United States Probation Department
Eastern District of Michigan

Proposed Amendment 31

It is our opinion that the Sentencing Commission should create another criminal history category, category VII. Option number three of this proposed amendment is preferred as it defines two additional criminal history categories and encompasses approximately 98% of the criminal history points of those defendants already sentenced under the guidelines. This would further reduce the need for departure for adequacy of criminal history. Career offenders should be sentenced under criminal history category VII because 28:994(h) requires those career offenders to be sentenced at or near the maximum term authorized.

United States Attorney's Comment on
Proposed Amendment 31. Criminal History Category VII.

The Department of Justice agrees with the endorsement of option number three. A defendant with 18 criminal history points should not be treated the same as a defendant with only 13 points. The third option follows the pattern established for other categories in that there is a three-point spread between criminal history categories. By authorizing upward departures for defendants who exceed 18 criminal history points, the option provides flexibility for judges at the time of sentencing.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 31

We oppose the draft letter's support for the creation of a Category VII. In addition to the analysis set forth below, we want to oppose the draft letter's assumption that career offenders would automatically come under Category VII. The Commission indicated, when hearing testimony, that such was not the case.

Amendment 31 -- Chapter 5, part A (Sentencing Table)

The Commission has proposed three options for establishing a new criminal history category VII for defendants with high criminal history scores. Option one calls for category VII to cover 15 or more criminal history points. Option two calls for Category VII to cover 20 or more criminal history points.. Option three calls for category VII to cover 16-18 criminal history points; for scores of 19 or more, the court could use category VII or depart. The Commission seeks comment about whether there should be a new category and, if so, which option should be adopted. In addition, the Commission seeks comment about how to deal with career offenders if a new category VII is established.

We believe that there is no need to add a new criminal history category.

When sentencing defendants in criminal history category

VI, courts currently depart upward under § 4A1.3 very infrequently. Adequacy of the criminal history category, moreover, seems to be only one of the reasons prompting the departure.[45] Commission data show that, out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 fell within criminal history category VI.[46] The data further indicate that there were 52 departures involving defendants in criminal history category VI, a departure rate of 2.4%.[47] The data, therefore, do not support a conclusion that there is a need for a new criminal history category.[48]

Finally, none of the options will enhance the predictive power of the criminal history score. The criminal history categories are based upon predicting the likelihood of future criminal conduct,[49]

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[45] See J. Meyer, Report on Criminal History Categories "0" and "VII", at 4 (Nov. 20, 1990) ("in most cases, inadequacy of Category VI penalties was cited as only one rationale for the departure")(discussing reported cases).

[46] Id. at 3.

[47] Id. Commission data shows 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000; 52 is 2.4% of 2,141.

[48] Commission staff speculates that "it seems plausible to infer that some courts might have refrained from departing beyond category VI in the past because of the uncertainty of structuring a departure beyond the sentencing table". Id. at 8. No evidence (letters or calls from judges or probation officers, for example) is presented to support such speculation. It is more plausible to conclude from the data that courts are departing whenever they believe departure appropriate. There should be little uncertainty about structuring a departure from category VI; the only constraint upon a court's ability to depart from category VI is that the departure be reasonable.

[49] See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987).

and a Commission staff report concludes that "the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior." There is no evidence that a new category VII will enhance the predictive power of the criminal history score.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 33

This amendment deals with imposition of sentences for defendants serving an unexpired term of imprisonment. Option number two creating a policy statement is preferred as it provides for the most judicial discretion of any of the options. (See 18:3584).

United States Attorney's Comment on
Proposed Amendment 33. Consecutive versus Concurrent Sentencing.

The Department of Justice has not yet taken an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

<u>Proposed Amendment 33</u>

We object to the draft letter's recommendation of option number two. We prefer option number one for the following reasons:

Amendment 33 -- § 5G1.3 (Imposition of a Sentence on a Defendant Servicing an Unexpired Term of Imprisonment)

The Commission proposes to rewrite this guideline completely. Proposed subsection (a) would require consecutive terms if the defendant committed the offense while "serving a term of imprisonment (including work release, furlough, or escape status)", after sentencing for, but before starting service of, such a term of imprisonment, or while "on bail or other release status:. Proposed subsection (b) would require the sentence for a new offense to be imposed "to result in a combined sentence equal to the total punishment that would have been imposed under § 5G1.2 . . . had all the sentences been imposed at the same time:, if (1) subsection (a) is inapplicable and the new offense constitutes part of the same course of conduct as the offense whose term is undischarged, or (2) the prior undischarged term was imposed under the Sentencing Reform Act.

The Commission has set forth three options for subsection (c), which would deal with "any other case". Option one would require concurrent terms, with commentary recommending a departure for

"anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishment for multiple offenses". Option two, labelled a policy statement, would recommend consecutive sentences "to the extent necessary to result in a total combined term of imprisonment [for the new and the old offenses] . . . so that a reasonable incremental punishment is imposed" for the new offense. Option three would require consecutive terms, with commentary recommending a departure for "anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishments, but not more than necessary to comply with the purposes of sentencing for multiple offenses".

We believe that proposed subsections (a) and (b), except for expanding the guideline to require consecutive sentences if the offense was committed while defendant was on bail or other release status, improve the present guideline. That part of proposed subsection (a) should not be promulgated. The Commission has offered no justification for the expansion. In light of § 2J1.7 (commission of offense while on release), it is unclear why this guideline should cover offenses committed while on bail. It is also unclear how the policy of this guideline (consecutive sentences) could be effectuated when federal and state offenses are involved and the federal sentence is imposed first.

With regard to proposed subsection (c), we believe that option one is best. Option one is consistent with the goals of the Sentencing Reform Act and gives the court flexibility in dealing

with cases not adequately covered by the general rule. In the great majority of instances, concurrent sentences will be sufficient to impose additional punishment and therefore are consistent with the statutory directive that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing (18 U.S.C. § 3553(a)). The sentence for the later offense will reflect that the defendant committed that offense while serving a sentence for a previous offense (because of chapter 4's criminal history rules).

If the court believes that a consecutive sentence might not result in incremental punishment (e.g., where the earlier sentence is very long), the court has 2 ways to adjust the sentence for the later offense in order to result in greater punishment -- (1) depart under § 4A1.3 (adequacy of criminal history category), or (2) depart by making part or all of the sentence for the later offense consecutive to the sentence for the earlier offense. The risk with consecutive sentences is excessively long sentences. The court's ability to adjust for an excessively long sentence is limited to departing to make the sentences concurrent.

We believe that option two would be the next best approach. The principal criticisms of option two are that it requires additional work by the sentencing court and that its policy cannot be effectuated because state sentencing laws vary in the determinacy of sentences. While option two may require additional calculations by the sentencing court, the additional work is not significant other than in a few cases. Option two addresses the

concern about fashioning a sentencing order that accounts for the variety of determinacy among the sentencing laws of the states -- the order can direct that the federal term begin on the earlier of a date certain or release from state custody.

We believe that it would be unwise for the Commission to adopt option three because option three would result in sentences that in most instances will be excessive. Option three, therefore, is inconsistent with the mandate of 28 U.S.C. § 994(l)(1) that the guidelines "reflect the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of multiple offenses committed in the same course of conduct . . . and multiple offenses committed at different times", as well as with the statutory directive of 18 U.S.C. § 3553(a) that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 37B

Guideline 1B1.2(a) should be amended to read that stipulations should be made a part of a formal written plea agreement. Such a practice would greatly assist the Court in determining the applicable guideline range.

United States Attorney's Comment on
Proposed Amendment 37(B). Stipulations.

The Department of Justice has not yet taken an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 37B

It is our understanding that the Sentencing Commission has removed this proposal from consideration this year.

FEDERAL PROBATION OFFICERS ASSOCIATION

March 19, 1990

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

RE: Public Hearing on Proposed Amendments to the Sentencing Guidelines: March 15, 1990

Dear Judge Wilkins:

This will serve as written recordation of my testimony on behalf of the Federal Probation Officers Association on March 15, 1990 regarding the proposed amendments and additions to the Sentencing Guidelines, Policy Statements and Commentary.

The primary concern of the FPOA relates to guidelines for revocation of probation and supervised release, Chapter Seven, "VIOLATIONS OF PROBATION AND SUPERVISED RELEASE." The Commission has set forth two options for the proposed revision of Chapter Seven.

First of all, the FPOA believes that a much more expansive Chapter Seven than currently exists is required, given the intent of Congress in the Comprehensive Crime Control Act of 1984.

Secondly, although there is much good language in Option Two, the FPOA supports Option One of the proposed Chapter Seven amendments, primarily based on structure. We believe that Option One is more clear and unambigious than Option Two. More importantly, Option One expresses a philosophy which will enhance respect for the supervision process. By that we mean supervision of federal offenders in the community, either instead of incarceration, or after incarceration. Option One's clear separation of new criminal conduct which may form the basis of a violation from the separate and distinct failure to abide by the conditions of supervision, establishes a more rational basis for accountability than Option Two as well as mirroring the reality of the situation as perceived by the community and probation officers in general. In other words, the "bargain basement" or "two for one" approach to violative behavior will no longer be acceptable and the criminal will pay a price for his or her new infraction as well as a separate penalty for the earlier conviction which resulted in a suspension of part or all of the possible prison term available at that time.

