Appendix B

Development of the Judicial Conference Recommendations

On April 17, 1990, Judge Edward R. Becker, Chairman of the Committee at that time, called a meeting of staff from the Administrative Office of the U.S. Courts and the Federal Judicial Center to develop ideas for expanding sentencing flexibility within the guidelines. Eight general conceptual approaches were identified. The staff developed written proposals demonstrating the eight approaches, which were presented to a group of twelve judges assembled for the First and Third Circuit Workshop in April, 1990. In addition to the proposals that were eventually endorsed, the initial approaches included these proposals which were *not* included in final recommendations:

1. **Creation of additional offense level adjustments, expanding adjustments for acceptance of responsibility, role in the offense and a series of factors in mitigation.** Some examples:

   Acceptance of Responsibility

   A. Increase acceptance of responsibility to a 3 level decrease.

   B. If the defendant provided assistance to the government but not to the extent required under §5K1.1, decrease by 2.

   Mitigating Role

   A. If the defendant was a passive participant, decrease by 6 levels (followed by minimal at 4 levels and minor at 2).

   Victim-Related Adjustments

   A. Victim Precipitation: If the victim was an initiator, willing participant, aggressor, or provoker of the incident, decrease by 2 levels.

   B. Victim Consideration: If the defendant exercised caution to avoid harm to persons or damage to property, ... decrease by 2 levels.

   C. Restitution: If the defendant made full restitution prior to sentencing, decrease by 2 levels.

2. **Removal of the requirement of a motion by the government to permit a reduction based on substantial assistance in the prosecution of another defendant.**

3. **Revision of the guidelines driven by mandatory minimum sentences.**

This approach involved asking the Commission to use its expertise to develop drug guidelines independent from mandatory minimum sentences required by some statutes.

4. **Expansion of the list of grounds for departure (e.g. age, dangerous offenders, and responsibility for dependents).** Some examples:

A. Eliminate all the specific directives in Chapter 5, Part H regarding the relevance of offenders characteristics, replacing them with a general policy statement regarding the "general inappropriateness" of considering a defendant's education, vocational skills, employment record, community ties and family ties" as per 28 U.S.C. § 994(3).

B. Draft additional guidelines or policy statements taking account of offender characteristics in unusual circumstances. For example:

1. If the defendant presents an unusual combination of characteristics which together suggest that the purposes of sentencing might be better met with a short period of incarceration or the use of sentencing options, decrease by 2-4 levels.

5. **Expansion of sentencing options that are considered substitute punishments for incarceration.** Some examples:

A. curfew B. community service
C. Day fines D. intensive supervision

6.. **Expansion of sentencing options for first offenders by creating a separate first offender category on the guideline imprisonment table or by making sentencing options more widely available for current Category I offenders.**

The tables on this and the following page illustrate the initial proposals.

TABLE 3:1 REDRAW LINES B & C FOR FIRST OFFENDERS

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	1-7	2-8	4-10	8-14	12-18	15-21
B	8	2-8	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71

TABLE 3:2. CREATE A NEW FIRST OFFENDER CATEGORY

Offense Level	I (0)	II (1)	III (2 or 3)	IV (4,5, 6)	V (7, 8, 9)	VI (10,11,12)	VII (13 or more)
			Criminal History Category (Criminal History Points)				
1	**0-6**	0-6	0-6	0-6	0-6	0-6	0-6
2	**0-6**	0-6	0-6	0-6	0-6	0-6	1-7
3	**0-6**	0-6	0-6	0-6	0-6	2-8	3-9
4	**0-6**	0-6	0-6	0-6	2-8	4-10	6-12
5	**0-6**	0-6	0-6	1-7	4-10	6-12	9-15
6	**0-6**	0-6	1-7	2-8	6-12	9-15	12-18
7	**0-6**	1-7	2-8	4-10	8-14	12-18	15-21
8	**0-6**	2-8	4-10	6-12	10-16	15-21	18-24
9	**0-6**	4-10	6-12	8-14	12-18	18-24	21-27
10	**0-6**	6-12	8-14	10-16	15-21	21-27	24-30
11	**2-8**	8-14	10-16	12-18	18-24	24-30	27-33
12	**4-10**	10-16	12-18	15-21	21-27	27-33	30-37
13	**6-12**	12-18	15-21	18-24	24-30	30-37	33-41
14	**9-15**	15-21	18-24	21-27	27-33	33-41	37-46
15	**12-18**	18-24	21-27	24-30	30-37	37-46	41-51
16	**15-21**	21-27	24-30	27-33	33-41	41-51	46-57
17	**18-24**	24-30	27-33	30-37	37-46	46-57	51-63
18	**21-27**	27-33	30-37	33-41	41-51	51-63	57-71
	⇩	⇩	⇩	⇩	⇩	⇩	⇩

In evaluating the varied options, the twelve judges at the First and Third Circuit Workshops carefully considered each conceptual approach. They favored pursuit of those approaches that would maintain the basic structure of the sentencing guidelines and would increase flexibility in sentencing for less serious offenders. For example, they thought recommendations to add a new offender category, to expand the pool of offenders eligible for any alternative, and to completely revise the drug guidelines were premature. However, they supported the increased availability of probation to those offenders already eligible for some alternatives. The group also supported approaches designed to give judges more flexibility to tailor sentences to the offender, i.e., changes in the use of offender characteristics, the definition of relevant conduct, and the acceptance of responsibility adjustment.

Based upon these comments, a series of proposals were redrafted for the consideration of the Sentencing Guidelines Subcommittee of the Committee on Criminal Law and Probation Administration. This work group met on June 11th, and further refined and narrowed the approaches, focusing on four basic strategies for increasing flexibility. These were presented to the full Committee at its regular six month meeting on June 21, 1990. The approaches approved were:

1. **Expand sentencing options by redefining the split sentence, and changing the lines on the sentencing grids so that straight probation and sentencing options are available for additional non-serious offenders.**

   These approaches were endorsed by the full Committee and the Judicial Conference, and are current recommendations 1-3.

2. **Allow greater flexibility to consider offender characteristics as a basis for departing from the guidelines.**

   These approaches were also endorsed and are current recommendations 4-6.

3. **Redefine relevant conduct to tailor punishment to individual culpability.**

   The sense of the Committee was that confusion surrounds the relevant conduct guideline, often preventing judges from using the guideline to tailor the offense level to the individual culpability of an offender. Particular problems with the logic and wording of the guideline and applications notes were discussed. The Committee's conclusion is found in current recommendation 7.

4. **Increase or redefine the offense level adjustment for acceptance of responsibility.**

The full Committee considered several options for amending the acceptance of responsibility guideline. These included:

A. Breaking the guideline into separate adjustments for guilty pleas, cooperation with authorities, and other affirmative acts to redress the harm of criminal conduct.

B. Providing a 3-level reduction up to offense level 18 and 4-level adjustment above that, to increase the perceived incentives to plead guilty at higher offense levels.

After extensive debate, the Committee concluded that more data was needed in order to make any firm recommendation. Instead, the Committee voted to urge the Commission to revisit this guideline to consider:

A. Whether more points were needed to create an adequate incentive for guilty pleas

B. Whether the reduction should be made proportionate to a defendant's offense level.

C. Whether judges might be given discretion to reduce within a range, such as 2 to 4 points, depending on the degree of acceptance of responsibility found in an individual case. These conclusions are represented by current recommendation 8.

At its September 1990 meeting, the Judicial Conference approved the recommendations described in Appendix A for submission to the Sentencing Commission.

Appendix C

How the 1991 Judicial Conference recommendations compare with those of the Sentencing Commission's Advisory Committee on Alternatives to Incarceration

Scope of the Recommendations

Comparisons between the recommendations of the two groups are summarized in Chart 1 on page 5. The Advisory Committee recommendations deal exclusively with substitutes for imprisonment (Chapter Five, Parts A,B,C,D of the Guidelines) while the Judicial Conference recommendations deal with relevant conduct (§ 1B1.3), use of offender characteristics (Chapter Five, Part H), and acceptance of responsibility (§ 3E1.1) in addition to substitutes for imprisonment.

Availability of Substitutes for Imprisonment

General Availability. Table 1 on page 6 shows the 52 Guideline cells for which some substitution for imprisonment is currently available. Tables 2 and 3 on page 7 show where sentencing options would be available under the Judicial Conference and Advisory Committee's proposals.

- The Judicial Conference proposal would not expand the pool of offenders eligible for some substitute for imprisonment beyond the current level.
- The Advisory Committee proposal would expand the number of cells to which substitutes could apply to a total of 67, with the newly eligible offenders falling exclusively in Criminal History Categories I - III. [1]

Straight Probation

[1] The text to the Advisory Committee report indicates two alternative recommendations, one extending the availability of alternatives to Criminal History Categories I - III and the other to Criminal History Categories I and II only. The Sentencing Table labelled "Advisory Committee's Recommendation" in the report uses the I - III proposal and is the one used for comparison here.

Straight Probation

•The Judicial Conference proposal would expand the availability of straight probation to two additional cells, both in Criminal History Category I.

•The Advisory Committee recommendations would not expand the availability of straight probation.

Probation with Conditions of Intermittent or Community Confinement or Home Detention

•The Judicial Conference proposal would expand this option to 10 additional cells --those with Guideline minimums from 7-10 months (i.e., the cells in which the "50-50 split sentence" is the only substitute currently available).

•The Advisory Committee proposal would expand the option to 15 additional cells --those with Guideline minimums from 7-18 months in Criminal History Categories I - III.

Combinations of Imprisonment and Supervised Release with Conditions of Community Confinement or Home Detention

•The Judicial Conference proposal would not expand the availability of this option but it would redefine the "split sentence" to require service of "at least one month in prison" compared to the current requirement of "half the minimum Guideline range."

•The Advisory Committee would expand the current "50-50 split sentence" to 15 additional cells --those with Guideline minimums of 11 - 24 months in Criminal History Categories I - III.

New Substitutes for Imprisonment

•The Judicial Conference proposal would introduce no new sentencing options that could be used to substitute for imprisonment for all or a portion of the Guideline term.

•The Advisory Committee offers two new "substitutes" for imprisonment. These are intensive supervisions and public service work.

Intensive supervision would be comprised of supervision with a curfew, daily contact with the probation office, close monitoring of associations and finances, restricted travel, random drug testing (with the first positive resulting in immediate referral for education and treatment). Further, all employable offenders would pay a supervision fee to cover the cost of supervision based on their income.

Public service work is a condition of supervision that requires offenders to work without pay for public and not-for-profit agencies at work that is of value and of a kind that "assists the needs of the community." Specialized skills should be utilized if they meet such a need, but the work "should involve genuine work." Money donations and public speaking would be precluded.

•The Advisory Committee extracts from the current "home "detention" alternative a separate, more restrictive "Residential Incarceration" option.

Residential Incarceration is defined as continuous confinement in the home. It differs from Home Detention in that it does not allow for any "authorized absences."

Exchange Rates

•The Judicial Conference proposal would maintain the current "exchange rates" of 1 day of prison for 1 day of intermittent confinement, community confinement, and home detention (within which the stricter "residential incarceration" is included).

•The Advisory Committee recommendations set both exchange rates and maximum prison equivalents for all options, as follows:

	Ratio		Maximum Equivalent	
	Current	Proposed	Current	Proposed
-Intermittent Confinement	1:1	1:1	6 ms.	6 ms.
-Community Confinement	1:1	1:1	6 ms.	18 ms.
-Home Detention	1:1	2:1	6 ms.	12 ms.
-Residential Incarceration	1:1	1.5:1	6 ms.	8 ms.
-Public Service Work	-	12 hrs:1 day	-	3 ms.
-Intensive Supervision	-	3:1	-	4 ms.

