; fewer defendants will qualify for Criminal Livelihood if, in addition to the \$10,000 requirement, there is a requirement that at least half of the defendant's total income be derived from crime.¹⁰ This alternative is an improvement over the current guideline because it, in effect, defines the term "substantial portion." The second proposal has the advantages of being socioeconomically neutral and easier to apply because it does not require the court to calculate the size and nature of a defendant's income.

Either of these two proposals would remedy significant problems created by the current guideline. If the Commission declines to repeal §4B1.3, the Working Group recommends consideration of these proposals.

B. Repeal of the Criminal Livelihood Guideline.

The most simple way to address the serious problems created by the Criminal Livelihood guideline is to repeal §4B1.3.

The argument for repeal of the provision is straightforward. Criminal Livelihood is unnecessary. An examination of the

¹⁰The fifty percent standard was derived from the Dangerous Special Offender statute. 18 U.S.C. § 3575.

legislative history of 28 U.S.C. § 994(i)(2) reveals that Congress sought to ensure that the "professional offender" who had received enhanced punishment under the Dangerous Special Offender provision would receive a substantial term of imprisonment under the Guidelines. The Commission has fully discharged this responsibility in other provisions of the Guidelines.

Criminal Livelihood is not only unnecessary; it is objectionable. The guideline is vague and difficult to apply. It is widely perceived as unfair and perhaps unconstitutional. It appears to violate the Commission's statutory mandate to promulgate socioeconomically neutral guidelines. Repeal of §4B1.3 would immediately accomplish four important goals:

1. Increase fairness. §4B1.3 is criticized for its unintended, disproportionate impact upon low-income, petty offenders. Repeal of the provision would address this concern and comply with the statutory mandate to ensure that the Guidelines be socioeconomically neutral.
2. Decrease unwarranted disparity. The overriding goal of the Sentencing Reform Act is the elimination of unwarranted sentencing disparity, yet a provision as vague as Criminal Livelihood inevitably encourages such disparity. Probation officers have told Rusty Burress that individual districts are establishing informal standards for application of

§4B1.3. These standards vary considerably from district to district. A court's decision to apply Criminal Livelihood to a particular defendant will not be guided by objective standards, but by the same unacceptable subjective judgments which the Commission was established to eliminate.

3. Increase simplicity. It is difficult to apply §4B1.3 because its terms are vague and because the court must make findings of fact about the size and nature of a defendant's income. Repeal of this one provision would contribute substantially to the simplification of the Guidelines.

4. Eliminate unnecessary litigation. The Criminal Livelihood provision is sure to be the subject of Equal Protection and void-for-vagueness challenges. If it survives these attacks, there will still be countless sentencing hearings and appeals at which the parties will vigorously contest the size and nature of a defendant's income and whether the defendant's criminal income constitutes a "substantial portion" of the defendant's total income. All of these proceedings will occur in criminal cases which are among the least serious in the federal system, those cases in which the defendant's offense level would otherwise be less than 13. Repeal of §4B1.3 would obviate the need for this litigation.

Large segments of the criminal justice community remain hostile to the Guidelines, and Criminal Livelihood is a prime target of criticism. Repeal of Criminal Livelihood would demonstrate that the Commission is responsive to constructive criticism and is striving to make the Guidelines more fair and more workable. The FPSSIS data suggest that the "cost" of repealing Criminal Livelihood is small. In any event, the benefits are substantial.

At first blush, repeal of §4B1.3 might appear unattractive from a crime control perspective. Some would argue that there are utilitarian reasons (e.g., incapacitation, deterrence) for imposing longer sentences on defendants who are dependent on crime as a means of subsistence.

Repeal of Criminal Livelihood, however, would not constitute an abandonment of these concerns. Professional offenders would still be severely punished, but not because of the size of their income. Repeal is appropriate if the Commission accepts the argument that there are other, more acceptable criteria elsewhere in the Guidelines which identify and effectively sanction the professional offender.

A P P E N D I X 1

Crosstabulation: POSITION

By CH.CRLIV

CH.CRLIV >	Count	no probl	minor pr	serious	Row Total
	Row Pct	ems	blems	problems	
POSITION		1	2	3	
judge	1	11 52.4	7 33.3	3 14.3	21 17.4
po	6	27 27.0	44 44.0	29 29.0	100 82.6
	Column Total	38 31.4	51 42.1	32 26.4	121 100.0