We believe that the violator who is on federal supervision when the new criminal violation takes place commits two breaches. First, there is the new violation of the law. Secondly, there is a violation of the terms and conditions of supervision whether that be probation or supervised release or whatever it may be called. We view the terms and conditions of probation or supervised release, etc., as a contract between the Court and the defendant. Violation of the terms and conditions of supervision requires an informed sanction. Proposed Option One calls for two separate considerations of sanctions for the two legally separate actions that we have just mentioned. Option Two does not, in our judgment, do so or, at least, with clarity.

In this respect, and in general, Option One is subject to less interpretation than Option Two. As a result, it is the opinion of the FPOA that more consistent application of violation sanctions will result from Option One than from Option Two.

Option One also provides appropriate latitude to the Court in cases involving so-called technical violations or violations involving new criminal conduct which is deemed petty or relatively minor.

We do suggest that in proposed Guideline 7A1.4(c)(1)(A) of Option One that for consistency as well as a better opportunity for the Court to order an appropriate sanction, the range be from one to twelve months instead of one to seven months as in the Commission's proposal. This would provide for an unbroken continuum of sanctions addressing increasingly more egregious violations. The least of the sanctions available in Option One equals zero time in custody. This is followed by a sanction range of from one to seven months which we are recommending see twelve months at the top of the range. The next most serious violation behavior has a range of twelve to eighteen months, with eighteen to twenty-four months being at the top of this particular ladder.

Regarding Guideline 7A1.4(d)(1) of proposed Option One, we are not clear as to the Commission's intent. For instance, in conjunction with Guideline 7A1.5(a) of Option One, it could be seen as providing that a given defendant be on supervision for life, on the installment plan. If so, we think that to be ill advised and, perhaps, punitive of the probation officer rather than the defendant. At any rate, we think that the Commission should clarify its intent here.

Guideline 7A1.5(b) in proposed Option One makes very clear and enhances the underlying philosophy of Option One that a sentence based upon revocation is a sanction for failure to honor the conditions of supervision and quite separate from any sanction which may be imposed for new criminal conduct. The FPOA endorses this.

Briefly, Option Two would require much more interpretation and calculation than Option One. We see this as unnecessarily complicating the violation procedure as well as prolonging the process without ensuring any greater fairness than Option One.

In summary, although Option Two has some language to recommend it, Option One is the preferred starting point in this area of our concern and, after sufficient experience with application of Option One, any deficiencies can be resolved in the amendment process which is available to the Commission.

The FPOA has also looked at other areas of the proposed amendments, including the areas of fines, obstruction of justice and role in the offense. Although the FPOA does not have complete position statements as to each of these areas, we do offer some preliminary commentary.

As to the fines section, the proposed amendments to Guideline 5E1.2 appears to clarify fine computation and, therefore, wards against errors in this area. In that respect it is a good amendment. The FPOA also likes the attention given to restitution and the "escape hatch" relating to the possible complication and prolongation of the sentencing process as is set forth in Paragraph 65 which is found on Page 66 of the Commission's proposed amendments.

A major concern in the area of proposed amendments to Chapter Five, Part E (Restitution, Fines, Assessments, Forfeitures) is in the area of comprehension and ease of calculation on the part of the practitioner. In other words, if these amendments result in a better understanding of this section of the Guidelines and make the probation officer's calculation easier, they are to be wholeheartedly supported. We are continuing to examine this aspect.

Regarding the Commission's proposed amendment to Section 3C1.1, Chapter Three, Part C (Obstruction) of the Guidelines, the FPOA believes that the proposed amendment more accurately describes this section and is therefore good. We are curious about one

matter, however. The word "wilfully" is taken out of the title of the Guideline in the proposed amendment but left in the Guideline itself. We wonder why this was done and whether or not this will lead to confusion. We are also concerned that there might be some message in this. Having heard the staff response to Your Honor's question during the hearing that, basically, the word "wilfully' was left out of the title for economy purposes, is reassuring. On the other hand, it is perhaps better to deal away economy in a matter such as this to be absolutely sure that clarity reigns supreme.

The FPOA chooses not to make any comment at this juncture regarding "Role in the Offense." With this, as with the proposed amendments relating to fines and "obstruction," the FPOA hopes to have completed positions in the hands of the Commission before the end of the commentary period.

As to the ASSYST computer program, it is the strong feeling of the FPOA that the field needs an updated software program and that the Commission must strive very hard to keep ASSYST current. Certainly, the technology is available for rapid modification of the program and even expansion of the program. To indicate how strongly we feel about this, if the Commission is short on resources to do this, the FPOA would consider supporting the Commission in obtaining the necessary resources. ASSYST is a valuable tool and makes the probation officer's work both easier and more accurate. The obvious result is that all parties - defendant, prosecutor and judge - are better served. When ASSYST lags behind the development of the Guidelines, one very negative fallout is that probation officers get out of the habit of using the program. It is not always that easy to get them back to the program. In short, we cannot overstate the necessity for a continuously updated and expanded ASSYST program and we will help the Commission in any way available to us to accomplish that.

The FPOA wishes to alert the Commission to something that has emerged as a discussion item, viz., it appears that some enhancements in Chapter Two of the Guidelines such as "Prior Similar Conduct" <u>may</u> more properly be addressed in Chapter Four, which deals with prior record considerations. For example, Guideline 2L1.1, "Smuggling an Unlawful Alien," has as a specific offense characteristic a two-level increase if the defendant had previously been convicted of smuggling an unlawful alien. Again, while we have no concrete position on

this we have begun discussing whether or not an obvious prior record consideration should not more properly be in Chapter Four instead of Chapter Two to preserve logic and the intregity of the Guidelines.

The Federal Probation Officers Association has been working with the Commission since before the first set of Guidelines was promulgated and have relished every minute of it. We are very grateful for the continuing opportunity to provide our input. This is the fourth consecutive year that the Commission has allowed me on behalf of the FPOA to testify on proposed amendments and we believe that it is very important for the Commission to hear the perspectives of the primary field practitioners, probation officers. We applaud the Commission for always having had an open door policy for us.

Respectfully submitted,

Tommaso D. Rendino

Tommaso D. Rendino
President

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March 21, 1990

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

Attention: Communications Director

Re: Proposed Amendment to the Guidelines #27

Dear Communications Director:

I write regarding proposed Amendment #27 which is an amendment to Section 2J1.6. Since I was the defense lawyer in United States v. Sharon Lee, 887 F.2d 888 (8th Cir. 1989), to which this proposed amendment is an obvious response, I hope my comments will be given some attention.

The proposal given here for a method of dealing with failures to report for service of sentence will result in a longer sentence, for example, for failure to report to serve a three month sentence than for a person who fails to appear for trial or sentencing facing 5 to 14 years in prison. This can be readily seen by examining 2P1.1, base offense 13, and the current 2J1.6(b)(2)--6+6=12.

The proposed amendment has the merit of simplicity, but to me appears to be a hasty response to the decision of the Eighth Circuit. I suggest the following is more consistent with the apparent underlying concept behind Section 2J1.6.

Section 2J1.6 commendably tries to follow the congressional intent of increased punishment for failure to appear relating to the severity of the offense. It would be simple, consistent, and appropriate to add a specific offense characteristic (c) which would state that if the failure to appear was for service of sentence for a person given voluntary surrender or a stayed surrender date, that the specific offense characteristic in (b) applicable to the sentence actually imposed is the one used.

Such a method would appear to me, under most examples, to impose harsh but appropriate punishment to the range of offenses under this category.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/sa

Children's Legal Foundation

"protecting the innocence of children"

March 22, 1990

Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

I am writing in reference to the proposed amendments to the federal sentencing guidelines, in particular, Amendments 22, 23, and 24 concerning child pornography and adult obscenity offenses.

Children's Legal Foundation, Inc. (CLF), formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. CLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area. CLF has more than 120 affiliated chapters across the nation representing approximately 100,000 supporters.

CLF supports any increases in penalties for violations of the obscenity and child pornography statutes. Department of Justice statistics describe the pornography industry as a $9 billion annual revenue enterprise controlled by organized crime -- indeed, their third most profitable enterprise behind only gambling and narcotics. Because of that, the Foundation strongly endorses any increases in these penalties, which might give federal prosecutors incentive to vigorously enforce the statutory provisions and which might deter the pornographer by increasing his risk of doing business.

CLF believes that overall the obscenity base offense level of "6" is too low to adequately confront this organized crime problem. I am attaching copies of two letters previously sent to the Commission addressing our concerns and advocating increased penalties. CLF respectfully requests that the arguments and recommendations contained therein be considered again.

Children's Legal Foundation, Inc. • 2845 E. Camelback Rd., Suite 740 • Phoenix, Arizona 85016 • 602 / 381-1322
Founded 1957

CLF approves of the change to include in the sentencing consideration a defendant's prior history of sexually abusing minors, found in Amendment 23. The Attorney General's Commission on Pornography pointed out: "The great bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children." [Final Report, p.68, Rutledge Hill Press]. Much of child pornography involves photographs taken by child abusers themselves, and which is then either kept or traded with other child abusers. An excellent summary of the unique subculture of child pornography and child abusers is found in Chapter 7 of the Final Report of the Attorney General's Commission on Pornography, a copy of which is attached.