Note particularly that, under the Advisory Committee proposal, it would now take 12 months of home detention to equate to 6 months of imprisonment.

Comparison of Proposals

On its face, the Advisory Committee's proposal appears more expansive because it would increase the types of substitutes for imprisonment and make them available to more offenders. However, the potential gain in flexibility from adding intensive supervision and public service work will be quite minor given the definitions, equivalency rates and maximum permissible

amounts, and would probably *not offset* the large loss in flexibility from changing the equivalency rate for home detention.

For example, judges may now impose probation with 6 months of home detention --the suggested maximum period of time for this option in the Commission's current application note -- as a substitute for 6 months imprisonment, the minimum Guideline range in all 21 cells for which the alternative is now available. Under the Advisory Committee proposal, this same sentence could be used to substitute for only 3 months of incarceration *satisfying the minimum Guideline ranges for only 11 of the cells* to which it is theoretically "available." The six-months equivalency could be obtained by adding 1,080 hours of public service to the 6 months of home detention (the current maximum number of community service hours recommended in the Probation Manual is 200), or adding 9 months of intensive supervision to follow home detention, or combining 6 month home detention with 6 months of intensive supervision plus 360 hours of public service work.

It is pushing the limits of *practical, enforceable* conditions to get the equivalent of 6 months of imprisonment from combinations of home detention, intensive supervision, and public service work. The potential availability of probation with various conditions to substitute for up to 18 months imprisonment as apparently allowed by the Advisory Committee's recommendations is, however, only theoretical unless one of those conditions is community confinement for 12 months. This is the costliest of the alternatives and a sanction whose availability varies from one jurisdiction to the next.

In addition, the Judicial Conference proposal's re-definition of the "split sentence" gives the court more flexibility in determining the appropriate mix of imprisonment and community alternatives. Under the Advisory Committee proposal, if probation with conditions is not imposed, the next step is imprisonment *for no less than half the minimum Guideline range.* Where that Guideline minimum is 18 months, this means that the court may impose either probation with conditions or nothing less than 9 months prison to be followed by supervised release with conditions. This is a break in the continuum of sanctions.

CHART 1
COMPARISON OF JUDICIAL CONFERENCE AND ADVISORY COMMITTEE RECOMMENDATIONS

Advisory Committee	Judicial Conference
Deal exclusively with substitutes for imprisonment.	Deal with relevant conduct, use of offender characteristics, and acceptance of responsibility as well as with substitutes for imprisonment.
Expand the availability of substitutes to offenders not currently eligible for some substitute.	Would not expand the availability of substitutes to offenders not currently eligible for some substitute.
Do not expand the availability of "straight probation."	Expand the availability of "straight probation" to two more cells.
Expand the availability of probation with conditions of intermittent confinement, community confinement, and home detention to 15 more cells.	Expand the availability of probation with conditions of intermittent confinement, community confinement, and home detention to 10 more cells (those that currently allow only the "50-50 split" sentence).
Expand the availability of the "50-50 split" sentence to 15 more cells. Maintains the current requirement that, to use a substitute in conjunction with some time in prison, at least half of the Guideline minimum must be served in prison.	Would not expand the availability of a split sentence, but eliminates the requirement that the prison portion of the split must be at least half of the Guideline minimum, substituting a requirement for at least one month of prison.
Reduce the equivalency ratio for home confinement from the current 1:1. Home detention (at home except for excused absences, including employment) would substitute for imprisonment at a ratio of 2:1 for a maximum of 24 months. "Residential incarceration" (continual confinement in the home) would substitute at a ratio of 1.5:1, for a maximum of 12 months.	Maintain the current 1:1 equivalency ratio for home detention (which would cover the more restrictive "residential incarceration," as well).
Expand the types of substitutes available to those currently and newly eligible for alternatives to include: •Intensive supervision at a ratio of 3:1 for a maximum of 12 months, equating to a 4 month substitute for imprisonment. •Public service work at a ratio of 12 hrs. to 1 day for a maximum of 1,080 hours, equating to a 3 month substitute for imprisonment.	Maintain the current list of substitutes (intermittent confinement, community confinement, and home detention).

TABLE 1: CURRENT GUIDELINE TABLE

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	1-7	2-8	4-10	8-14	12-18	15-21
B	8	2-8	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

KEY

A - Probation available
B - Probation with conditions of confinement available
C - "Half-and-Half split sentence" available

TABLE 2
JUDICIAL CONFERENCE PROPOSAL

	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	**0-6**	2-8	4-10	8-14	12-18	15-21
	8	**0-6**	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
B	10	6-12	8-14	10-16	15-21	21-27	24-30
&	11	8-14	10-16	12-18	18-24	24-30	27-33
C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
		⇩	⇩	⇩	⇩	⇩	⇩

TABLE 3
ADVISORY COMMITTEE PROPOSAL

	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	1-7	2-8	4-10	8-14	12-18	15-21
	8	2-8	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
C	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
		⇩	⇩	⇩	⇩	⇩	⇩

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
C 11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
A 3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1-7~~ 0-6	2–8	4–10	8–14	12–18	15–21
8	~~2-8~~ 0-6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
& 11	8–14	10–16	12–18	18–24	24–30	27–33
C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
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United States Court Of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
United States Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782

January 28, 1992

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

Re: Proposed 1992 Amendment to the Federal Sentencing Guidelines

Dear Billy:

I write to urge adoption of all of the recommendations of the Judicial Conference for amendments to the Sentencing Guidelines that are included in the 1992 Amendments. I am gratified that these proposals are in the "package" and fervently hope that they will become part of the Guidelines themselves.

Sincerely,

Edward R. Becker

ERB:pmk

cc: Hon. Julie E. Carnes
Hon. Helen G. Corrothers
Hon. Michael S. Gelacak
Hon. A. David Mazzone
Hon. Ilene H. Nagel
✓ John Steer, General Counsel

P.S. to John Steer:

I take the liberty of sending on two recent opinions (Parson and Yu) which contain suggestions to the Commission for guidelines amendment. I also enclose two other opinions (Kopp and Tsai) which contain detailed exegeses of guidelines issues; you may find them of interest.

Smolkin

#1

PREPARED STATEMENT OF FREDERIC N. SMALKIN,
UNITED STATES DISTRICT JUDGE, DISTRICT OF MARYLAND
RELATING TO PROPOSED 1992 AMENDMENTS TO THE SENTENCING GUIDELINES

Before addressing specifically the amendments proposed for the 1992 cycle, I should point out the general concern that I share with many of my colleagues, as well as attorneys and probation officers, over the Guideline amendment process. The amendments, in the span of just a few years, have become so numerous and voluminous that they must be contained in a separate volume of the Guidelines Manual. Many amendments pose ex post facto and other interpretative problems, and there is a feeling, especially among probation officers (who are the front line troops here), that the whole process of Guideline sentencing--tremendously complex to start with--has become practically unmanageable due to the frequency and volume of amendments. There is also a concern that the Guidelines increasingly will come to resemble the Internal Revenue Code, as interest groups, criminal justice professionals, and academics try to incorporate every one of their soi-disant good ideas into the Guidelines. Also, as a practical matter, we perceive that the courts of appeal are treating everything the Commission promulgates as black-letter law. This tendency also argues against larding up the Guidelines with more and more specific amendatory language. I realize that, on these points, I am not exactly preaching to the choir, but these things need to be said.

Turning to specific items on the 1992 agenda, I endorse the position of the Judicial Conference committee on criminal law

regarding the inadequacy of the current Guidelines scheme for dealing with first offenders who do not deserve incarcerative treatment. Option 6 of Amendment 29 appears to give the greatest flexibility in fully implementing the Congressional mandate (28 U.S.C. § 994(j)) that first offenders generally should not be sentenced to incarceration, unless they have committed an offense so serious as to warrant that treatment in lieu of other, less costly, and more effective, treatment.

I think almost all judges would agree that all parts of (A)-(D) of Amendment 33 should be adopted, to give them the flexibility to treat atypical cases appropriately within the departure discretion that Congress specifically reserved to the judiciary under the enabling act. The power of the courts of appeal to review departures for reasonableness should certainly keep the judges in line with the language of the Guidelines.

I believe that Option 3 of Amendment 23 appropriately encourages offenders to accept their responsibility, while mirroring the reality that acceptance of responsibility can and should have more manifestations than simply pleading guilty. The reality under the current scheme is that the acceptance of responsibility adjustment is treated as an automatic "discount" for pleading guilty, which is simply not appropriate. It is especially important to allow more than just 2 offense levels to be deducted for acceptance of responsibility in significant cases, given the tremendous societal costs of trial as opposed to guilty pleas.

The relevant conduct amendment, **Amendment** 1, is particularly troublesome, given the perceived tendency, pointed out above, of the courts of appeal to treat everything between the covers of the Guidelines manual as black-letter law. I think that pointless pettifogging litigation will be brought on by the greater detail of the proposed amendment language. Absent evidence that the current language as to relevant conduct has caused insurmountable problems in the field, it simply ought to be left alone.

There are two amendments not proposed by the Judicial Conference that I should like to address. First, **Amendment** 10, certainly is warranted from my personal experience in sentencing a pollution case. Although the cumulation in present sections 2Q1.2 and 1.3(b)(1) and (4) can be justified on the basis that acting in violation of a permit or not obtaining a permit is a separate affront to the sovereignty of the government from simply dumping pollutants, the current scheme does allow too much double-counting. I also support **Amendment** 5, to eliminate the "more than minimal" planning adjustment in section 2F1.1(2), which is the source of much pointless litigation.

The other major area, beyond the Judicial Conference recommendations, that I wish to address today is the question of adjustments for role in the offense, especially in drug cases. This is a matter of specific interest and concern to me, as I was among a number of judges in our District, including Chief Judge Black and Senior Judge Harvey, who met with the Commission's working group on drug offenses under Commissioner Carnes some time

ago to discuss these matters. Our sentiment then, as it is now, was that too many "fringe players" in drug conspiracy cases were being sentenced to very long periods of imprisonment, given that their sentences were driven in general by the scope of the overall conspiracy (as to drug quantity) of which they usually had considerable knowledge, often as girlfriends or spouses of major players. These people now have only the possibility of a small downward adjustment for their minimal or minor roles in the offense under § 3B1.2, unless they cooperate against their family members or others close to them. **Proposed Amendment 19, Option 2,** appears to be the simplest way to approach this problem without unnecessary drawing of fine lines, and without a major change in the concept of minimal and minor roles as they exist under the current Guidelines. I think most participants in the process realize that, given the breadth of the relevant conduct for which a drug conspirator can usually be held accountable, the current adjustment simply does not provide for fair and just differentiation among conspirators in proportion to their real culpability and need for long incarceration. Therefore, the second option of proposed **Amendment 19** is a sound one and ought to be adopted.

Thank you for hearing me out today.

Fed Defenders

[redacted]

Statement of

Henriette D. Hoffman
Attorney-in-Charge
Criminal Appeals Bureau
Federal Defender Services Unit
The Legal Aid Society
New York, New York

on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission
Washington, D.C.

February 25, 1992

My name is Henriette D. Hoffman and I am head of the Criminal Appeals Bureau of the Federal Defender Services Unit of The Legal Aid Society in New York. The Society's federal defender services unit provides representation for indigent federal defendants in the Southern and Eastern Districts of New York and in the Court of Appeals for the Second Circuit. I appear today to present the views of the Federal Public and Community Defenders.