Number of Missing Observations = 3

UNITED STATES SENTENCING COMMISSION
INITIAL TRAINING SURVEY COMMENTS ON

PART B: TRAINING PROBLEMS

5. CRIMINAL HISTORY (Chapter 4):

- Overcoming the Probation Officers "mindset" about "criminal livelihood" versus how Guidelines define "criminal livelihood." (#3)
- 4B1.3 was open to interpretation with the wording, "substantial portion of income," in the Guideline and the commentary portion in general. (#4)
- The group found it difficult to reconcile the apparent difference in applying criminal livelihood to high and low income cases. (#6)
- 4B1.1 - \$1000 stolen by someone earning \$5000/yr. might be a "livelihood" case while someone who steals \$10,000 and earns \$1,000,000 may not. "Substantial portion of income" needs limits, better definition. It's subject to multiple interpretations. (#7)
- "Substantial period of time" and "substantial portion of his income" as referenced in 4B1.3 are problematic. If possible, "substantial should be more precisely defined. (#8)
- There were problems regarding criminal livelihood and the definitions of "substantial period of time" and "substantial portion of his income." (#10)
- Criminal Livelihood - Most participants have problems with this. They feel the poorer people will be penalized most. (#13)
- The phrase "from which he derived a substantial portion of his income" will result in enhanced punishment and no probation for poorer defendants. For example, one small theft might be a substantial portion of the income of a welfare mother. (#14)
- 4B1.1 - Very unclear about application, especially for low-income defendants. (#16)
- Criminal livelihood: definition - substantial portion of income. (#17)
- Criminal livelihood presented major problems in definition and interpretation. (#19)

- Some felt the Guideline for Criminal Livelihood to be too vague. (#20)
- Criminal livelihood is very ambiguous and difficult to judge. (#21)
- 4B1.1 - Need a definition. (#22)
- 4B1.3 needs better working definition at "substantial portion of his income." 4B1.3 footnote should be added to the manual explaining why the Commission raised past offense level to 13 (assuring the defendant is incarcerated). (#29)
- The criminal livelihood provision seems to be punishing unemployed, undereducated defendants more harshly than the white collar criminals for whom it was meant. (#39)
- Again, depending on whether a Judge appeared to be defense oriented or prosecution oriented, there was a large variance of opinion on the issue of criminal livelihood. (#43)
- There were problems regarding criminal livelihood and the definitions of "substantial period of time" and "substantial portion of his income." (#44)
- The definition of "substantial" seems to favor the affluent. (#46)
- Several examples of who could be drawn into definition of criminal livelihood. (#47)
- Livelihood will result in disputes, but Manual covers resolution adequately. (#48)
- (4B1.1)--Very unclear about application, especially for low-income defendants. (#49)
- The language "Substantial Amount" and "Substantial Time" used in the definition of criminal livelihood (4B1.1) need to be more clearly defined otherwise you get too many different interpretations and too much disparity. (#51)
- B.--(4B1.1)--Again the legislative history and the Guideline at 2T1.2 point to the fact that "criminal Livelihood" is based on the RICO statute. Nonetheless, the Guideline linguistically applies to many who are not defined as such. (#56)
- "Substantial portion of income" is much too broad a consideration, unless a long term view. (#60)
- 4B1.1--Problem will be in assessing "substantial" in relation to portion of income and period of time. (#65)

- 4B1.1--Definitions a little vague. What percentage of income is necessary to qualify for criminal livelihood? (#67)
- Criminal livelihood, on the other hand, was less well defined and staff seemed to have trouble in applying it. For instance, what constitutes a substantial portion of the offender's income should it be 50%, 20%, or something else. Additionally, it is often virtually impossible to tell just how much money an offender was earning from his criminal conduct. Again, an expanded commentary in this section with additional examples and more concise definitions would be useful in training staff to properly apply the sentencing enhancement for criminal livelihood. (#68)
- Criminal livelihood maybe discriminatory to poor criminals. Rich criminals who do not derive a substantial livelihood sanction. (#69)
- Criminal livelihood under 4B1.3 is one of the most confusing and it is felt that the Sentencing Commission should determine how many acts and for how long a time would constitute their explanation. We need to know a number rather than the word "substantial" period of time. Give us months, substantial portion of his income, give us a percent & how many criminal acts constitute criminal livelihood--1, 3, 5? (#71)
- Much disagreement over the application of this item. Some feel that indigents who have no other income other than their criminal involvement even over a substantial period of time should not have this item applied. There is also disagreement over what constitutes a substantial period of time. (#72)
- Problems with definition of what constitutes criminal likelihood [sic]. (#73)
- There were complaints the Guidelines are confusing and cumbersome on computation. On other items (4B1.1 and 4B1.3) there were serious concerns about how a defendant defends against these enhancements without implicating Fifth Amendment rights. (#74)
- "Criminal Livelihood" clearly requires further definition. (#75)
- Participants questioned the term "substantial" in relation to criminal livelihood. This will probably have to be fleshed out through appellate decisions interpreting the act. (#76)