Statistically, a defendant convicted of distributing or possessing child pornography is highly likely to be a child abuser, and also a pedophile. "Child pornography plays a central role in child molestations by pedophiles, serving to justify their conduct, assist them in seducing their victims, and provide a means to blackmail the children they have molested in order to prevent exposure." [Report of the U.S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia, 1986].

Dr. Eugene Abel, Professor of Psychiatry at the Emory University Medical Center, clinically studied 240 child molesters (pedophiles). They averaged 30 (homosexual or same-sex) to 60 (heterosexual) victims before being caught. The average number of children molested by these pedophiles was 380 in a lifetime. [Abel, 1986].

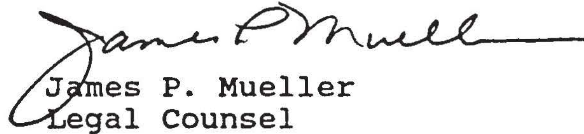
The fact that a person convicted of possessing or distributing child pornography has a previous history of sexually abusing minors is very relevant to the sentencing of that individual. Especially in light of the fact that pedophilia is considered untreatable and thus the primary goal of sentencing should be removal of the pedophile offender so that he or she does not present a threat to society -- hopefully for a long time.

The proposals found in Amendment 22 (increases based on age of victims, based on whether the perpetrator is in supervisory control of the child, or based on the number of victims exploited) are well-reasoned and certainly justified. Also, the provisions found in Amendments 23 and 24 which, in effect, require courts to impose the more severe sentencing guidelines of the original offense in cases of "plea bargaining" are an excellent method of keeping the pornographer from avoiding the

penalty for his intended criminal act. This proposal is much needed and CLF strongly recommends its adoption.

CLF supports the recommended increases in sentencing for obscenity and child pornography violations, found in Amendments 22, 23 and 24, and urges further increases.

Sincerely,



James P. Mueller
Legal Counsel

JPM/lak

Enclosures

CHAPTER • 7

Child Pornography

THE SPECIAL HORROR OF CHILD PORNOGRAPHY

What is commonly referred to as "child pornography" is not so much a form of pornography as it is a form of sexual exploitation of children. The distinguishing characteristic of child pornography, as generally understood, is that actual children are photographed while engaged in some form of sexual activity, either with adults or with other children. To understand the very idea of child pornography requires understanding the way in which real children, whether actually identified or not, are photographed, and understanding the way in which the use of real children in photographs creates a special harm largely independent of the kinds of concerns often expressed with respect to sexually explicit materials involving only adults.

Thus, the necessary focus of an inquiry into child pornography must be on the process by which children, from as young as one week up to the age of majority,[70] are induced to engage in sexual activity of one sort or another, end the process by which children are photographed while engaging in that activity. The inevitably permanent record of that sexual activity created by a photograph is rather plainly a harm to the children photographed. But even if the photograph were never again seen, the very activity involved in creating the photograph is itself an act of sexual exploitation of children, and thus the issues related to the sexual abuse of children end those related to child pornography are inextricably linked. Child pornography necessarily includes the sexual abuse of a real child, and there can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography is child abuse.

CHILD PORNOGRAPHY AS A COTTAGE INDUSTRY

In addition to understanding the way in which child pornography is defined by its use of real children engaged in real sexual activity, it is important to understand the way in which the "industry" of child pornography is largely distinct from any aspect of the industry of producing and making available sexually explicit materials involving only adults.

A significant aspect of the trade in child pornography, and the way in which it is unique, is that a great deal of this trade involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers. As we discuss in more detail later, some of these child abusers are situational, abusing children on occasion but not restricting their sexual preferences to children. Others are preferential, not only preferring children as a means for achieving sexual satisfaction, but seeking out children in order to satisfy this desire. We have heard substantial evidence

70. A significant amount of sexually explicit material includes children over the applicable age of majority who look somewhat younger Because people who are actually minors are not used in this type of publication, it would not qualify as child pornography, although it might still be legally obscene In general, this variety of material does not cater to the pedophile, but instead to those who prefer material with young-looking models.

that both situational and preferential child molesters frequently take photographs of children in some sexual context. Usually with non-professional equipment, but sometimes in a much more sophisticated manner, child abusers will frequently take photographs of children in sexual poses or engaged in sexual activity, without having any desire to make *commercial* use of these photographs. At times the child abuser will merely keep the photograph as a memento, or as a way of recreating for himself the past experience. Frequently, however, the photograph will be given to another child abuser, and there is substantial evidence that a great deal of "trading" of pictures takes place in this manner.[71] The desire to have collections of a large number of photographs of children seems to be a common, although not universal, characteristic of many pedophiles. Some of this exchange of photographs takes place in person, a great deal takes place through the mails, and recently a significant amount of the exchange has taken place by the use of computer networks through which users of child pornography let each other know about materials they desire or have available.

In addition to the primarily non-commercial trade in child pornography, there appears to be a commercial network for child pornography, consisting to a significant extent of foreign magazines that receive the very kinds of pictures described in the previous paragraph, and then sell in magazine form collections of these non-commercially produced photographs. These magazines will frequently contain advertisements for private exchange of pictures in addition to publishing pictures themselves.[72] Although the publication of the magazines, almost exclusively abroad, is itself a commercial enterprise, it does not appear as if most of the contributors contribute for the purpose of commercial gain. And although the publication of these magazines is largely foreign, there is substantial evidence that the predominant portion of the recipients of end contributors to these magazines are American.

Prior to the late 1970s, when awareness and concern about child pornography escalated dramatically, commercially produced and distributed child pornography was more prevalent than it is now. It was in the late 1970s that this awareness and concern started to be reflected in major law enforcement initiatives, state and federal, against child pornography. When the Supreme Court in 1982 approved of child pornography laws whose coverage was not restricted to the legally obscene, these enforcement efforts accelerated, and the sum total of these enforcement efforts has been to curtail substantially the domestic commercial production of child pornography. This is not to say that it does not exist. There is a domestic commercial child pornography industry, but it is quite clandestine, and not nearly as large as the non-commercial use of and trade in non-commercially produced sexually explicit pictures of children.

Although there now appears to be comparatively little domestic commercial production of child pornography, there remains a significant foreign commercial industry, and much of this material is available in the United States. Some of this material is in magazine form, some are photographic motion picture films, but increasingly, as with much of the adult material, video tapes are dominating the market. None of this material is available openly, however. We received some testimony that commercially produced child pornography was available "under the counter" in some establishments selling adult sexually explicit material. A number of experienced police officers testified to having no actual knowledge that material is available in this way, but others indicated that they had either heard of its availability or had themselves seen its availability in rare circumstances. We have also heard evidence about more surreptitious networks for the distribution of this material, and we have heard some evidence about the way that this material is sold through the mails. We have little doubt that there is some distribution in the United States of commercially produced material, although the extremely clandestine nature of the distribution networks makes it difficult to assess the size of this trade.

Although we note, therefore, that there is some commercially produced material, efforts to deal with the problem of child por-

71. There is also evidence that commercially produced pictures of children in erotic settings, or in non-erotic settings that are perceived by some adults as erotic, are collected and used by pedophiles There is little that can be done about the extent to which, for example, advertisements for underwear might be used for vastly different purposes than those intended by the photographer or publisher, but we feel it nevertheless important to identify the practice.

72. Some of this private exchange is quite informal, but there is evidence that more formal and elaborate underground networks for the exchange of these pictures exist

nography will fail if they overestimate the extent of the commercial side of the practice, and underestimate the non-commercial side. The greatest bulk of child pornography is produced by child abusers themselves in largely "cottage industry" fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children. That does not make the problem of child pornography unimportant. On the contrary, to the extent that it is an aid to and a part of a problem that is unfortunately prevalent and plainly outrageous, child pornography, in both its creation and its distribution, is of unquestioned seriousness. But it is different, in virtually every aspect of its definition, creation, distribution, and use. Serious consideration of the issue of child pornography must begin with this fact.

CHILD PORNOGRAPHY, THE LAW, AND THE FIRST AMENDMENT

Because the problem of child pornography is so inherently different from the problems relating to the distribution of legally obscene material, it should be no surprise to discover that tools designed to deal with the latter are largely ineffective in dealing with the former. The problems to which child pornography regulation is addressed are numerous, but four stand out most prominently.

The first problem is that of the permanent record of the sexual practices in which children may be induced to engage. To the extent that pictures exist of this inherently nonconsensual act, those pictures follow the child up to and through adulthood, and the consequent embarrassment and humiliation are harms caused by the pictures themselves, independent of the harms attendant to the circumstances in which the photographs were originally made.[73]

Second, there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children. Children are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it.[74] As with the problem of the permanent record, we see here a danger that is the direct consequence of the photographs themselves, a danger that is distinct from the harms related to the original making of the picture.

Third, photographs of children engaged in sexual practices with adults often constitute an important form of evidence against those adults in prosecutions for child molestation. Given the inherent difficulties of using children as witnesses, making it possible for the photographs to be evidence of the offense, or making the photographs the offense itself, provides an additional weapon in the arsenal against sexual abuse of children.