There are presently 45 Federal Public and Community Defender Organizations in the United States. Federal Public and Community Defender Organizations operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. We appear before magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of defendants in federal court, providing legal representation to indigent criminal defendants in nearly 50 judicial districts, including all judicial districts with major urban areas. We represent persons charged with frequently-prosecuted federal crimes, like drug distribution, and with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with white-collar crimes, like bank fraud, and persons charged with street crimes, like first degree murder. Federal Public and Community Defenders have, in short, a great deal of experience with the guidelines. Based upon that experience, we are pleased to offer our comments on the proposed

amendments to the Federal Sentencing Guidelines Manual that the Commission has published in the Federal Register.

Relevant Conduct
(Amendment 1)

Amendment 1(A) would revise the relevant conduct rule of § 1B1.3(a)(1) to deal more specifically with jointly-undertaken criminal activity. The amendment would modify and move existing commentary into the guideline, where it more appropriately belongs. The amendment also would add new commentary clarifying the applicability of § 1B1.3(a)(1) to jointly-undertaken criminal activity. We support all of these changes.

Amendment 1(B) would add a new application note explaining the terms "common scheme or plan" and "same course of conduct," which are used in the relevant conduct rule of § 1B1.3(a)(2). We find the explanation to be helpful in understanding and differentiating the terms, and we support the amendment.

Cooperation Agreements
(Amendment 2)

Amendment 2(A)

Amendment 2(A) would revise application note 1 to indicate that a sentencing court can consider information disclosed by a defendant under a cooperation agreement when determining whether (and to what extent) to depart in response to a government motion under § 5K1.1. We oppose this amendment because it defeats the purpose of this guideline, which is to encourage defendants to cooperate with the government. A defendant who cooperates with the government, and provides information that is otherwise unknown to

the government, should be able to rely that the disclosure of that information will not result in a sentence that is longer than if the defendant had kept quiet.

Amendment 2(B)

Amendment 2(B) would revise § 1B1.8(a) to authorize cooperation agreements where the defendant's obligation is to provide information about the defendant's own unlawful activities. We support the change, which can only work to the benefit of both parties and the court.

Cooperation agreements in which the defendant is to provide information about his or her own activities will occur infrequently, and only when such an agreement is beneficial to the government. The government would be interested in such information only if the government believes that the defendant's information is very important and that there is no other practical way of getting the information in a timely manner. A defendant, however, is unlikely to disclose such information without an assurance that the information disclosed will not adversely affect the disposition of the case. We believe that the proposed change will accommodate the public interest in obtaining such information.

Juvenile Delinquents
(Amendment 3)

Amendment 3 proposes a new policy statement dealing with persons sentenced as juvenile delinquents. Juvenile cases arise infrequently in the federal system. They primarily involve native American children in Indian country, but occasionally involve

children of military personnel living on base. We are not aware of any substantial complaints from the native American community or the military community about how juveniles are treated in federal court.

If a juvenile is involved in a serious federal offense, that juvenile is treated as an adult and is subject to the guidelines. This is consistent with what the criminal justice system traditionally has done -- treat juveniles less harshly than adults, unless there is a finding of aggravating circumstances. The proposed policy statement would junk that approach.

The proposed policy statement, in effect, calls for the imposition of a guideline sentence,[1] and recommends (in proposed subsection (c)) that the sentencing court consider a sentence below the guideline range "to the extent that a juvenile delinquent's age and youthfulness, and lesser culpability associated with such age and youthfulness, distinguish the juvenile delinquent from an otherwise similarly situated adult defendant." Thus, the proposed policy statement would call for a juvenile who is treated as a juvenile to receive the same sentence as an adult. There may be reasons, peculiar to the federal system, for abandoning the traditional approach, but nothing in the "Reason for Amendment" suggests what those reasons are.

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[1]Although proposed subsection (a) of the new policy statement states that "the sentencing guidelines do not apply" to such persons, that proposed subsection also states that "the guidelines can provide an appropriate starting point for considering a sentence" for a juvenile delinquent.

Given the few juvenile cases that come before federal courts, the apparent lack of substantial complaints about the present system, and the radical proposal to abandon an approach that the criminal justice system over the years has found to be effective and consistent with public welfare, we recommend that the Commission study the matter further and not promulgate Amendment 3 at this time.

Criminal Sexual Abuse
(Amendment 4)

Amendment 4(A)

Amendment 4(A) would add cross-reference subsections to § 2A3.2 (criminal sexual abuse of a minor (statutory rape) or attempts to commit such acts) and § 2A3.4 (abusive sexual contact or attempt to commit abusive sexual contact). The proposal responds to "a review of cases sentenced under these guidelines [which] indicates that a significant proportion of cases sentenced under § 2A3.2 and § 2A3.4 clearly involved conduct that would more appropriately be covered under an offense guideline applicable to more serious sexual abuse cases."[2] We believe that the proposal is premature and that further study of the cases is necessary.

The vast majority of federal sex offense prosecutions involve native American defendants. Using data from the Administrative Office of the United States Courts, the Federal Public Defender for the District of New Mexico found, for example, that in the period

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[2]The review was conducted by the child sex offense working group, see P. Montgomery & M. Selick, Child Sex Offense Working Group Report (n.d.).

July 1, 1989 to June 30, 1990, 86% of all defendants prosecuted in federal court for rape, sex abuse, or child abuse were native Americans. Changes in the sexual abuse guidelines, therefore, will affect primarily native Americans.

Although there is a child sex offense working group report available, nothing in it indicates the extent to which cases were sentenced under § 2A3.2 and § 2A3.4 as the result of plea agreements. There are sound reasons why prosecutors will agree to a plea to a lesser offense, such as lack of medical evidence to support a claim of penetration or a complainant who, for whatever reason, does not want the prosecution to go forward.

Because the use of cross-references will increase the offense level, amendment 4(A) undoubtedly will result in fewer pleas, or in pleas to offenses covered by other guidelines in chapter 2, part A, subpart 2. We recommend that the Commission explore the matter further before acting.

Amendment 4(B)

Amendment 4(B) would make changes concerning official victims to three guidelines in chapter 2, part A, subpart 2. We support the amendment.

Theft and Fraud
(Amendments 5 and 6)

Amendments 5 and 6 propose changes in the theft and fraud guidelines.

Amendment 5 -- Theft and fraud loss tables

Amendment 5 would revise the loss tables for the larceny and

fraud guidelines, and eliminate the enhancements in those guidelines for more than minimal planning. We agree with the Commission that the more than minimal planning enhancement "has proven difficult to apply consistently in practice", and we support its deletion.

It is difficult to evaluate the various alternative loss tables set forth in Amendment 5. We do not know the considerations that led the Commission to establish the levels in the current tables, and we do not know the considerations behind each of the alternatives. It appears to us that the biggest problem with the loss tables is the proliferation of levels at low amounts -- i.e., the range in amounts at the lower end of the tables is too small. The result is that a relatively small loss yields too great an increase in the offense level. Of all the options set forth, we favor alternative table 1.

Amendment 6 -- Financial institution enhancement

Amendment 6 proposes to add an enhancement to the theft, bank and commercial bribery, and fraud guidelines that would increase the offense level four levels "if the offense affected a financial institution." This proposal is based upon a Justice Department recommendation and reflects the Justice Department's view that "Congress has sent what is clearly a strong signal that individuals whose criminal conduct jeopardizes the integrity of our nation's banking system should receive harsh sentences, including lengthy periods of incarceration."

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

We also disagree with the Justice Department's recommended enhancement, which would apply anytime a financial institution was "affected," whether the loss to the financial institution was $10,000 or $10,000,000. It seems clear that an individual who embezzles $10,000 from a bank does not "jeopardize[] the integrity of our nation's banking system." Congress, in enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the financial institutions provisions of the Crime Control Act of 1990, clearly was concerned with high level officials -- such as chief executives and controlling investors -- who caused substantial losses to the institutions that they directed or controlled.[3] Congressional attention was not directed at low- and

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[3]For example, Congress directed the Commission to "promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(m), 103 Stat. 501 (emphasis added). To comply with that

mid-level officials whose crimes involved relatively modest sums of money. Those persons are insured of spending some time in prison because financial institution offenses have 30 year maximums, and probation is precluded for such offenses.[4]

Drug Offenses
(Amendments 7 and 20)

Amendment 7 -- Offense levels and drug quantities

Amendment 7 is a request for comment upon a Justice Department proposal, brought forward late in this cycle's amendment process, "regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances, anabolic steroids, and Schedule I and II depressants, so that violations involving large quantities of these substances would result in higher offense levels."

The Justice Department has offered no evidence to suggest that there is any problem with the present guideline, which allows the sentencing court to depart upward for quantities significantly greater than the highest quantity accounted for in the Drug Quantity Table. We believe that it would be worthwhile for the Commission to study the feasibility and desirability of the Justice

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directive, the Commission added what is now subsection (b)((7)(A) of § 2B1.1. U.S.S.G. App. C, amend. 317.

Similarly, Congress in 1990 directed the Commission to act to make sure that the guidelines ensured that a defendant convicted of any of the above offenses receive an offense level under chapter 2 of not less than 24 "if the defendant derives more than $1,000,000 in gross receipts from the offense." Crime Control Act of 1990, Pub. L. No. 101-647, § 2507, 104 Stat. 4862 (§ 2507 is captioned "Increased Penalties in Major Bank Crime Cases").

[4]See 18 U.S.C. §§ 3561(a)(1), 3581(b).

Department's proposal. The maximum penalty for Schedule V controlled substances under 21 U.S.C. § 841(b)(3), for example, is one year (two years if the defendant has at least one other drug trafficking offense), so the need to increase the offense levels for Schedule V controlled substances is questionable.

Amendment 20 -- § 2D1.8

Amendment 20 sets forth three options for dealing with renting or managing a drug establishment (an offense under 21 U.S.C. § 856). Option 1 would delete § 2D1.8 and amend the Statutory Provisions Note to § 2D1.1 to indicate that that guideline covers offenses under 21 U.S.C. § 856.[5] Option 2 would amend § 2D1.8 to call for the use of (1) the offense level from § 2D1.1 applicable to the underlying drug offense, or (2) if the defendant's role was only to rent or allow use of the premises, four levels less than the offense level from § 2D1.1 but in no event more than 16. Option 3 would amend § 2D1.8 to require the use of the offense level from § 2D1.1 or 16, whichever is greater.

The present guideline can operate unfairly. A defendant whose house is involved with large quantities of drugs is treated the same as a defendant whose house is involved with only small quantities. At the same time, it should be recognized that the section 856 offense is often used for plea agreement purposes and that all of the proposed changes, to differing extents, would inhibit such plea agreements. Plea agreements do not benefit only

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[5]Presumably, the Statutory Index in Appendix A would also be amended at the entry for 21 U.S.C. § 856 to indicate that offenses under that provision are covered by § 2D1.1.

the defendant. Plea agreements work to the government's advantage -- to reward a cooperating defendant, or to ensure punishment when the government's evidence is weak, for example -- so it would seem advantageous to retain the plea agreement utility of the guideline.

Option 1 would effectively remove any plea agreement utility for 21 U.S.C. § 856. Option 3 continues the unfairness to defendants when small drug quantities are involved. We support option 2, which reduces the unfairness without completely rendering 21 U.S.C. § 856 useless for plea agreement purposes.

Tax Offenses
(Amendment 14)

Amendment 14 would amend the income tax guidelines to require a minimum offense level of 17 for tax violations that involve, or are related to, drug law violations. We oppose the amendment, which is based upon a Justice Department recommendation brought forward late in this cycle's amendment process.