- B.--(criminal livelihood)--Again, the word substantial causes interpretation and application problems. The Judges were particularly concerned with this Guideline in general and a lot of negative conversation was generated by both the Judges and the Probation Officers over the wording of criminal livelihood. (#77)
- As to criminal livelihood, the term substantial needs to be defined in more concrete term so consistent application can be made. (#78)
- On livelihood--it appears to be overly harsh for felony cases reduced to misdemeanor and the defendant had a marginal standard of living. (#81)
- What are a "substantial portion of his income" and a "substantial period of time"? This guideline and its commentary are too vague. (#82)
- Criminal livelihood issue concerning definition. What is "a substantial portion of income?? 30%, 40%, 50%." This is a very critical issue and needs further clarification. (#83)
- Discussion on 4B1.1 was very broad. (#84)
- Section 4B1.3, a "substantial portion" of one's income is vague. (#87)
- Financial status of defendant affects application of this adjustment. (#88)
- "Substantial portion of income" is not clear and may pose some problems if someone is given an adjustment under this category. (#92)
- Criminal livelihood has been difficult because of the lack of specificity. How long is a "substantial period of time" and how much is "substantial amount of income"? Criminal livelihood seems to penalize the poor--"substantial amount of income" when you make very little is easier to reach than when you're making over \$40,000-50,000. What is the intent of this enhancement--whom did Congress intend we penalize? (#98)
- Criminal livelihood needs less subjectivity in its definition. How much time and how much money should be stated clearly. (#101)
- This element discriminates against the poor. It has a disparate effect on the poor. A poor defendant will engage in the same conduct as a rich defendant. The rich defendant supports himself with dividends and interest. The poor defendant is supported by his criminal conduct. (#102)

- People seem able to convince selves that criminal livelihood was not meant to apply to many defendants to whom the rule seems plainly to apply. (#104)
- Criminal conduct occurring over a substantial period of time or involving a substantial portion of income is vague terminology. A person illegally receiving food stamps for two or three years would fit both categories and yet a bank executive who embezzles \$20,000 in a period of two months but has a yearly income of \$60,000 would not meet the definition. The example used in Exercise #4 of the Guideline Orientation Manual wherein the student was considered a "career offender" caused considerable disagreement with persons in attendance at the training. (#106)
- "Substantial portion of income"--?--phrases not clear. "Substantial portion of time"--?--to Probation Officers. (#107)
- Under criminal livelihood, there were questions as to what actually constitutes a substantial portion of income. (#109)
- There was some division and uncertainty over what constituted a "substantial portion of a defendant's income. (#112)
- The terms "substantial portion of income over a substantial period of time" is too ambiguous and does not lend to training. (#115)
- Same as discussion in Washington as to intent of the statute. (#117)
- B. (4B1.1)--What constitutes a "substantial period of time"? Are there months involved as a guideline? What about an individual who works regularly but is also involved in illegal activity over a six-month period in which his income doubles. (#118)
- (4B1.1)--discriminates against the poor. (#119)
- More clarification is needed--is this to deal with "RICO" type offenders primarily or exclusively or otherwise? (#122)
- C. (4B1.3)--Several participants found it difficult to understand that all requirements were needed for these points. (#124)

A P P E N D I X 3

Criminal Livelihood Data From Prison Impact Study

	% of All Defendants	% of All Defendants with Offense Level < 13	% of All Defendants with Offense Level > 13
Defendants Eligible for Criminal Livelihood ("majority of income")	.33	.10	.23*
Defendant Eligible for Criminal Livelihood Under Revised Criteria ("majority of income at least \$10,000 Criminal Income)	.11	.03	.08**

*70 percent of eligible defendants under current standard have offense levels equal to or greater than 13 (.23 / .33 = .70).

**73 percent of eligible defendants under revised standard have offense levels equal to or greater than 13 (.08 / .11 = .73).

~~provision, the offense level is raised to 13, if it is not already 13 or greater.~~

Background: 28 U.S.C. § 994(i)(2) directs the Commission to ensure that the guidelines specify "a substantial term of imprisonment" for a defendant who "committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income." For the most part, the offense levels in the guidelines accomplish this result directly. This guideline serves to ensure that the offense level is sufficient to permit a significant term of imprisonment in those cases in which the professional offender is convicted of an offense for which the offense level is less than [13][11].

KEY TO PROPOSED AMENDMENT

- Lined-through material - the Working Group unanimously recommends that this material be eliminated from the guideline.
- Underscored material - the Working Group unanimously recommends that this material be added to the guideline.
- Bracketed material - the Working Group does not make a unanimous recommendation with respect to these options.

§4B1.3. Criminal Livelihood.

If the defendant committed the instant offense as part of a pattern of criminal conduct from which he derived ~~a substantial portion of his income~~ income in excess of \$10,000 in any twelve-month period, [and if said income exceeded fifty percent of the defendant's total income for the same period,] his offense level shall be ~~not less than 13. In no such case will the defendant be eligible for a sentence of probation.~~

- (a) not less than [13][11] if the defendant did not affirmatively accept personal responsibility for his criminal conduct (i.e., if §3E1.1 does not apply); and
- (b) not less than [11][9] if the defendant affirmatively accepted responsibility for his criminal conduct (i.e., if §3E1.1 applies).

Commentary

Application Note:

- "Pattern of criminal conduct" means planned criminal acts occurring over a ~~substantial period of time~~ period of at least one year. Such acts may involve a single course of conduct (e.g., an ongoing fraudulent scheme) or may involve independent offenses (e.g., a number of burglaries or robberies, or both).

Background:--Section 4B1-3 implements 28 U.S.C.--994(i)(2) which directs the Commission to ensure that the guidelines specify a "substantial term of imprisonment" for a defendant who committed that offense as part of a pattern of criminal conduct from which he derived a substantial proportion of his income.--Under this