Finally, an argument related to the last is the unquestioned special harm to the children involved in both the commercial and the noncommercial distribution of child pornography. Although harms to performers involved would not otherwise be taken to be a sufficient condition for restriction of the photographs rather than the underlying conduct, the situation with children is of a different order of magnitude. The harm is virtually unanimously considered to be extraordinarily serious, and the possibility of consent is something that the law has long considered, and properly so, to be an impossibility. As a result, forms of deterrence of the underlying conduct that might not otherwise be considered advisable may be considered so with respect to photographs of children. If the sale or distribution of such pictures is stringently sanctioned, and if those sanctions are equally stringently enforced, the market may decrease, and this may in turn decrease the incentive to produce those pictures.

As part of the previous justification, it

73. We refer in this regard to our specific recommendation regarding possession of child pornography. We do not believe that a photograph of a child engaged in sexual activity should be part of someone else's "collection," even if that collection remains in the home.

74. We note that there seems to be significant use of adult sexually explicit material for the same purpose. Child molesters will frequently show sexually explicit pictures of adults to children for the purpose of convincing a child that certain practices are perfectly acceptable because adults engage in them with some frequency. We are greatly disturbed by this practice, although we do not take the phenomenon as sufficient to justify restrictions we would not otherwise endorse. Many of the materials used for this purpose are not even close to being legally obscene, and, in the words of Justice Felix Frankfurter, we do not want to "burn the house to roast the pig." *Butler v. Michigan*, 353 U.S., pp. 380, 383, (1957). Nevertheless, we have no doubt that the practice exists, and we have no doubt that it is dangerous insofar as it helps break down the resistance of children to sexual advances by adults. At the very least, we strongly urge that children be warned about the practice in the course of whatever warnings about sexual advances by adults are being employed.

ought to be obvious that virtually all child pornography is produced surreptitiously, and thus, even with vigorous enforcement efforts, enforcement will be difficult. Enforcement efforts against the more accessible product of the process rather than or in addition to the less accessible process itself may enable the realities of enforcement to track the magnitude of the problem.[75]

For all of these, as well as other, reasons, a number of states, including New York, enacted around 1980 laws directed at "child pornography" itself. These laws defined child pornography not in terms of the legally obscene, but rather in terms of *any* portrayal of sexual conduct by a child, or in terms that were somewhat similar to this. Under these statutes, the sale or distribution of any photographic depiction of a real child engaged in sexual activity was made unlawful, regardless of whether the photograph, or magazine, or film was or could be determined to be legally obscene pursuant to *Miller v. California*.[76]

Because these new child pornography statutes encompassed material not legally obscene pursuant to *Miller*, and therefore encompassed material presumptively protected by the First Amendment, a constitutional challenge ensued. But in *New York v. Ferber*,[77] the Supreme Court unanimously rejected the constitutional challenges for reasons substantially similar to those discussed just above. The Court noted the undeniably "compelling" and "surpassing" interests involved in protecting children against this variety of exploitation, and also rested its conclusion on the fact that "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." Given this minuscule amount of First Amendment protection, therefore, the Court determined that "when a definable class of material, such as that covered (by the New York statute), bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."

As a result of *Ferber*, virtually every state, as well as the United States, now prohibits by its criminal law the production, promotion, sale, exhibition, or distribution of photographs of children engaged in any sexual activity regardless of whether the material is legally obscene under the *Miller* standards. After *Ferber* these laws are clearly constitutionally sound, and none of us has any quarrel with the constitutionality of these statutes.

ENFORCEMENT OF THE CHILD PORNOGRAPHY LAWS

In Chapter 6 we discussed the enforcement of state and federal obscenity laws, and described what we see as a rather consistent pattern of underenforcement of these laws. We do not reach the same conclusion with respect to the child pornography laws. It is plain to us that every unenforced violation of the child pornography laws is an underenforcement that ought to be remedied. We believe that many cases remain uninvestigated, and we believe that state and federal prosecution of child pornography, commercial and noncommercial, needs to be even more vigorous. Nevertheless, it remains the case that the child pornography laws seem now to be the subject of a substantial amount enforcement efforts on both the state and local levels. The federal statistics are illustrative. From January 1, 1978, to February 27, 1986, one hundred individuals were indicted in the federal system for violation of the federal obscenity laws, and of those indicted seventy-one were convicted.[78] During that same time period, 255 individuals were indicted in the federal system for violation of federal child pornography laws, and of those 215 were convicted. Although these statistics themselves are highly suggestive of a substantial disparity, we be-

75. As much as we urge the most vigorous enforcement of child pornography laws with respect both to commercial and noncommerical production, possession, and distribution, we recognize that the problem of child abuse is larger than the problem of child pornography. We urge vigorous enforcement of child pornography laws as an important way of fighting child abuse, but if it is treated as the only weapon, or the major weapon, a great deal that needs doing will remain undone.

76. 413 U.S., (1973), p. 15. *Miller* is discussed extensively above in Chapter 3.

77. 458 U.S., (1982), p. 747.

78. See, *supra* note 52.

lieve that, if anything, the statistics understate the disparity. For one thing it is highly likely that in absolute terms there are more violations of the federal obscenity laws than there are violations of the child pornography laws. In addition, it was not until final adoption of the Child Protection Act of 1984 on May 21, 1984, that federal law, following Ferber, finally eliminated the requirement of "obscenity," and of the 255 indictments in fact 183 were secured in the period from May 21, 1984, through February 27, 1986.

This comparatively aggressive approach to enforcement of the federal child pornography laws has been matched by equally vigorous efforts in the vast majority of states. Although we urge even more aggressive enforcement of the child pornography laws at both state and federal levels, we see less systematic under-investigation, under-prosecution, and under-sentencing than seems to exist with respect to enforcement of the obscenity laws.[79] Child pornography seems to be a matter that judges, prosecutors, and law enforcement personnel have, with few exceptions, taken seriously. We are glad that they do, and we urge them to take it even more seriously.

In terms of taking these matters even more seriously, we note again the inseparable relationship between child pornography and child abuse. To take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa. It is apparent that as of the date of this Report the sexual abuse of children is being taken increasingly seriously in this country, and we applaud that increased concern for a problem that has long been both largely unspoken and largely avoided. That situation is changing rapidly, and the increased attention to child pornography is part of the increased attention being given to all forms of sexual abuse of children, whether photographs are part of the act or not. We do not hesitate to support further efforts, in public education, in the education of children, and in law enforcement, to continue to attempt to diminish the sexual abuse of children, regardless of the form it takes.

None of us doubt that child pornography is extraordinarily harmful both to the children involved and to society, that dealing with child pornography in all of its forms ought to be treated as a governmental priority of the greatest urgency, and that an aggressive law enforcement effort is an essential part of this urgent governmental priority. Our unanimity of vigor about child pornography does not surprise us, and we expect that it will not surprise others. We hope that society will respond accordingly.

79 There are, however, impediments to investigation and prosecution that are specially related to any prosecution involving sexual abuse of children. One is the difficulty we address in our specific recommendations. Another is the fact that on occasion parents have themselves been involved in the illegal activity. And there seems still to be some reluctance to impose stiff sentences upon people who look and act otherwise "normal." To that extent a significant problem in dealing with sexual abusers of children is the mistaken and dangerous assumption that all or most of those people are self-evidently "weird."

CDL

April 6, 1989

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

Dear Sir:

I serve as General Counsel of Citizens for Decency through Law, Inc., a national, non-profit legal organization devoted to assisting police and prosecutors to enforce constitutional laws prohibiting obscenity and regulating pornography. Since 1957, CDL has been involved in all aspects of the fight against pornography, but especially in providing expert legal assistance to allow communities, cities, states and the federal government to take effective action against illegal activity involving pornography.

Because the proposed sentencing guidelines for pornography offenses are so lenient they will be ineffective in dealing with this organized-crime controlled industry, we oppose the proposed amendments.

Citizens for Decency through Law, Inc., assisted Congress in drafting the federal pornography statutes affected by these guidelines. Indeed, on several occasions CDL provided expert testimony in Congress. Memoranda of law authored by CDL's legal staff were entered into the Congressional Record as bedrock support for these laws on three separate occasions. CDL has submitted amicus curiae briefs in every case before the Supreme Court involving obscenity or pornography for the last three decades. In addition, CDL currently represents a 4-year-old victim of dial-a-porn in a $10-million lawsuit against the pornographic message provider and Pacific Bell. The child was molested by a 12-year-old boy after he listened to two-and-a-half hours of explicit sex messages. CDL has hundreds of affiliated citizen organizations around the United States with thousands of members, and hundreds of thousands of contributers. These supporters were instrumental in motivating Congress to pass the above legislation.

The proposed sentencing guideline amendments, No. 126 (distributing obscene matter), No. 127 (obscene telephone

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Founded 1957

communications) and No. 128 (broadcast obscenity), would be completely ineffective in deterring and punishing violators of these statutes. By taking the teeth out of these criminal laws, the amendments would in one fell swoop negate the years of work that went into this legislation -- by the Attorney General's Commission on Pornography, by citizen and community leaders, and by many members of the Senate and House of Representatives. Most importantly, the amendments would frustrate the will of Congress, which overwhelmingly passed the Child Protection Act in response to demonstrated and serious national problems.