The amendment seems to be an attempt to make the guideline a real offense guideline, but, unfortunately, goes beyond real offense and produces strange results. For example, a defendant commits a level 14 drug offense and evades the tax on the income from that offense. If the defendant is convicted of the drug offense, the defendant's offense level would be 14. If the defendant is convicted of tax evasion, however, the offense level would be at least 17. Thus, the punishment for the tax offense is greater than the punishment for the "real" offense.

International Terrorism
(Amendment 15)

Amendment 15 would add a new guideline to Chapter 3, Part A, that calls for a three-level increase if the offense was a felony "that involved, or was intended to promote international terrorism." The amendment is based upon a Justice Department recommendation brought forward late in the amendment process this cycle.

We oppose the amendment because there is no evidence that § 5K2.15 fails to deal adequately with such a circumstance. If Amendment 15 is promulgated, however, then § 5K2.15 would have to be deleted because there would no longer be a statutory basis for a departure.

Role in the Offense
(Amendments 16(B), 17, 18, and 19)

Amendment 19 -- § 2D1.1

In our view, the guidelines result in inappropriately high offense levels for persons who are minimal or minor participants in most offenses. The large number of drug cases, however, makes the role problem most acute with respect to drug offenses. The most direct way for the Commission to address the matter is set forth in option 1, and we support that proposal.

Option 1 would amend § 2D1.1 to provide a role adjustment based upon the type of controlled substance involved. Option 2 is similar but calls for a single reduction without regard to the controlled substance involved. Option 3 would provide a role adjustment but only for minimal role, and like option 2 calls for

a single reduction without regard to the controlled substance involved.

We see no reason to treat drug offenses differently from other offenses by eliminating the minor role adjustment in drug cases. We therefore oppose option 3.

Options 1 and 2 differ only in that option 1 bases the extent of the reduction on the type of controlled substance involved in the offense. We prefer option 1, which is more consistent with the way in which the offense level is determined under § 2D1.1.

Option 1 contains alternative ceilings on the offense level when there is a mitigating role adjustment. We favor an offense level of 16 in subdivision (3)(A), 20 in subdivision (3)(B), 22 in subdivision (4)(A), and 26 in subdivision (4)(B). The higher alternatives in those subdivisions appear to be driven by concern about defendants subject to mandatory minimums. An offense level of 26 for proposed subdivision (3)(A) would insure that the bottom of the guideline range is at least 60 months for a Category I offender who is a minimal participant. The higher levels in the other subdivisions follow from the offense level in proposed subdivision (3)(A).

It is unnecessary to provide specially for a defendant subject to a mandatory minimum because, as § 5G1.2(b) recognizes, the guidelines cannot override a statutory mandate. Thus, if the applicable range for a minimal or minor participant subject to a five year mandatory minimum is less than 60 months, the guideline sentence is 60 months. The effect of making a choice based upon

concern for defendants subject to a mandatory minimum is to raise the offense level of defendants not subject to a mandatory minimum. Choosing level 16 for proposed subdivision (3)(A) enables a court to impose an appropriate sentence upon a defendant not subject to a mandatory minimum, while not preventing the court from imposing the mandatory minimum on defendants subject to the mandatory minimum.

Amendment 16(B) -- §§ 3B1.1 and 3B1.2

Amendment 16(B) would revise the commentary to §§ 3B1.1 and 3B1.2 to indicate that a defendant, who is otherwise entitled to a reduction for minor or minimal role but who supervised a limited number of participants of equal or lesser role, should not receive an aggravating role enhancement. The commentary would indicate that defendant's supervisory activity should be accounted for in determining whether the defendant should receive a reduction for minor or minimal role. We support the amendment as consistent with appropriate guideline-application principles.

Amendment 17(A) -- §§ 3B1.1 and 3B1.4

Amendment 17(A) would delete § 3B1.4 and revise § 3B1.1 and the accompanying commentary. The amendment would clarify the text of § 3B1.1 and modify the definition of "participant" in application note 1 to state that undercover law enforcement personnel can be participants. The latter change reverses case law that the Commission expressly embraced last year.[6]

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[6]United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990). See U.S.S.G. App. C, amend. 414. See also United States v. Bierley, 922 F.2d 1061, 1065 (3d Cir. 1990); United States v. Fells, 920

We support the clarifying changes to the text of § 3B1.1 and oppose the amendment to application note 1. Including undercover law enforcement personnel as participants is inappropriate. The threat to society from a criminal enterprise penetrated by law enforcement is significantly less than the threat from a criminal enterprise that has not been so penetrated. In the former instance, law enforcement can act at any time to thwart the criminal enterprise from reaching its objectives, while in the latter instance law enforcement is virtually powerless until after the enterprise undertakes to accomplish its objectives. Sentencing policy should reflect the lesser threat.

Including undercover law enforcement personnel as participants enables law enforcement personnel to manipulate the guidelines to drive up the offense level artificially.[7] Guideline manipulation is a real problem, especially because federal law enforcement personnel are now being trained in guideline application and know, for example, that the quantity of drugs involved in a drug offense

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F.2d 1179, 1182 (4th Cir. 1990), cert. denied, 111 S.Ct. 2831 (1991); United States v. Scott, 757 F. Supp. 972, 977-78 (E.D. Wis. 1991).

[7]Amendment 17(A) recognizes that there is a risk of manipulation by amending the commentary to § 3B1.1 to indicate that "if an undercover agent were recruited to assist in transporting marihuana and that agent recruited three other undercover agents, only the first undercover agent would be counted as a participant." It is difficult to square that statement with another statement that Amendment 17(A) would add to the commentary -- "a participant ordinarily includes any person who plays the role of a participant, even if such person is not actually criminally responsible for the offense". The "Reason for Amendment" does not set forth a reason for counting the initial undercover officer but not any other undercover officer that the first recruits into the criminal activity.

is the main determinant of the offense level. The courts are beginning to address the problem,[8] but we believe that the Commission should not increase the opportunity for guideline manipulation.

Amendment 17(B) -- § 3B1.1

Amendment 17(B) would revise the commentary to § 3B1.1 to state expressly that the aggravating role adjustment applies only when the offense is committed by more than one participant. We support the amendment, which states what should be self-evident -- if you are going to organize, lead, manage, or supervise, there has to be someone who is organized, led, managed, or supervised.

Amendment 18(A) -- § 3B1.2

Amendment 18(A) would revise the text of and commentary to § 3B1.2. We support the amendment to the text of the guideline, which would delete an instruction to decrease the offense level by three levels "in cases falling between (a) [minimal participant] and (b) [minor participant]." Subsections (a) and (b) define contiguous sets, so there is no between into which to fall.

We support revising the commentary to § 3B1.2, although we find much of what is proposed to be unnecessary or inappropriate. We believe that the mitigating role adjustment should be based upon the defendant's conduct during the offense and any relevant conduct -- not upon how the defendant's conduct compares to the conduct of

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[8] See United States v. Lenfesty, 923 F.2d 1293, 1300 (8th Cir. 1991); United States v. Richardson, 925 F.2d 112, 117-18 (5th Cir.), cert. denied, 111 S.Ct. 2868 (1991); United States v. Salmon, 948 F.2d 776 (D.C. Cir. 1991).

the participants in an abstract "typical" offense. As proposed application note 6 indicates, the sentencing court must be able to assess the totality of the facts and circumstances, and no single factor should be dispositive.

We support proposed application note 1, which states that the mitigating role adjustment is applicable only if there is more than one participant in the criminal activity. That proposition follows from the relative nature of the test.

We believe that proposed application note 2, which would make specified factors determinative, is inappropriate. To begin with, possession of a dangerous weapon undoubtedly will increase the defendant's offense level, so using that factor to preclude a mitigating role adjustment is akin to double counting. There is no question that possession of a weapon and the other factors set forth in proposed application note 2 are appropriate considerations, but we do not believe that those factors should be dispositive.

We believe that the first option in proposed application note 3 (defendant is "plainly among the least culpable of the participants in the criminal activity") sets forth the appropriate test to determine if the defendant is entitled to a minimal role adjustment. We recommend deletion of all other bracketed language in the first paragraph of proposed application note 3.

The second paragraph of proposed application note 3 lists factors that must be present if the defendant is to qualify for a minor role adjustment. Even if the Commission were to decide to

make certain factors dispositive, the factors enumerated in proposed application note 3 should not be in that category. The requirement that the defendant have "no proprietary interest in the criminal activity," for example, would exclude a courier whose pay is a small portion of the drugs transported. The temporal factor -- the defendant "participated in the criminal activity . . . [[for no more than a short period of time]]" -- besides being vague (how long is "a short period of time"?), could exclude a minimal or minor participant simply because the criminal activity took too long to play itself out.

We believe, as noted above, that it is inappropriate to make any factor dispositive. We therefore suggest that the third paragraph simply list some factors that the sentencing court should consider in determining whether a defendant qualifies for an adjustment under § 3B1.2. If proposed application note 3 is so modified, proposed application note 4 would also have to be modified.

We support the first option in proposed application note 5 ("significantly less culpable than a defendant who carried out the same criminal activity without assistance") as the test to determine if the defendant is entitled to a minor role adjustment. We also support proposed application note 6 but recommend deletion of the last clause of the final sentence ("and the quantity of controlled substances with which the defendant was personally involved"). The test should be what the defendant did in relation

to the other participants, so the concern should not be with quantity but with percentage of the total quantity.

Finally, we support proposed application note 7, which indicates that for a controlled substance trafficking offense, the criminal activity for purposes of determining the defendant's role is the overall drug trafficking and "not merely the transportation of the controlled substance from one place to another." This standard is consistent with the Commission's relevant conduct approach to determining the offense level and sets forth the appropriate context in which to measure the relative role of the defendant.

Amendment 18(B) -- § 3B1.2

Amendment 18(B) would add new commentary to § 3B1.2, stating that the sentencing court can depart downward on the basis that "minimal participation exists to a degree not contemplated by the guidelines." We support the amendment, which simply points out authority that the sentencing court already has.

Under 18 U.S.C. § 3553(b), a sentencing court can depart if there is a factor present in the case that is of a kind, or is present to a degree, not adequately accounted for in the guidelines. Thus, a sentencing court has authority to depart downward for a defendant who has received an adjustment for minimal participation if the court concludes that the four-level reduction

called for by the adjustment does not adequately account for the insignificant role of the defendant.[9]

Reckless Endangerment During Flight (Amendment 21)

Amendment 21 but requests comment on whether the § 3C1.2 should be revised to incorporate a base offense level and enhancements "for physical injury, serious physical injury, or if death results."[10] We oppose the amendment because there is no evidence of a need to amend § 3C1.2.

Multiple Counts (Amendment 22)

Amendment 22 requests comment on the present structure of the multiple count rules. The amendment is based upon a Justice Department recommendation brought forward late in this cycle's amendment process.

There is no evidence that the present rules bring about inappropriate results. The examples cited by the Justice Department are not specific enough to enable meaningful evaluation, but it would appear that the applicable guideline range would, in each example, provide the sentencing court with the flexibility to account for the conduct that the Justice Department asserts is being overlooked.

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[9] See United States v. Restrepo, 936 F.2d. 661, 666-68 (2d Cir. 1991).

[10] Presumably the terms "physical injury" and "serious physical injury" would be replaced by the defined terms "bodily injury" and "serious bodily injury." See U.S.S.G. § 1B1.1, comment. (n.1(b), (j)).