IMPORTING, MAILING OR TRANSPORTING OBSCENE MATTER

The base offense level of 6 for "Importing, Mailing, or Transporting Obscene Matter," is ridiculously low for what always has been considered a very serious offense. These laws have traditionally been aimed at preventing huge interstate shipments of obscene material. And it is the consensus of law enforcement officials nationwide that there is no major interstate distributor of hard-core pornography who is not affiliated with or directly controlled by organized crime. (See generally Attorney General's Commission on Pornography Final Report, Vol. II at 1037-1238). Organized crime is not likely to be deterred from engaging in an $8 billion annual industry by a sentence of six months probation. Most states have higher penalties for transporting obscene material into the state than for selling it within, and virtually all of those states punish the crime more severely than under these proposed guidelines.

Additionally, making the penalty dependent on the volume of obscene materials transported along with whether transported for "pecuniary gain," forces the government to prove for purposes of sentencing two elements not relevant to whether the statute has been violated. This is inadvisable, for in a very real way this has the effect of amending the statute. So too with the proposed increased penalties if the material depicts sado-masochism or violence. Sado-masochism is not an element of the test for obscenity. The Congress has not determined that sado-masochistic obscenity is more heinous than other forms of obscenity; neither should this commission. All obscenity is heinous, and should be treated more seriously than by these proposed guidelines.

OBSCENE TELEPHONE COMMUNICATIONS FOR A COMMERCIAL PURPOSE

Interestingly, where the transportation of obscene material penalties are increased if for "pecuniary gain," the

penalty for telephone obscenity remains Level 6 even though the entire telephone pornography industry is engaged in the business for pecuniary gain. If pecuniary gain is important in transporting obscene materials so that the penalty can become much higher than Level 6, why is the penalty for obscene telephone communications not higher?

Again, the problem is that this commission apparently does not believe obscene telephone messages to be a serious problem, despite the clear concern expressed by Congress for the victims of telephone pornography, most frequently children. The increase by a mere two levels for dissemination to a minor is outrageous considering the documented harms associated with this activity, including those suffered by our client in the above-mentioned case. The exemption if the defendant took "reasonable action" to prevent access by minors or relied on such action by the phone company is equally outrageous, and almost certainly broad enough that no one will be sentenced according to this provision. And again, there is an unnecessary and unwarranted increase in levels if the material is sado-masochistic. Why is a description of orgasms achieved by sex with animals, or through defecation and urination, treated less severely than descriptions of someone being spanked in conjunction with sexual activity?

The telephone pornography business is a multi-million dollar industry that will not be affected in the least by laws which carry such impotent penalties.

BROADCASTING OBSCENE MATERIAL

In the broadcast medium, along with telephone pornography, we have the greatest possibility that children will be in the initial audience -- much more so than with material sold in sexually oriented businesses. Those who are responsible for disseminating harmful, illegal and obscene sex scenes in such a reckless manner must be dealt with harshly, certainly more harshly than under these proposed amendments. Also, the broadcasting industry is obviously engaged in business for pecuniary gain, yet in this area again, that does not seem to affect the commission's thinking -- the punishment remains at Level 6. And as discussed previously, CDL does not support separate categories of penalties based on the type of illegal obscenity being disseminated.

CONCLUSION

CDL urges this commission to reconsider its proposed guidelines in the above-discussed areas, and increase considerably the penalties for violations of these important federal laws. Passing these proposed amendments as currently written will have two primary effects:

(1) federal prosecutors will not seek to enforce these laws, knowing that the penalties are so weak as to not have any effect on the illegal activities; and

(2) no distributor of obscenity, no company that sells telephone sex messages, and no broadcaster of pornography will alter their behavior in an attempt to comply with the law, but will view any potential penalties as minor and incidental costs of doing business.

The law will be unenforced by prosecutors and ignored by the industry. Hence, the victimization of women and children by pornographers will continue unabated. The Child Protection Act might as well never have been passed.

Respectfully submitted,

Benjamin W. Bull
General Counsel

Children's Legal Foundation

"protecting the innocence of children"

June 30, 1989

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

Dear Sir:

I serve as Executive Director of Children's Legal Foundation, (formerly Citizens for Decency through Law, Inc.), a national, non-profit legal organization devoted to assisting police and prosecutors to enforce constitutional laws prohibiting obscenity, child pornography and sexual exploitation. Since 1957, CLF has been involved in all aspects of the fight against pornography, but especially in providing expert legal assistance to allow communities, cities, states and the federal government to take effective action against illegal activity involving pornography.

I formerly served as Executive Director of the Attorney General's Commission on Pornography and Chief of the Criminal Section of the U.S. Attorney's Office in Louisville, Kentucky.

Children's Legal Foundation assisted Congress in drafting the federal pornography statutes affected by these guidelines. Indeed, on several occasions CLF provided expert testimony in Congress. Memoranda of law authored by CLF's legal staff were entered into the Congressional Record as bedrock support for these laws on three separate occasions. CLF has submitted amicus curiae briefs in every case before the Supreme Court involving obscenity or pornography for the last three decades. In addition, CLF currently represents a 4-year-old victim of dial-a-porn in a $10 million lawsuit against the pornographic message provider and Pacific Bell. The child was molested by a 12-year-old boy after he listened to two-and-a-half hours of explicit sex messages. CLF has hundreds of affiliated citizen organizations around the United States with thousands of members, and hundreds of thousands of contributors. These supporters were instrumental in motivating Congress to pass the above legislation.

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This letter is in response to your June 2, 1989 request for comment on the proposed temporary emergency amendments to the Sentencing Guidelines regarding distribution of obscene materials. I would first request that you review the April 6 letter of our General Counsel, Benjamin Bull (copy attached), which sets forth in detail our views generally on this matter.

With respect to the proposed temporary, emergency amendments, Children's Legal Foundation renews its objections to several of the guidelines:

(1) The base offense level of (6) is too low to adequately confront a billion-dollar industry controlled almost exclusively by organized crime. When Congress overwhelmingly passed this legislation, it certainly did not intend that it never be used by federal prosecutors. Yet that will undoubtedly be the effect if the penalties remain this low -- prosecutors will recognize that convictions will have little to no impact on the illegal pornography industry.

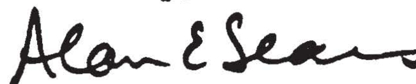
(2) We oppose any attempt to increase or decrease the penalty depending on the "retail value" of obscene materials transported or whether transported for "pecuniary gain." Obscenity is illegal because it is considered harmful to communities, and to the nation as a whole. The motivation of its purveyors should not be relevant in sentencing. The fact that organized crime controls the industry because of its profitability supports our push for harsher penalties. But we do not seek to suppress obscenity <u>only</u> because organized crime gets rich selling it. We seek to suppress obscenity because it is harmful to our nation. Harsher penalties will deter organized crime, and therefore reduce the harm to our country. But it is the harm caused by obscenity, not its mere profitability, that should be the focus of law enforcement efforts and sentencing guidelines. And the harm flowing from the proliferation of obscenity in the United States exists whether disseminated for proven "pecuniary gain" or not. There is no Congressional intent to the contrary.

Again, we would ask the Commission to reconsider its proposed guidelines in light of this legislation's overwhelming support in Congress and the nation as a whole. We should point out that the trend in recent state and federal legislation has been to <u>increase</u>, not decrease, penalties for violations of obscenity and child pornography statutes, in recognition of growing evidence of organized crime's control of the industry.

The Commission's recommendations fall far below the penalties in current law for numerous states for similar intra-state violations. Let us not make the federal law into a paper tiger, to be laughed at by the career criminals who flout it daily with impunity.

Thank you very much for your consideration.

Sincerely,



Alan E. Sears
Executive Director

AES:kb

THE UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis Newton

SUBJECT: Amendments Addressing Case Law Issues

DATE: 26 March 1990

Attached for your information is a document prepared by Pam Barron and Dean Stowers that lists those amendments that have a direct relationship to developing case law. There may be other amendments that relate to case law, but that relationship is not the driving force behind the amendment; these may not be included in this memorandum. Hopefully, this information will prove helpful in your consideration of amendments.

Attachment

UNITED STATES SENTENCING COMMISSION
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William W. Wilkins, Jr. Chairman
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Ronald L. Gainer (ex officio)

February 27, 1990

MEMORANDUM

TO: Phyllis J. Newton
Staff Director

FROM: Pamela O. Barron PB
Dean A. Stowers DS

RE: Amendments Addressing Case Law Issues

Amendment 2, §1B1.8 This amendment addresses the holding in United States v. Shorteeth, 887 F.2d 253 (10th Cir. 1989) which interpreted §1B1.8 as requiring the plea agreement "to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so." This amendment clarifies that §1B1.8 was not intended and should not be read to limit the use of certain information at sentencing.

Amendment 3, §3D1.2 "This amendment clarifies the intended scope of §1B1.3(a)(2) in conjunction with the multiple count guidelines to ensure that the latter are not read to limit the former only to conduct of which the defendant was convicted . . . ." The amendment is prompted by the opinion in United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989) and says so in the Reason for Amendment.

Amendment 9, §2B3.1, §2B3.1 This amendment merely clarifies the apparently unclear scope of §2B3.1. The inclusion of robbery or attempted robbery in specific offense characteristic 1, has lead one court to conclude that attempted robbery must be covered by §2B3.1 as opposed to §2X1.1. See United States v. Williams, 891 F.2d 962, 965 (1st Cir. 1989). This clearly is not the case and can readily be rectified by the amendment. The reason for amendment may be improved here, however, to clearly indicate that §2X1.1 applies for attempted robberies.

Amendment 14, §2D1.1 This amendment discusses the method for combining the quantities of different controlled substances. It suggests alternate approaches to solving the problem in

applying the instructions in Application Note 10 when certain combinations involving Schedule I or II depressants, or Schedule III, IV, and V substances "appear to override the capped offense levels provided for such substances in the Drug Quantity Table at guideline 2D1.1(c)." The amendment discusses the approach taken by the court in United States v. Gurglio, No. 89-3519 (3d Cir. Jan. 12, 1990). In remanding the multi-substance case for resentencing, the court instructed the district court to limit the contribution of the Schedule III substance to the capped maximum heroin equivalent attributable to crimes involving Schedule III substances.

Amendment 16, §2D1.6 This amendment addresses a class of departure cases for convictions under 21 U.S.C. §843, commonly referred to as the telephone count. Two Circuits have held that the Commission had not adequately considered the amount of controlled substance involved in the offense in establishing an offense level under § 2D1.6, and have approved upward departures on this basis. See United States v. Correa-Vargas, 860 F.2d 35 (2d Cir. 1988); United States v. Williams, No. 89-1134 (8th Cir. Jan. 22, 1990). These courts have apparently approved a structured departure, using the drug quantity table of § 2D1.1 as the measuring stick of the reasonableness of the departure. The amendment would make this departure practice the guideline practice by reference to the drug quantity table.

Amendment 27, §2J1.6 This amendment addresses the applicable guideline when a defendant fails to appear for service of sentence, providing a cross-reference to §2P1.1 (Escape). United States v. Lee, 887 F.2d 888 (8th Cir. 1989) and United States v. Savage, 888 F.2d 528 (7th Cir. 1989) pointed out differences between failure to report for trial and failure to report for service of sentence. In Lee, the court stated that §2J1.6 as applied to failure to report for service of sentence was not "sufficiently reasonable," and violated the Sentencing Commission's Congressional mandate. In Savage, the court pointed out that an escapee would receive a reduction for voluntary return within 96 hours, whereas no reduction was provided for the defendant charged with failure to report for service of sentence who voluntarily returned in a similar manner. The amendment attempts to solve these problems. [To ensure this result, the language of the cross-reference could be further improved by inserting the italicized language: "(1) If the offense constituted a failure to report for service of sentence, apply §2P1.1 (Escape, Instigating or Assisting Escape) *as if the offense constituted an escape from non-secure custody*".]

Amendments 43-44, §2P1.1 This amendment would seek to clarify the operation of §4A1.1(d) and (e) in escape cases. This has been a much-litigated issue in the courts, but to date all six Circuits that have addressed the perceived double counting problem have decided it consistently with the clarifying

amendment. See United States v. Ofchinick, 877 F.2d 251 (3d Cir. 1989); United States v. Vickers, No. 89-3308 (5th Cir. Dec. 8, 1990); United States v. Carrol, No. 88-2260 (6th Cir. Jan. 9, 1990); United States v. Evidente, No. 88-5208 (8th Cir. Jan. 29, 1990); United States v. Wright, 891 F.2d 209 (9th Cir. 1989); United States v. Goldbaum, 879 F.2d 811 (10th Cir. 1989). Note that the district court opinions cited in the federal register, disallowing the counting of points under both §4A1.1(d) and (e), have been overruled by the Eighth Circuit in Evidente. In light of the fact that six Circuits have favorably decided the issue addressed by this amendment, the necessity of the amendment to address a case law problem appears to have dissipated. However, it may still be prudent to make it clear that points are to be added under both subsections in §4A1.1 for offenders sentenced under §2P1.1.

The Commission may wish to consider revising the amendment, however, to remove the second sentence of the new application note which reads, "The addition of criminal history points on the basis of the defendant's custody status at the time of the escape is expressly authorized by the guidelines and does not constitute inappropriate double counting." This language could be interpreted to require express authorization of the Commission whenever two plainly applicable sections could be applied and create so-called 'double counting.' This is a different standard than courts are currently applying with respect to double counting. It appears that courts to date have read the general Commission policy against double counting as a rule of guideline construction, militating against reading two arguably applicable guideline enhancements as applying cumulatively where such an application does not appear clearly permissible upon plain reading of the respective sections. This is the logic of the opinions of six Circuits in determining whether both §4A1.1(d) and (e) should be applied in escape cases. The superfluous application note sentence would appear to turn the table on the logic of the analysis of these opinions and imply that an express authorization by the Commission would need to exist prior to cumulating adjustments from two locations in the guidelines. While this may be an appropriate statement of Commission policy on double counting, it is a new one to the guidelines and has the potential to influence judicial decisionmaking in future double-count cases. If such a general rule is deemed appropriate, §1B1.1 would seem the more appropriate location.

Amendment 50, §§3B1.1, 3B1.2 Any number of cases, depends upon specific issue involved.

Amendments 50, 52, §3C1.1 Any number of cases, depends on specific issue involved.

United States District Court
For the Eastern District of Michigan
802 U.S. Courthouse
Detroit, Michigan 48226

Chambers of
Barbara K. Hackett
United States District Judge
(313) 226-6010

February 7, 1990

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

Dear Mr. Billy Wilkins:

Thank you for this opportunity to address proposed changes in the sentencing guidelines relative to bank robberies. I recommend as follows:

Under Option 1, is it necessary to determine whether a "robbery or robberies were part of the same course of conduct or common scheme or plan of the offense of conviction?" Isn't a bank robbery by its very nature sufficiently different from other bank robberies, making it appropriate to remove it from consideration as conduct or scheme or plan? I believe the particulars of each bank robbery and the threat to persons involved must be considered separately.

Option 2 should be amended to delete "whether or not part of the same course of conduct or common scheme or plan as the offense of conviction." The 2-level increase provision should apply to each additional robbery. The real or perceived threat to persons involved is a primary concern. We often learn much later of the impact of the happening on the lives of others at the scene.

Again, best wishes for success in these matters. Yours is not an easy task. I look forward to seeing you in the near future.

Cordially,

Barbara

Barbara K. Hackett
United States District Judge

BKH:sr

Johnson

BARBARA MEIERHOEFER
1725 Maxwell Court
McLean, VA 22101
(703) 893-2485

March 23, 1990

Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

RE: Proposed Revocation Guidelines

Dear Judge Wilkins:

I would like to comment on the two proposed options for handling the revocation of probation and supervised release. My past and current experience includes research and writing in the areas of sentencing and community supervision, development of federal guidelines for parole release and revocation, and membership on the Committee on Criminal Law and Probation Administration's Task Force on Supervision for the last two years. I emphasize, however, that the comments that follow express my personal views rather than the official position of any organization.

In my opinion, neither option as presented captures all of the elements necessary for a purposeful, fair, and workable set of revocation guidelines. Option 1 distinguishes poorly among the types of revocation behavior to be sanctioned or deterred, it does not consider the risk the offender presents to the community, and it neither differentiates between probation and supervised release nor provides for intermediate sanctions. Its only merits are a workable number of violation types and ease of application.

Option 2 makes too many distinctions among offense behaviors. Many allegations of new criminal conduct will be considered on revocation prior to a conviction and/or based on non-federal arrests. Obtaining the detailed, reliable information necessary for a full recalculation of the offense level under these circumstances will surely be more difficult than it is when reports from U.S. Attorneys and case agents more familiar with guideline-information needs are available. I believe that offense level calculation is an unnecessarily onerous approach given that reflecting the seriousness of the offense is not one of the statutory purposes for either imposing or responding to violations of supervised release.

Number of Violation Behavior Categories

I recommend that the number of categories to describe violation behaviors be kept to around five. Not having been a probation officer, I do not feel competent to describe the nuances that should be captured in the

classifications. I strongly recommend, however, that the Commission form a working group of knowledgeable officers to devise a realistic set of violation categories.

Assessing Offender Risk

I strongly recommend that any set of revocation guidelines include an assessment of offender risk. Protection of the public is a statutory purpose to be served in responding to violations of both probation and supervised release. Such an assessment could be easily accomplished by a recalculation of the Offender History Score as proposed in Option 2.

Consecutive vs. Concurrent Service of Violation Terms

I endorse the Option 2 approach. The Commission should avoid the disparate overall treatment of similar violators based on the prosecutorial and sentencing practices of criminal justice systems beyond its control.

Over-reliance on Imprisonment

Neither option adequately allows for graded, "half-way back" responses to violations. Although Option 2 allows the substitution of community and home confinement under the same conditions as allowed in the initial guideline application, it does not provide a broad enough array of intermediate sanctions or attend sufficiently to the purposes to be accomplished by community supervision.