This amendment illustrates a problem with coming forward with a proposal late in the amendment cycle. The issue upon which comment is sought is unfocussed and vague. Had the matter been brought forward earlier in the process, Commission staff could have reviewed it, given it the serious study it deserves, and produced concrete proposals that we and others could respond to in a meaningful way.

We find it almost impossible to respond to the request for comment because of the breadth of the issue. If the issue is narrow, the range of possibilities would be limited, and we could focus our comments on the paramount concerns. Where the issue is broad, however, there is a multitude of possibilities, making it almost impossible for us to focus on the major concerns. We recommend that the Commission pass over this amendment and seek comments on proposed amendments or more specifically-defined issues.

Acceptance of Responsibility
(Amendment 23)

Amendment 23 sets forth four options for revising the acceptance of responsibility guideline, § 3E1.1, which directs the sentencing court to reduce the defendant's offense level by two levels "if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." Commentary indicates that the defendant must accept responsibility for "the offense and related conduct", and the guideline itself indicates that the court can apply the guideline

whether the defendant pleaded guilty or nolo contendere or was convicted on a plea of not guilty.

Option 1 would amend § 3E1.1 to provide that the defendant must accept responsibility for the offense of conviction and relevant conduct. Option 2 would amend § 3E1.1 to increase the adjustment for acceptance of responsibility to three levels where the offense level "determined above" is 30 or more. Option 3 would amend § 3E1.1 to provide a two-level reduction if the defendant pleads guilty or truthfully admits involvement in the offense of conviction before adjudication of guilty. In addition, option 3 would amend § 3E1.1 to authorize a reduction of an additional level if the defendant takes additional steps, such as voluntarily paying restitution before adjudication of guilt. Option 4 would amend § 3E1.1 to provide a three-level reduction if the defendant "clearly demonstrates a recognition and affirmative acceptance of responsibility for his offense in a timely manner;" a two-level reduction if the defendant pleads guilty before the government opens its case; and a one-level reduction if the defendant pleads guilty after the government opens its case.

We believe that the acceptance of responsibility guideline should be revised. The data presented in the report of the acceptance of responsibility working group indicates that 12% of the defendants who plead guilty fail to receive a reduction for acceptance of responsibility.[11] In our view, that percentage is

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[11]S. Winarsky, D. Debold, R. McNeil, Acceptance of Responsibility Working Group Report 5 (Oct. 16, 1991).

far too high. What greater acceptance of responsibility is there than voluntarily to submit oneself to punishment? Only in extremely rare instances should a defendant who pleads guilty be denied acceptance of responsibility.

The two-level adjustment currently authorized by the guideline, in our judgment, is inadequate and does not insure a real reduction in sentence (because of the overlapping ranges in offense levels). A greater adjustment for acceptance of responsibility will not only insure a certain, though small, reduction in sentence, but will also reduce pressure to reach plea agreements that hide facts or are otherwise of a kind that the Commission would like to discourage.

We oppose option 1. Commentary to the guideline presently indicates that the defendant must accept responsibility for the offense of conviction and "related conduct." If the term "related conduct" is interpreted to be merely a variant of the term "relevant conduct," option 1 would do no more than restate the present rule. If the term "related conduct" is interpreted to be broader than "relevant conduct" -- a matter that the Commission has not addressed in the commentary -- then option 1 would narrow the present rule.

We believe that the appropriate standard is offense of conviction. That is, after all, what the defendant has been convicted of and is being sentenced for. We recommend that the Commission, in whatever amendment it may promulgate, include

language indicating that the defendant must accept responsibility for the offense of conviction.

We believe that the Commission should adopt a modified version of option 2. Option 2 as proposed would amend the guideline to provide a two-tier approach -- a two-level reduction below offense level 30, and a three-level reduction above offense level 30. We agree with the two-tier approach, but believe that the second tier should begin at a lower offense level. Offense level 30, for a category I offender, authorizes a guideline sentence of at least seven years and three months. We believe that the second tier should begin when the guideline range authorizes a sentence in excess of five years.

We also support a modified version of option 3. Option 3 provides for a two-level reduction if the defendant pleads guilty or nolo contendere before the opening of the government's case at trial or truthfully admits involvement in the offense of conviction before adjudication of guilt while going to trial to preserve issues not related to factual guilt (proposed subdivision (a)); a one-level reduction for full acceptance of responsibility accompanied by timely affirmative steps (proposed subdivision (b)); and a three-level reduction for pleading or truthfully admitting accompanied by timely affirmative steps (proposed subdivision (c)).

The difficulty with proposed subdivision (c) is that for probably the great majority of defendants, pleading guilty is the only thing they can do to manifest acceptance of responsibility. Indigent defendants cannot make timely restitution, and in drug

cases, the fruits and instrumentalities of the crime generally are seized at the time of the arrest. We believe that the factors for obtaining the additional level are more appropriately considered in determining whether the defendant has accepted responsibility, the theory behind proposed subdivision (b). Thus, we would increase the reduction called for by proposed subdivisions (a) and (b).

Proposed subdivision (b) lists factors that presently are set forth in the commentary to the guideline. We see no need to move those considerations to the text of the guideline.

In sum, we suggest that § 3E1.1 be amended to read as follows:

"(a) If the defendant --
(1) is convicted upon a plea of guilty or nolo contendere that is entered before the completion of the government's case-in-chief, or
(2) otherwise affirmatively accepts personal responsibility for the offense of conviction,
reduce the offense level as set forth in subsection (b) of this guideline.

"(b) The acceptance of responsibility reduction is 3 levels if the defendant's adjusted offense level is not greater than 23, and 4 levels otherwise.

Criminal History Score
(Amendments 24, 25, and 26)

The Commission has published three amendments (24, 25, and 26) to modify the guidelines pertaining to calculating the defendant's criminal history score. Any modification of these guidelines, in our judgment, should be related to what the criminal history score measures.

The criminal history score is not intended to, and does not, measure simply the extent of a defendant's criminal record.

Rather, the criminal history score is intended primarily to measure the likelihood of future criminal conduct.[12] Thus, certain prior convictions are not counted in determining the criminal history score -- stale convictions, foreign, tribal, and certain military convictions, and convictions for certain petty offenses -- and all sentences for more than 13 months receive three points, whether the conviction was for theft of a car or murder.

Similarly, criminal history points are assigned for other than prior convictions. Two points are added if the defendant committed the offense while "under any criminal justice sentence," and two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days.[13]

The criminal history score is based primarily upon the United States Parole Commission's salient factor score.[14] The Sentencing Commission, when it adopted the initial set of guidelines, believed that the criminal history score would be predictive of future criminal behavior,[15] and Commission data indicates that the

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[12]See U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

[13]Only one point is added for the latter factor if two points are added for the former.

[14]U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 43 (June 18, 1987).

[15]Id. ("the high correlation between the two instruments [criminal history score and the U.S. Parole Commission's salient factor score] suggests that the criminal history score will have significant predictive power").

Commission was correct in its belief.[16]

The rule that two points are added if the defendant committed the offense less than two years after release from imprisonment of 60 days or more is largely unrelated to the severity of the offense for which the defendant was serving the sentence. Unless the offense is minor (i.e., the defendant was sentenced to a term of less than 60 days imprisonment), two points are added whether the sentence was for tax evasion, for burglary, or for murder. This rule is based upon the premise that someone who commits an offense after recently undergoing punishment is more likely to offend again upon release.

The part of the definition of related cases that looks to whether the cases were consolidated for trial or sentencing also focusses upon the punishment experience. Cases that are consolidated will result in a single punishment. For purposes of prediction, if the previous sentence is imprisonment for 60 days or more, it does not matter whether the sentence is for one offense or three offenses consolidated for sentencing.

Amendment 24 -- § 4A1.1

Amendment 24 would revise § 4A1.1 to narrow the related case doctrine. We oppose the amendment.

Under present § 4A1.2(a)(2), the sentencing court must, for purposes of determining the defendant's criminal history score,

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[16] See U.S. Sentencing Comm'n Staff Working Document, Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990) ("the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior").

treat as one sentence "prior sentences imposed in related cases." Application note 3 to § 4A1.2 indicates that "cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." There is an exception to treating related cases as one. Under § 4A1.1(f), which took effect only last November 1, the sentencing court adds one point for each prior sentence for a crime of violence that did not receive any points under § 4A1.1(a), (b), or (c) because of the related case doctrine, unless the cases were considered related because the offenses occurred on the same occasion.

Even though subdivision (f) has been in effect less than four months, the Justice Department, late in this cycle's amendment process, recommended revising that provision. Amendment 24, which is based upon the Justice Department's recommendation, would expand § 4A1.1(f) to require the court to add one point for each prior sentence, or set of consolidated sentences, counted under § 4A1.1(a) for which the defendant actually served at least five years of imprisonment before initial release.

The Justice Department has presented no data indicating that the present rule results in sentences that are inadequate, probably because subdivision (f) is so new, and no data to indicate that its recommendation will improve the predictive power of the criminal history score. Absent any showing of need for the change, we oppose the amendment.

Amendment 25(A) -- § 4A1.2

Amendment 25(A) sets forth two options for modifying subdivisions (f) and (j) of § 4A1.2, the guideline that sets forth definitions and instructions for computing criminal history scores. We support option 2.

Subdivision (f) now provides that a disposition involving diversion from the criminal justice system without a finding of guilt is not counted in determining the criminal history score, but that a diversionary disposition involving a finding of guilt is counted (unless the diversion is from juvenile court). Subdivision (j) now provides that "sentences for expunged convictions are not counted" in determining the criminal history score. Application note 10 to § 4A1.2 indicates that while expunged convictions are not counted, convictions set aside or pardoned "for reasons unrelated to innocence or errors of law" are counted.

We believe that the present guideline works unfairly. A conviction that is "expunged" for a reason unrelated to the defendant's innocence or to a legal defect in the proceedings against the defendant, is not counted under the guideline. If, for such a reason, that conviction is "set aside" instead of "expunged," the conviction would be counted. Thus, the label used by a particular jurisdiction becomes dispositive, and because there are no uniform standards or terminology, the result can be disparate treatment of similarly situated defendants.

We believe that the Commission should eliminate this unfairness. We also believe, however, that the Commission should

minimize any intrusion upon state law policies. The federal government should not renege on a state's promise to wipe a defendant's record clean. We think that such an approach is not only required by sound principles of federalism, but also is compelled by fundamental notions of fairness.

Option 1 would revise subdivision (f) by deleting the reference to juvenile court and referring instead to offenses committed before the defendant's eighteenth birthday. Option 1 would amend subdivision (j) to require the court to count a sentence that has been set aside for reasons other than legal defect or innocence, unless the sentence was a juvenile sentence.

Option 2 would revise subdivision (f) to provide that a diversionary disposition (1) is counted if the instant offense was begun before the defendant had complied with all of the conditions of the diversionary disposition, or (2), as an alternative, is not counted at all. Option 2 sets forth three alternatives for amending the guideline to deal with an adult sentence that has been set aside for reasons other than legal defect or innocence -- (1) count the sentence if it contains a term of imprisonment of 60 days or more, (2) count the sentence if it contains a term of imprisonment of more than a year and a month, and (3) count the sentence if the defendant began the instant offense before the prior sentence was set aside. For juvenile sentences, option 2 provides two alternatives -- set aside sentences are not counted, or set aside sentences are not counted unless the instant offense was begun before the prior sentence was set aside.

In our judgment, option 2 provides a bright-line rule that brings greater fairness to the guideline. To give maximum deference to state-law policies, we support the second alternative for counting sentences set aside for reason other than innocence or legal defect (count the sentence if it contains a term of imprisonment of more than a year and a day). This will enable the counting of serious offenses where the conviction has been set aside or pardoned for reasons other than innocence or legal defect.