We need a system of supervision that is designed to assure compliance with the conditions imposed, protect society in the short-term by providing adequate methods of detection and control, and strive for long-term protection of society through the provision of necessary correctional treatment. What has been referred to as the simplistic "tail 'em, nail 'em, and jail 'em" philosophy, with its resulting over-reliance on prison, is unlikely to accomplish these goals and gives too little attention to statutory directives to impose the least restrictive sanction necessary to accomplish the purposes. Attempts can and should be made to bring offenders into compliance with the conditions of their supervision while keeping them in the community under controlled conditions that afford adequate public protection. I would go even further and suggest that the Commission break with precedent and define a category of offender risk and type of violation behavior for which a community sanction is the normally appropriate response, with incarceration as the "outside guidelines" decision.

In short, I think that more thought should be given to this important area, and would encourage at least one more round of modification and comment prior to promulgation. Thank you for the opportunity to express my views.

Sincerely,

Barbara Meierhoefer, Ph. D.

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
PROBATION OFFICE

PERRY D. MATHIS
CHIEF PROBATION OFFICER

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March 27, 1990

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

Re: Proposed Amendments
to Sentencing Guidelines

Dear Director:

I write to comment on the proposed amendments to Chapter Seven - Violations of Probation and Supervised Release. I support the adoption of Option 1 over Option 2.

Several items concern me about the implications for Probation Officers and the Court under Option 2.

1. Section 7A1.2(c)(1) will require the USPO to go through the process of determining Relevant Conduct issues of the new criminal conduct. This proves difficult sometimes even when the criminal conduct constitutes a federal offense from the outset. It would prove particularly cumbersome if the new criminal conduct constituted a non-federal offense since the level of investigation and record keeping may be incomplete and important issues would perhaps take even more time to resolve than the original case circumstances.

2. The specific offense characteristics, Victim Related Adjustments, Obstruction issues, Multiple Count issues (if the new violation involved more than one crime), Acceptance of Responsibility issues, Chapter Four calculations, etc. would come into play because "the guideline range of imprisonment shall be the guideline range that would have been applicable if the new criminal conduct had constituted a federal offense - - - - -". This is a lot of work to arrive at a calculation which is not called for under Option 1.

3. Option 2 could lead to attempts to re-open objections which were not resolved to the satisfaction of the complaining party in the original sentencing.

4. As I interpret Option 2, Section 7A1.2(c)(1) the USPO would essentially complete another PSI in order to assist the Court in revoking probation or supervised release. Even after going through all these calculations it could be determined that the sentence called for is less than the 6 to 12 months which is mandated under 7A1.3(c)(1) or (2).

5. It appears that sentencing a person by use of 7A1.2(c)(1) would result in a sentence for criminal conduct totally unrelated to the original conviction even though the stated goal in the Introductory Commentary for Chapter Seven is to impose a sentence as to sanction for failure to abide by conditions of supervision and not as a sanction for new criminal conduct. For instance, the original conviction may have been Theft which has a base offense level of 4 under 2B1.1(a). If the new criminal conduct is Possession of 250 Grams of Marihuana the base offense would be 6 under 2D1.1(a)(3). This just does not seem appropriate to me.

It is my opinion that Option 2 presents the potential for creating an enormous amount of work for the USPO and the Court which would be avoided if Option 1 is adopted.

Sincerely,

Perry D. Mathis, Chief
U. S. Probation Officer

PDM:bh

cc: Earl E. O'Connor, Chief
U. S. District Court Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA
PROBATION OFFICE

S. THOMAS NOELL, JR.
CHIEF PROBATION OFFICER
227 FEDERAL BUILDING
401 WEST TRADE STREET
CHARLOTTE, N. C. 28202

March 29, 1990

GEORGE E. MICHAEL, JR.
SUPERVISING PROBATION OFFICER

REPLY TO:

Charlotte, N.C.

Mr. Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

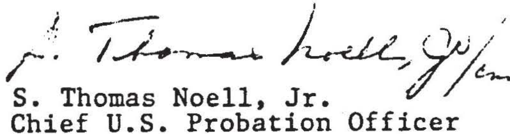
Re: Comments on Proposed Guideline Amendments

Dear Mr. Martin:

I serve as Chief Probation Officer in the Western District of North Carolina and wish to forward my responses, comments and opinions on the proposed amendments to the Sentencing Guidelines, to be submitted to Congress on or before May 1, 1990. My comments are contained on the attached page(s) in response to the numbered proposed amendments and more specific to the changes proposed in revision of Chapter Seven (Violations of Probation and Supervised Release). My comments are responding only to those changes to which I highly favor or those changes to which I object.

Please see that this information is forwarded to the proper person for consideration. Thank you for soliciting input to the amendments.

Sincerely yours,



S. Thomas Noell, Jr.
Chief U.S. Probation Officer

STN:cm

Encl.

RESPONSES & COMMENTS TO PROPOSED AMENDMENTS TO SENTENCING GUIDELINES

S. Thomas Noell, Jr., Chief U.S. Probation Officer, NCW

March 29, 1990

Proposed Amendment 64

Favor adoption of the additional Criminal History Category VII.

Proposed Amendment 69
(Revision Chpt. Seven)

7A1.1 - Object to the classification system which categorizes primarily on the designation of legal criminal convictions. Does not adequately take into consideration that multiple violations of Class III violations may consitute a serious potential harm to the public (DWI, Driving After Revocation or repeated minor assaults). One of the potential values of probation or supervised release is to prevent further violations rather than condoning several violations and then punishing.

7A1.2 - Object to classification of violations but scheme for determining method of reporting to the Court is good!

7A1.3 - Strongly agree with this plan.

7A1.4 - Strongly object to the scheme of prescribed penalties for violations of probation and TSR. For probation violations the sanction for revocation (if imprisonment) should revert back to the original calculated range of imprisonment for the offense, determined by the Court at the time of sentencing. Within that range the Court has discretion to take into consideration the nature of the violation, rather than the classification. The classification system is too rigid and apparently can actually enhance punishment beyond the originally calculated range of sentence. It appears that Class I and Class II violations are designed to punish, through the probation sentence, for the new violations rather than leaving prosecution for the new criminal violation to the prosecutor and, eventually to the sentencing court.

For supervised release (TSR) violations, the present scheme in 18 USC 3583(e)(3) is simple, fair and sound! This plan, it seems to me, is in keeping with the idea of determinate sentencing (the defendant knows at the time of sentencing the maximum punishment if he violates TSR. If TSR is revoked, then the Court has the discretion to punish severely with the maximum period or a lesser sentence for less serious violations.

(d)(1) - The added term of TSR, I believe, expands punishment and is inconsistent with a concept of determinate sentencing (the defendant knows the maximum amount of imprisonment to which he can be exposed at the time of sentencing - no added punishment after the sentence begins - and some reasonable expectation as to when the sentence will end).

7A1.3(c)(1) - The current system under 18 USC 3583(e) is simple, fair and much easier for all parties to understand.

(e) - Continuation of the obligation of added punishment (restitution, fine, community confinement or intermittent confinement) should be discretionary ... not mandatory!

(f) - Object - penalty for violation of TSR is imprisonment. To extend or reactivate TSR enhances punishment (from original sentence).

7A1.4 - Agree with and support this amendment as proposed.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U.S. COURT HOUSE
312 N. SPRING STREET
LOS ANGELES. 90012

March 28, 1990

Mr. Paul Martin
Communications Director
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D. C. 20004

Re: Guideline Amendments

Dear Paul:

Having had the opportunity to review the proposed Guideline amendments, our presentence management staff have the following thoughts and suggestions:

Guideline 2B3.1: In that Option 1 appears to be unnecessarily confusing and Option 2 places the Probation Officer in the position of having to judge the quality of evidence on unconvicted counts, we would suggest raising the base offense level to 22 for robbery, thereby avoiding the proverbial "can of worms." In the Central District of California, the one count bank robbery Indictment is rare. It is much more common to see multiple counts of bank robbery. However, in those cases where only one bank robbery has been committed, the commentary to the robbery guideline could note that the lower end of the guideline sentencing range would be warranted by this factor. These comments are made based on the assumption that the Commission wants the offense level for robbery to more adequately reflect the overall real offense conduct, recognizing that most bank robbery Indictments are multiple counts. Should raising the base offense for bank robbery be unacceptable, Option 2 is viewed as a more clear and "clean" guideline. Although both options are viewed as ripe for objections by defense, it is anticipated that Option 1 would be subject to excessive controversy because of the introduction of the concept of multiple counts with respect to a guideline that does not group on the aggregate principle.

Guidelines 2B1.1 and 2F1.1: The specific offense characteristic of these two guidelines, referring to the "safety and soundness of a federally insured financial institution" requires more explanation in the commentary. For instance, should the defendant who is responsible for all of the financial problems sustained by the institution be punished to the same degree as the defendant who is not involved in causing the underlying financial problems of the institution, but was responsible for the "last straw that broke the camel's back?" In other words, who is this specific offense characteristic actually reaching for?

Guideline 2D1.6: This statute appears to be charged for either a defendant who truly has a less aggravating role in a controlled substance offense, or for a defendant who has cooperated with the government and as part of a plea agreement is allowed to plead to this lesser included charge. To account for this difference, it is recommended that the commentary state that if a person had a mitigating role in the underlying controlled substance offense, as defined by Guideline 3B1.2, then the offense level of 12 should apply. The commentary should further note that in such a situation the adjustment for mitigating role would not apply to Guideline 2D1.6.

Guideline 2G3.1: Many of the cases in our District where Guideline 2G3.1 applies, involve a very small-time distributor, who is using the mails for videos that are openly sold in video shops throughout the city. In these cases a base offense level of 15 seems a bit severe, and we would suggest raising the base offense level to 10. The specific offense characteristic that allows for an enhancement corresponding to the retail value of the obscene matter would appear to hold the more culpable defendant fully accountable, while allowing for the distinction just described.

Guideline 2J1.6: To avoid any confusion concerning the application of this guideline, we recommend the commentary explain that the specific offense characteristic having to do with the underlying offense applies whether or not the defendant is convicted of the underlying offense. It would also avoid confusion if the commentary noted that the specific offense characteristic (b)(1)(2) or (3) applies to the underlying offense with the highest statutory penalty and is not cumulative.

Guideline 2K2.6: We found that Option 2 was neither practical nor workable. To obtain detailed information regarding offense behavior on prior convictions, particularly if they occurred in a different state from that of the present offense, is enormously difficult and at times virtually impossible. Thus, we would strongly recommend against Option 2. As for Option 1, it is certainly more workable, but it is questionable as to whether such a guideline is necessary as the mandatory 15-year sentence for an armed career criminal appears to adequately meet the sentencing goals of punishment, deterrence and incapacitation. When the defendant is classified as an armed career criminal based upon a present offense that does not involve the use of a weapon in committing or attempting another offense, it appears that the sentencing guideline range for the higher criminal history categories requires that periods of imprisonment exceed that which would normally be necessary to meet the goals of sentencing.

Guidelines 2L1.1, 2L2.1 and 2L2.2: Taking into account the number of aliens or the number of documents in these guidelines makes a great deal of sense, as the numbers do reflect the seriousness and

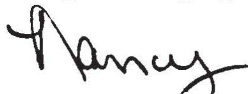
scope of these offenses. However, we suggest that the commentary to Guidelines 2L2.1 and 2L2.2 explain that blank documents are to be counted. We also suggest that the commentary further explain what is meant by "a set" of documents. For instance, if there are 30 blank Social Security cards charged in one count and 30 blank Alien Registration cards charged in another count, would this be 60 documents or 30 documents? We also foresee plea agreements in these cases whereby the defendant is offered a guilty plea to a violation of 18 USC 1028, thereby avoiding the higher offense level, since the applicable guideline for this statute would be 2F1.1, and the number of documents would not be considered. Therefore, we suggest that a separate guideline should be promulgated for 18 USC 1028.

Guideline 2P1.1: Application note No. 5 to this guideline states that, "...criminal history points from 4A1.1(d), or 4A1.1(d) and (e), may apply." Why use the word "may" apply rather than simply the word apply? To include the word "may" leaves room for dispute, and we were unable to think of a situation when 4A1.1(d) and (e) would not apply to escape while serving a sentence of imprisonment.

Guideline 4B1.1: We view the career offender guideline as sufficiently punitive; thus, should the Commission choose to add a criminal history category of VII, we would recommend Option 2 in order to retain the present sentencing guideline ranges for career offenders.

I hope the Commissioners and Commission staff will find these comments helpful. We attempted to focus on the proposed amendments affecting guideline application. If any clarification is needed, please let me know.

Very truly yours,



NANCY REIMS, Deputy Chief
U. S. Probation Officer

NR:aw

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
PROBATION OFFICE

KEITH A. KOENNING
CHIEF PROBATION OFFICER

668 EUCLID AVENUE ROOM 606
CLEVELAND 44114

March 30, 1990

U.S. SENTENCING COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Attention: Paul K. Martin

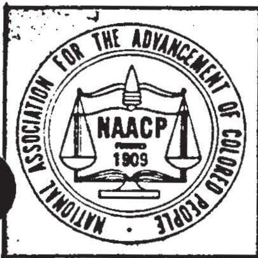
Re: Proposed Amendments
Chapter Seven

I urge that adoption of the proposed amendments for VIOLATIONS OF PROBATION AND SUPERVISED RELEASE be delayed.

The probation system is presently pilot testing in select districts a new classification and supervision system. I understand that by the end of this year we will have information on the results of this pilot testing. I recommend that these results be considered before the Commission adopts revocation guidelines.

Respectfully submitted,

Keith A. Koenning



WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1025 VERMONT AVENUE, N.W. • SUITE 730 • WASHINGTON, D.C. 20005
(202) 638-2269

March 30, 1990

Mr. Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

The NAACP submits the following comments, on sentencing guidelines in 55 Fed. Reg. 5718 (February 16, 1990).

The NAACP, in its 81st year, is the nation's oldest and largest civil rights organization. From its inception after the infamous 1908 Springfield, IL. race riot, the NAACP has responded to the incidences of lynching and hate crimes against blacks.

The NAACP in 1919 published, at great risk to many of its members, Thirty Years of Lynching in the United States: 1889 - 1918. This study, the first of its kind, chronicled and tabulated one hundred lynchings that took the lives of 3,224 persons. In the 1960's the NAACP's Washington Bureau lobbied Congress extensively for passage of the Civil Rights Acts. Congress was persuaded, in part, by the efforts of the NAACP and the comments of the Justices of the Supreme Court (in two cases

U.S. v. Guest and U.S. v. Price) to provide "... an effective means of deferring and punishing forcible interference with the exercise of federal rights." (Civil Rights Act of 1968, P.L. 90-284, 1968 U.S. Code Cong. and Admin. News 1837, 1841). Consequently, Title I of the Civil Rights Act of 1968 was added to include 18 U.S.C. 245 to the U.S. Code.

The existence of these federal laws, however, has not deterred a very small, but very violent segment of the population from committing hate crimes. Therefore it is timely that concerted attention is paid to proposed guidelines regarding sentencing. The NAACP has carefully scrutinized the proposed guidelines and submits its comments on three provisions of said guidelines:

(1) Whether an increase (as currently provided) of 2 levels over the offense level applicable to any underlying offense is sufficient to adequately reflect the increased harm such crimes inflict on society when they are used as a means of insidious discrimination or to suppress the exercise or enjoyment of Federal rights; if not, should the Commission amend sections 2H1.1(a)(2), 2H1.2(a)(2), 2H1.3(a)(3) and 2H1.5(a)(2) by deleting "2" and inserting "4" in lieu thereof and by making comparable revisions to section 2H1.4:

(2) Whether any chapter 3 general adjustment the Commission may adopt for offenses that are not prosecuted as civil rights offenses yet nevertheless involve the infliction, or intended infliction, of any harm motivated at least in part by the victim's status with respect to race, color, religion, alienage, or national origin or by the victim's exercise or enjoyment, of any right of privilege secured under the Constitution or laws of the United States (see proposed amendment 49) should have the same or a comparable structure and/or adjustment levels asthe guidelines in part H, subpart 1 of chapter 2.

(3) Whether the Commission should provide a general adjustment in chapter 3 where offenses have been committed by public officials under color of law or otherwise under the cloak of official duty or authority (in cases other than described above) that is distinct from the provision in § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) and, if so, whether the amount of such an adjustment should be the same as the 4-level increase for public officials contained in the guidelines in part H, subpart 1 of chapter 2.

I. The NAACP believes that an increase (as currently provided) of two levels over the offense level applicable to any underlying offense is sufficient to adequately reflect the increased harm of hate crimes. The numbers of hate crimes have proliferated in recent years. Federal statutes such as 42 U.S.C. 245 are avialable to be utilized by victims of racially-motivated violence. These federal criminal civil rights statutes, however, need to be strengthened by increasing the penalties of conviction. Hopefully, increased penalties would serve as a deterrent.

Individuals and racist groups, such as the Skinheads, the Order and the Klu Klux Klan must be deterred from racially-motivated violence by stringent terms of imprisonment and fines. Some cases in point:

On March 1, 1990 in Dallas, five Skinheads were found guilty of conspiring to violate the civil rights of minorities. All five were convicted of 13 counts of conspiring to violate the civil rights of blacks, Jews and Hispanics by vandalizing a Jewish synagogue and harassing blacks and Hispanics in a Dallas, Texas park. U.S. District Judge Barefoot Sanders has set

sentencing for April 13, 1990. Each of the charges carries up to 10 years in prison and a $250,000 fine.

A revitalized federal effort to remedy the effects of racially-motivated violence is necessary to deter these crimes. More stringent terms of imprisonment will help judges to impose harsher sentences.

Kenneth M. Mieske, 23, of Portland Oregon was sentenced to life imprisonment in March, 1989, with no parole for at least 20 years, for beating a man to death because he was black. Mulugeta Seraw, 27, an Ethiopian national was beaten to death with a baseball bat by Mieske on November 13, 1988. Mieske admitted when he pleaded guilty that he killed Seraw "because of his race". (Los Angeles Times, June 6, 1989 at 4, col.4)

Mieske will be eligible for parole in 20 years, however, the state parole board could release Mieske earlier by only a unanimous vote.

The NAACP believes that the federal government must make a strong response to vicious crimes, such as the Seraw ruling.

II. The NAACP believes that the Commission should adopt a comparable structure and/or adjustment levels for chapter 3 general adjustment as exists for part H, subpart 1 of chapter 2.