Amendment 25(B) -- § 4A1.2

Amendment 25(B) sets forth two options for amending § 4A1.2(e), which sets forth rules for determining whether a prior conviction is stale -- i.e., falls outside the applicable time period. The applicable time periods for adult offenses currrently are 15 years for sentences of 13 months or more and 10 years for other offenses. We oppose both options.

Option 1 would retain the present periods but extend them by excluding any period of time when a defendant was continuously imprisoned (with options for specifying what that period of time should be). Option 2 would call for the same extension and also revise the applicable time period to be 12 years for all adult convictions.

There is no evidence that these proposals respond to a real problem. As we indicated above, the criminal history score is not intended merely to measure the extent of a defendant's criminal record but rather primarily to measure the likelihood of future

criminal conduct.[17] There is no evidence to indicate that either option will enhance the predictive power of the criminal history score. Absent any showing of need for a change, we oppose the amendment.

Amendment 26 -- § 4A1.3

Amendment 26 proposes several revisions to the policy statement on criminal history departures (§ 4A1.3). That policy statement indicates that a departure may be appropriate if the defendant's criminal history category "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."

Amendment 26(A)

Amendment 26(A) sets forth two options for amending § 4A1.3 to address criminal-history based departures for defendants in criminal history category VI. Option 1 amends the policy statement to recommend that the sentencing court determine the extent of a criminal history departure from Category VI by extrapolation. Option 2 amends the policy statement to recommend that the sentencing court consider the nature of the prior offenses and, if a departure is warranted, that the court move down the sentencing table one level at a time to find the appropriate sentence.

Option 1 would result in a policy statement that is both vague and confusing. The policy statement as amended by option 1 would call for extrapolation but would not explain how the court is to

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[17] See U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

extrapolate. The policy statement would also direct the court, with regard to cases involving "unusually serious criminal history, or unusually high numbers of criminal history points," to extrapolate and then depart farther. Such a direction makes no sense if the extrapolation technique is the way in which to determine the appropriate extent of a departure. Option 2 is better drafted than option 1 and would provide better guidance to sentencing courts.

Given the relatively low rate of departure from Category VI -- 2.4%[18] -- we question the need for a revision. If the Commission wants to go forward, however, we recommend option 2.

Amendment 26(B)

Amendment 26(B) revises § 4A1.3 concerning the likelihood that the defendant will commit further crimes. We do not believe that the policy statement needs the extensive changes that Amendment 26(B) would make, and we do not believe that those changes will improve the policy statement. For example, proposed new subdivision (b) is captioned "Type of Risk," which suggests that the considerations in that subdivision look to the future. The text of the subdivision, however, looks backward, not forward.

Amendment 26(C)

Amendment 26(C) adds language to the policy statement stating that a criminal-history departure is "not warranted" for the career offender and armed career criminal guidelines. The amendment,

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[18] See n.31 infra.

which would overturn caselaw,[19] is based upon a Justice Department recommendation brought forward late in this cycle's amendment process.

We oppose the amendment because the new language is misleading and inaccurate. The sentencing court's authority to depart is statutory. The Commission cannot, as a matter of law, preclude a departure if there is a factor in the case that the Commission did not adequately consider when formulating the guidelines. Thus, if the court is applying § 4B1.1 and determines that criminal history category VI overstates the seriousness of the defendant's criminal history, the court has the legal authority to depart.

The legislative history of the career offender guideline indicates that Congress did not want to foreclose departures. The career offender mandate to the Commission in 28 U.S.C. § 994(h) began as a mandate to the sentencing court.[20] A mandate to the sentencing court, at that time, would have completely precluded a departure, and today would preclude a departure unless the government moves under 18 U.S.C. § 3553(e) for a departure because the defendant has substantially assisted authorities. Congress instead specifically decided to utilize the guidelines, knowing full well that a sentencing court could depart if there was a factor in the case that the guidelines did not adequate account for.

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[19] See United States v. Brown, 903 F.2d 540, 545 (8th Cir. 1990).

[20] See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. S-12870 (daily ed. Sept. 30, 1982).

Departures from the career offender guideline are due to the breadth of that guideline. The likelihood of such departures will be reduced to the extent that the Commission acts to narrow the career offender guideline.

Career Offenders
(Amendment 27)

Congress in the Sentencing Reform Act of 1984 directed the Commission to insure that career offenders receive a sentence "at or near the maximum term authorized for categories of defendants."[21] The Commission has interpreted this phrase to require the guidelines to provide a sentence at or near the statutory maximum.[22]

The severe penalties called for by the career offender guideline should be reserved only for those offenders with the most serious criminal records or else unwarranted disparity is created. The present career offender guideline, unfortunately, applies to

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[21]28 U.S.C. § 994(h) (enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2021).

[22]U.S.S.G. § 4B1.1, comment. (backg'd). This interpretation, however, makes the phrase "for categories of defendants" a nullity. An Eighth Circuit case, moreover, suggests that the Commission's interpretation is not correct. See United States v. R.L.C., 915, F.2d 320 (8th Cir. 1990), cert. granted, 111 S.Ct. 2850 (1991). The R.L.C. case involves an interpretation of the phrase "maximum term that would be authorized if the juvenile had been tried and convicted as an adult" in 18 U.S.C. § 5037(c)(1)(B). The Eighth Circuit rejected the government's argument that the phrase refers to the maximum prescribed by statute for the offense committed, holding instead that the phrase means the maximum term that the juvenile could have received under the guidelines had the juvenile been sentenced as an adult.

too many defendants to do an adequate job of selecting the most serious offenders for the most severe punishment.

The definition of "crime of violence" is so broad that the term includes offenses that are not serious enough to warrant application of the most severe penalties. For example, the offense of sending a threatening communication generally involves a mentally unstable defendant who poses very little risk of actual harm. That offense, however, is a "crime of violence" for purposes of the career offender guideline.[23]

The Commission, in amendment 27, has published several proposals to revise the career offender guideline.

Amendment 27(A) -- § 4B1.1

Amendment 27(A) sets forth two options to amend the commentary to § 4B1.1 to clarify the meaning of the term "offense statutory maximum." We support option 1.

Option 1 would amend application note 1 to indicate that the term refers to the maximum prison term before enhancement by a sentencing enhancement statute applied because the defendant has a prior conviction. Option 2 would amend that application note to indicate that the term refers to the maximum prison term after enhancement by such a statute.

We oppose option 2 because it will drive up offense levels and produce even higher guideline ranges than at present. There is no evidence to suggest that present levels of punishment under the

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[23] See United States v. Poff, 926 F.2d 588 (7th Cir. 1991) (18 U.S.C. § 871); United States v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990) (18 U.S.C. § 876).

career offender guideline are inadequate. Option 2, moreover, results in a double enhancement that is neither fair nor consistent with the structure of the guidelines. To use the same prior convictions to enhance the statutory maximum and to increase substantially both the offense level and the criminal history category, is a form of double counting.

Amendment 27(B) -- § 4B1.2

Amendment 27(B) would revise the definition of the term "prior felony conviction" in application note 3 to § 4B1.2. We support the amendment.

At present, application note 3 defines that term to mean a conviction for an offense punishable by imprisonment for more than one year. Amendment 27(B) would revise that definition to require that the offense be punishable by imprisonment for more than two years. The purpose of the amendment is to prevent less serious offenses from triggering the application of the career offender guideline.

We favor this amendment because the present definition can include (depending on the jurisdiction) an assault conviction stemming from a barroom altercation -- not of the same level of seriousness as armed robbery of a convenience store, for example. We also recommend that the definition require the offense to be punishable by imprisonment for more than five years in order to ensure that only to the most serious offenses will trigger application of the career offender guideline.

Amendment 27(C) -- § 4B1.2

Amendment 27(C) would revise § 4B1.2(3), which provides that the date when the judgment of conviction is entered is the date of conviction for purposes of the career offender guideline. Amendment 27(C) would overturn the result in a Fourth Circuit case[24] and revise § 4B1.2(3) to provide that the date of conviction is the date when the defendant's guilt is established. We oppose the amendment, which will only increase the likelihood that more people will go to prison for longer periods of time when we already have a prison system operating at 50% over capacity.

Neither a plea of guilty or nolo contendere, nor the jury's return of a guilty verdict, establishes the defendant's guilt as a matter of law. That occurs when the trial court enters a judgment of conviction. The plea can be withdrawn, for example, or the trial court may overturn the verdict because no reasonable jury could convict on the evidence that was presented. Until the judgment of conviction is entered, the trial court cannot impose sentence. We believe that the date when the defendant's legal status changes is the appropriate date to use.

Amendment 27(D) -- § 4B1.2

Amendment 27(D) asks for comments on whether "lesser" crimes of violence should receive special treatment under the career offender guideline. As noted above, Congress did not intend that "lesser" crimes of violence should lead to application of the career offender guideline. While adoption of Amendment 27(B) with

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[24]United States v. Bassil, 932 F.2d 342 (4th Cir. 1991).

our suggested revision will, to a considerable extent, minimize the problem, there are other approaches that the Commission can take to ensure that all lesser crimes of violence are excluded. For example, the Commission could amend § 4B1.2 to require that the defendant receive a term of imprisonment of more than a year and a month for the offense to qualify as a crime of violence. We would also recommend a similar requirement in the definition of "controlled substance offense".

Amendment 27(E) -- § 4B1.1

Amendment 27(E) seeks comments on whether the career offender guideline should be revised to provide that prior offenses that could have been consolidated for trial under Rule 8 of the Federal Rules of Criminal Procedure will be treated as one conviction. Rule 8(a) of the Federal Rules of Criminal Procedure permits the joinder of offenses that "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Such a change, by recognizing that the manner in which offenses are charged and tried should not control how those charges are treated for career offender guideline purposes, would help ensure that the career offender guideline is applied only to the most serious offenders. We believe that the change can be effectuated by adding the following new subdivision to § 4B1.2:

(4) For purposes of this guideline, treat felony convictions not separated by an intervening arrest that result in concurrent, consecutive, or overlapping sentences as one prior felony conviction.

Amendment 27(F) -- § 4B1.2

Amendment 27(F) requests comments on whether the career offender guideline should be modified to require that all convictions occur sequentially -- i.e., that conduct resulting in conviction for the second prior offense occur after the conviction for the first prior offense. Career offender enhancements are premised upon the theory that a defendant has not learned from punishment and is therefore deserving of harsher punishment if subsequently convicted of another offense. That theory applies only when the prior offenses occur sequentially -- when the defendant commits the second offense after being punished for the first offense. Sentence enhancement statutes based upon prior convictions, therefore, have traditionally required that the convictions occur sequentially. We believe that the career offender guideline also should require sequential convictions.

Alternatives
(Amendments 28(A) and 29)

A major problem with the guidelines is that they produce overly-harsh punishment for offenders in Criminal History Category I. The Commission, perhaps in recognition of this, has published several amendments specifically intended to ameliorate the treatment of such defendants.

There is, we believe, an urgent and compelling need for action. The federal prison system is seriously overcrowded. Federal prisons are presently at 150% of capacity.[25] The costs of the over-incarceration of Category I defendants -- both in human and financial terms -- greatly exceed any benefits to the public. We hope that the Commission will act to help ameliorate the overcrowding of federal prisons.

We recognize that sentencing courts presently have alternatives to imprisonment, and like others we are disturbed that those alternatives are not being utilized more frequently.[26] We do not think, however, that this justifies inaction. We believe that the use of alternatives will increase with training and education programs for judges, probation officers, and defense attorneys.

Amendment 29 -- Chapter 5, Parts A, B, and C

Amendment 29 sets forth six options for ameliorating the treatment of offenders in Category I and with low offense levels. We support options 1, 2, and 5, and we support option 3 with modifications.

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[25]U.S. Dep't of Justice, Fed. Prison System, Monday Morning Highlights (Feb. 17, 1992).

[26]The problem appears to be most acute in Zone B of the Sentencing Table, where some 53% of the defendants receive a sentence of imprisonment. P. Martin et al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 4 (Oct. 23, 1991). This is more than twice the percentage of defendants in Zone A who are sentenced to imprisonment (22.8%), see id. at Table 2. The percentage of defendants in Zone C who are sentenced to imprisonment is 75.4%, see id at Table 6.

We believe that the Commission should act to increase the number of defendants in Zones A, B, and C of the Sentencing Table. The best way to accomplish that -- the way most compatible with the structure and format of the guidelines -- is by revising the ranges in the Sentencing Table.

Options 3 and 4 would expand Zone A by adding additional offense levels to Zone A. Option 3 expands Zone A to offense levels 7 and 8, Category I, and option 4 expands Zone A to offense level 7, Category I, offense level 6, Category II, and offense level 5, Category III. We believe that option 3 is preferable because it focusses on persons with the least serious criminal history scores, but we suggest that option 3 be modified to expand Zone A to offense level 9, Category I.

The expansion of Zone A should have an impact upon an appreciable number of persons. Commission data indicates that option 3 would have added an additional 1,075 cases to Zone A in fiscal year 1990 and that option 3 modified as we suggest would have added another 387 cases.[27] Commission data also indicates that none of the cases added by option 3 modified as we suggest would have been homicide, kidnapping, drug, robbery, sex offense, or firearms cases.[28]

We believe that option 3 should be further modified to reduce the guideline ranges for Category I offenders at additional offense

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[27]P. Martin et al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 10.

[28]Id. at Table 11.

levels and to address a disproportional increase ("cliff") problem. Under option 3, offense level 8, Category I, has a range of 0-6, and offense level 9, Category I, has a range of 4-10. The present Sentencing Table does not jump from range 0-6 to range 4-10. Under Categories I, II, and III, for example, the transition is range 0-6, range 1-7, range 2-8, range 4-10. We recommend modification of other offense levels to avoid the cliff problem. The following is our recommendation:

Offense Level	Present Range	Recommended Range
7	1-7	0-6
8	2-8	0-6
9	4-10	0-6
10	6-12	2-8
11	8-14	4-10
12	10-16	6-12
13	12-18	9-15
14	15-21	10-16
15	18-24	14-20
16	21-27	18-24
17	24-30	22-28
18	27-33	26-32

Options 2 and 5 would expand Zones B and C respectively. We support both proposals. Option 2 would expand Zone B by amending § 5B1.1 to authorize probation with a confinement condition if the bottom of the guideline range is 10 months or less. This would expand Zone B by two offense levels under Categories I through IV and one offense level under Categories V and VI. We support this change, which is technical in nature, because there is little practical difference between a sentence of probation with a confinement condition and a split sentence. Defendants who option 2 makes eligible for probation with a confinement condition are presently eligible for a split sentence.

Option 5, however, would make a substantive change by authorizing a split sentence if the bottom of the guideline range is 12 months or less. This change would expand Zone C by one offense level at each Criminal History Category. Under option 5, Zone C would end at offense level 13, Category I. If the Commission adopts option 3 as we recommend, Zone C would end at offense level 14, Category I. Commission data indicates that had option 5 been in effect in fiscal year 1990, an additional 248 cases would have been in Zone C under Category I.[29] Expanding Zone C will not pick up large numbers of cases where the Commission is likely to think that a split sentence is inappropriate.[30]

Options 1 and 2 revise the prison component of the split sentence and probation with a condition of confinement, respectively. The options would reduce the prison component to one month. We support these changes.

Amendment 28(A) -- New Criminal History Category 0

Amendment 28(A) asks for comments on establishing a new Criminal History Category 0, and suggests that the category would cover defendants with no criminal record (as opposed to defendants

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[29]P. Martin et al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 10. Had both option 5 and our recommended version of option 3 been in place, another 493 cases would have been in Zone C. Id.

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

with no criminal history points). Amendment 28(A) also seeks comments about how to provide reduced sentences for Category 0 defendants.

We do not see any value in trying to distinguish between defendants with no criminal record and those in Category I. Defendants in Category I have a minor record -- i.e., any conviction is either stale or for an offense that is not serious. The present criminal history categories, moreover, are principally based on empirical studies on the likelihood of recidivism, and there is no empirical evidence that the recidivism rate of defendants in Category I would be different from the recidivism rate of defendants with no criminal record.

New Criminal History Category VII
(Amendment 28(B)

Amendment 28(B) requests comments on whether a new Criminal History Category VII should be established and, if so, what range of criminal history points the category should encompass. We oppose a new Category VII.

We believe that there is no need to add a new criminal history category, and the Commission's data does not indicate any need. When sentencing defendants in criminal history category VI, courts currently depart upward under § 4A1.3 very infrequently. Although the most recent criminal history working group report does not indicate the departure rate from Category VI for criminal history reasons, a previous report of the working group indicates that the

rate is 2.4%.[31] Adequacy of the criminal history category, moreover, seems to be only one of the reasons prompting the departure.[32] The data, therefore, does not support a conclusion that there is a need for a new criminal history category.

Finally, adding a new Criminal History Category VII will not enhance the predictive power of the criminal history score. The criminal history categories are based primarily upon predicting the likelihood of future criminal conduct,[33] and a Commission staff report concludes that "the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact,

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[31]J. Meyer, Report on Criminal History Categories "0" and "VII", at 3 (Nov. 20, 1990). The report indicated that out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 fell within criminal history category VI. Id. The report also indicated that there were 13 departures in a representative sample of one-fourth of the 35,000 cases. Id. The report does not indicate the reasons for the departures, but assuming that all of them were for criminal history reason, extrapolation yields 52 as the total number of departures for the entire 35,000; 52 is 2.4% of 2,141.

The earlier report speculated 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) was 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.

[32]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).

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

predict future criminal behavior."[34] There is no evidence that a new Category VII will enhance the predictive power of the criminal history score.

Substantial Assistance to Authorities (Amendment 34)

Amendment 34 would revise § 5K1.1 to remove the requirement of a government motion and to add that the sentencing court should give "substantial weight" to the government's "evaluation of the extent and value of the defendant's assistance." In addition, amendment 34 adds commentary to § 5K1.1 stating that "it is expected that the consideration of a downward departure will generally be based upon the motion of the government." We support the amendment.

The sentencing court must, to comply with 18 U.S.C. § 3553(a), consider the defendant's "history and characteristics" when imposing sentence. Section 5K1.1, however, purports to limit the sentencing court's consideration of one aspect of the defendant's history and characteristics -- whether the defendant has assisted law enforcement authorities -- by requiring a government motion before the court can depart. While 18 U.S.C. § 3553(e) requires a government motion before the court can impose a sentence below a minimum term required by statute, 28 U.S.C. § 994(n) does not mandate such a requirement when the departure is below the guideline range but not below a statutory minimum. Indeed, as

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[34]Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990).

Judge Clark as has pointed out

> there appears to be no logical reason why the prerequisite nature of a government motion under § 3553(e) should be mechanically transposed onto departures from the guidelines authorized pursuant to 28 U.S.C.A. § 994(n). It is far more logical to interpret § 3553(e) as an exception to the general rule set out in § 994(n).[35]

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

The available data suggests that the problem of fairness is more than theoretical. The § 5K1.1 departure rate nationwide is 7.5%,[36] but there is a great disparity among the circuits and among the districts. Thus, the § 5K1.1 departure rate is 2.4%, one-third the national average, in the District of Columbia Circuit.[37] The departure rate in the Third Circuit is 14.5%, six times the rate in the District of Columbia Circuit.[38] In a sample of ten districts selected by the Commission, the § 5K1.1 departure rate ranged from a low of 2.3% in the Western District of Texas to a high of 14.5% in the Eastern District of New York.

The Commission's study of mandatory minimum sentencing provisions, moreover, raises the possibility of racial

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[35]United States v. Chotas, 913 F.2d 897, 903 (11th Cir. 1990) (Clark, J. specially concurring in part and dissenting in part).

[36]U.S. Sentencing Comm'n, Annual Report 1990, at 80 (Table U).

[37]Id.

[38]Id.

discrimination in applications for § 5K1.1 departures. The Commission's data suggests that racial discrimination infects prosecutorial decision-making with regard to mandatory minimums and substantial assistance departures.[39] If racial discrimination is manifested in decisions about mandatory minimums, racial discrimination is likely to be manifested in decisions about § 5K1.1 departures.

Section 5K1.1 is a policy statement and therefore not binding upon the sentencing court, but for the most part courts have chosen to follow the Commission's recommendation. They have attempted to ameliorate the chance of unfairness by indicating that a government motion may not be necessary if the prosecutor acts in bad faith.[40]

A more direct way to deal with the concern for fairness is simply to recommend a departure if the defendant has substantially assisted authorities. Amendment 34 revises § 5K1.1 to state that the sentencing court should give substantial weight to the government's opinion about the extent and value of the defendant's assistance, something we would expect courts to do even in the

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[39]The substantial assistance departure rate for whites, where there was a five year mandatory minimum, was 19.9%. The rates for blacks and hispanics was 13,8% and 6.8%, respectively. Where the mandatory minimum was ten years, the substantial assistance departure rates were: whites, 25%; blacks, 18.3%; and hispanics, 11.8%. U.S. Sentencing Com'n, Mandatory Minimum Penalties in the Federal Criminal Justice System 81 (Tables 23A-23E, 24A-24E) (Aug. 1991).

[40] See United States v. LaGuardia, 902 F.2d 1010, 1017 (1st Cir. 1990); United States v. Justice, 877 F.2d 664, 668-69 (8th Cir.), cert. denied, 109 S.Ct. 3172 (1989); United States v. White, 869 F.2d 822, 828-29 (5th Cir.), cert. denied, 110 S.Ct. 374 (1989).

absence of that language. Section 5K1.1 as revised by amendment 34 will avoid needless litigation about whether the government is acting in bad faith and will focus the attention of the parties and the court upon the true issue -- did the defendant substantially assist law enforcement authorities.

Miscellaneous
(Amendment 36)

Amendment 36 would revise several guidelines and policy statements and accompanying commentary. We support the changes.

Interpretation of References to Other Offense Guidelines
(Amendment 37)

Amendment 37 asks for comments on whether § 1B1.5 or the commentary to that provision "should be amended to further clarify how the guidelines are to be applied when a Chapter Two offense guideline references another guideline." We find it difficult to respond in the absence of any concrete proposal or any indication of the nature of the clarification.

Concurrent and Consecutive Sentences
(Amendment 38)

Amendment 38 would amend § 5G1.3(b), which provides a rule for determining sentence when the rule of subdivision (a) of § 5G1.3 is inapplicable. The Federal Register indicates, in the "Reason for Amendment" section, that "the Commission has found a number of problems in implementation of the second prong of subsection

(f)."[41] Neither the nature nor the extent of the problems is set forth.

The Commission extensively revised § 5G1.3 effective November 1 of last year. We are unaware of the problems referred to in the Federal Register and suggest that further study of the matter would be desirable.

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[41]The reference to "subsection (f)" undoubtedly is a typographical error and should be to "subsection (b)."

Sulkey - ABA

AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

#5

STATEMENT OF

STEVEN SALKY, CHAIRPERSON
U.S. SENTENCING GUIDELINES COMMITTEE
CRIMINAL JUSTICE SECTION

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION

BEFORE THE
U.S. SENTENCING COMMISSION

CONCERNING THE PROPOSED
1992 AMENDMENTS TO THE SENTENCING GUIDELINES

WASHINGTON, D.C.
FEBRUARY 25, 1992

Mr. Chairman and members of the Commmission:

My name is Steven Salky. I appear today to testify on behalf of the 380,000 members of the American Bar Association in my capacity as Chairperson of the ABA's Committee on the United States Sentencing Guidelines. Our Committee, part of the Section of Criminal Justice, is made up of a cross-section of interested parties, including private defense attorneys, public defenders, Assistant United States Attorneys, attorneys from the Justice Department, academicians, and judges. I am pleased to have this opportunity to convey the ABA's views with respect to the proposed 1992 amendments to the federal sentencing guidelines.

As you know, we have testified before the Commission on numerous occasions concerning the process by which the Commission promulgates guideline amendments. Our position is informed to a significant extent by our Criminal Justice Standards, and in particular the Sentencing Standards (which, by the way, are undergoing revision). The Standards envision a guidelines process much like that contemplated by the Sentencing Reform Act -- whereby an administrative agency with particular expertise in the operation of the criminal justice system, and removed from the political process, can study and refine guidelines that serve the basic purposes of criminal sentencing: deterrence, incapacitation, just punishment, and rehabilitation. Thus, we have praised the Commission when its process has been deliberative and has been based upon a careful assessment of the need for guideline revisions,

including an evaluation of available empirical data. Likewise, we have not hesitated to criticize the Commission when its processes have been characterized by undue haste and the absence of a meaningful analysis of the reasons for amending particular guidelines.

The process by which many of this year's proposed amendments have been developed has much to praise. The Commission decided last year that particular matters deserved careful study and thereafter assigned various working groups to research the operation of the guidelines in these priority areas. We commend the Commission for establishing these working groups to study the acceptance of responsibility guideline, the criminal history guidelines, the drug offense guidelines, and other areas. Regardless of whether or not we agree with the conclusions reached by the working groups, we believe the Commission acts wisely when it amends the guidelines on the basis of staff recommendations, especially where the staff has analyzed the available data to determine the actual problems in guideline application. We very much appreciate having had the opportunity to provide input to several of the working groups and were particularly impressed by the quality of several of these reports.

The value of the working group process for generating amendments can de seen by reviewing The Acceptance of Responsibility Working Group Report. According to its report, the working group analyzed the raw data generated from the

case files submitted to the Commission after each guidelines sentencing and conducted an in-depth analysis of the files containing atypical cases. The working group further analyzed published opinions of the courts, reviewed available literature, and considered the input of defense practitioners, judges, probation officers and others. Only after considering the implications drawn from the raw data and only after considering the manner in which a guideline was used in the plea bargaining and sentencing processes, did the group draft proposed amendments. We believe this type of deliberative study is what Congress had in mind when it created the Commission. Thus, any amendment to Section 3E1.1 can now be based on current practice data and social science research.

To commend the Commission for establishing working groups to study an area before it considers amending guidelines is not to suggest that the Commission should never amend a guideline without a working group report. However, there should be a presumption against any substantive amendment that is not accompanied by some research and analysis that clearly justifies an alteration. We note that several proposed amendments would increase offense levels or provide greater enhancements for certain offenses without any justification and without any reference to any staff report. We suggest shelving any such proposals, regardless of the proponent, until the matter is studied by the Commission.

Before leaving the matter of "process," let me renew the suggestion that one of my predecessors, Sam Buffone, has raised with you in the past: the Commission should promulgate internal regulations to govern the guideline amendment process. The Commission is an expert administrative agency regulating a complex area of our society. Most federal agencies have adopted regulations governing their rulemaking activity. The Sentencing Reform Act envisions the same for this agency. For the Commission not to adopt a set of regulations for its rulemaking function is not only to leave its decisionmaking process open to legal challenge, but to limit its credibility within the criminal justice community.

The Commission's process for amending guidelines has shown progress as regards the public comment period. In 1990, we expressed our dismay at the very short comment period. This year, the Commission published its proposed amendments in early January, thus allowing interested parties such as the ABA approximately 45 days before the public hearing and 60 days before the end of the comment period in which to review and develop comments on the significance and desirability of the proposals. We continue to recommend that the Commission allow at least 90 days between publication and the end of the comment period. While the ABA had access to working group reports and monitored the development of certain amendments, not all interested parties had this luxury. In light of the importance of many of the proposed amendments, a 90 day

comment period will help involve others in the amendment process and further develop institutional credibility for the Commission.

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

rate of imprisonment may not be a basis to accept or reject a proposed amendment, it cannot continue to be ignored.

Lest my remarks be viewed as simply those of another disgruntled defense attorney, let me quote to you the words of Andrew L. Sonner, the Chairperson of the ABA Section of Criminal Justice, whose Report to the Members was published in the Winter, 1992, edition of the magazine Criminal Justice. Mr. Sonner, the highly respected States Attorney for Montgomery County, Maryland, commented on the remarks of experienced state and local prosecutors who have called for the development of new approaches to dealing with guilty criminals other than imprisonment. He said,

> "[T]here is a great deal of evidence to support their position. The costs of construction and maintenance of new jails drains precious resources from vital social programs that many believe prevent more crime than punishment does. . . . Most experts argue that there is no perceptible correlation between getting tough by imposing long sentences and reduced crime rates."

The ABA believes these comments apply equally to the federal system and point to the absurdity of regulating sentencing practices without any consideration of the effect on rates and length of imprisonment.

We are also concerned about the proposed amendments as a whole for another reason. While there are clearly areas within the guidelines for improvement, we are concerned that the Commission not over-amend the guidelines. One of the conclusions of the Report on Disparity referred to earlier is

that most private defense attorneys do not have an adequate understanding of the guidelines. One of the reasons is clearly the fact that each year the practitioner is faced not only with mastering the original set of guidelines, but with mastering an ever greater number of amendments. This does not mean the Commission should not react to real problems in guideline application. When I turn to our comments on specific proposals, you will note that we endorse many of the proposed clarifications and changes. The point we want to make, however, is that the Commission should avoid the tendency inherent in any highly regulated scheme (such as the Sentencing Guidelines) constantly to revise, simply for the sake of amending.

I have appended to this testimony our specific comments on the proposed amendments. While I will limit my remarks to just a few proposals, let me be up front about several concerns which inform those comments:

o First, several of the proposed amendments will increase the use of and length of incarceration. While this may or may not be warranted in a particular case, many proposed amendments contain no justification for this result and, indeed, appear to be based on the normative view of the proponent that more incarceration is always good. For instance, proposed amendment 6 would increase by four levels any offense graded under 2F1.1 that "affected a financial institution." While the purpose may be to punish officers convicted

of savings and loan fraud, the amendment would increase sentences for a much broader range of conduct, for which there does not appear any justification. If the argument is that fraud offense levels -- which were amended in 1989 -- are too low in the case of a significant class of offenders, the proponent has not put forth any evidence to support this claim. Consistent with the ABA Standards, we believe a heavy burden rests on the proponent of any amendment that seeks to further increase offense levels. Thus, we generally oppose any amendment that will increase punishment, but does not articulate some evidence, empirical or otherwise, to establish that the increase will enhance deterrence or the other purposes of sentencing.

o Second, several amendments appear to move specific guidelines away from "modified real offense" to "pure real offense" sentencing. Amendment no. 4, part A, Amendment no. 9, Amendment 20, Option 1 and 3, Amendment 36, Part (G) . and (P) all appear to eliminate any reference for purposes of sentencing to the charge of conviction. When the initial guidelines were promulgated, the Commission acknowledged the tension between real offense and charge offense sentencing and explained that it had resolved that tension by constructing a carefully balanced compromise between the two systems. In brief, those convicted of offenses involving more "fungible" items like money and drugs would be subject to real offense sentencing to minimize the dangers of prosecutorial manipula-

tion of sentencing. On the other hand, offenders convicted of offenses involving very discrete acts, like robbery and burglary, would be subject to charge offense sentencing. This balance between real offense and charge offense sentencing constitutes one of the bedrock policy choices of the initial guidelines. Several of our comments reflect our concern that on an ad hoc basis, the Commission is moving from its carefully considered "line" between real offense and charge offense sentencing without detailed public explanation based on available data.

Let me turn to our comments on proposed amendments. They are listed below in the order in which they appear in the Federal Register, but I will limit my remarks today to those proposals that we strongly endorse (numbers 1(A) and 1(B); 23; 29; and 34).

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1A and 1B. These amendments represent valuable clarifications of the critically important relevant conduct standard. In our judgment, the amendment makes it clear that the relevant conduct is not meant to be limitless - instead, courts must carefully evaluate the extent to which each defendant should be held accountable for the acts and omissions of others. This amendment helps clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were "in furtherance" of jointly undertaken activity and which were "reasonably foreseeable". Likewise, the terms "common scheme or plan" and "same course of conduct" are not without limits. The amendment gives judges some flexibility to tailor the offense level to the total amount of drugs or money for which each defendant should be held culpable, instead of sentencing all co-defendants to the same period. While some members of the ABA may have some minor language suggestions, the amendment is an admirable attempt to guide the courts in their interpretation of these terms. An important aspect of this is be that the Commission should indicate that the purpose of the amendment to be

clarification of the guideline and commentary. This should avoid judicial rulings that this is a substantive change that does not apply before the effective date.

2B. This is a useful amendment for several reasons. First, it will allow a defendant to clear his/her conscience, something the criminal justice system should encourage. Second, it will allow the government to solve many additional cases, as it will encourage defendants to admit to all their prior criminal conduct. For example, assume that a defendant has committed four bank robberies, but only one is known to the government. This amendment will encourage the defendant to report his involvement in the other three, allowing the government to close these cases. Because the guideline requires the government to agree that the self-incriminating information will not be used, it is difficult to perceive how this guideline amendment could be abused by defendants.

3. The ABA standards envision an entirely different model of sentencing juveniles from that used for adults. Indeed, the system is recognized as being so different that there are 24 corporate volumes of juvenile justice standards. The ABA believes that juveniles have very different needs than adults and that they should be treated differently. The emphasis should be, in large part, on treatment and rehabilitation -- issues that are not recognized in the guidelines. Further, the juvenile justice system must take into account a wide variety of individual characteristics. Again, this is contrary to the guidelines system. We oppose any introduction of sentencing guidelines into that system, especially without an extensive study of the effects this would have on the system.

4(A). This amendment moves the guideline in sexual abuse cases to a pure real offense guideline and is objectionable for the reasons we have already explained in our general testimony. Moreover, by this amendment, consent -- a classic issue for the jury in a criminal case -- is now left for adjudication at sentencing. This merely lowers the standards of proof and represents a dangerous precedent.

5. We agree that the "more than minimal planning" enhancement has not been applied consistently. We note that if the Commission promulgates this amendment, it may want to eliminate "more than minimal planning" from the other guidelines that are often cross-referenced. In addition, the elimination of "more than minimal planning" from these guidelines would avoid double-counting.

Additional Issues For Comment. All distinctions in offense levels based on the amount of loss are arbitrary at best. Given the arbitrariness of the distinctions in dollar

loss, we favor placing less emphasis on "loss" as a sentencing factor. Thus, Table 3 is the best of the proposed alternatives in our view.

6. We can find no justification for this amendment. What empirical basis is there for increasing the offense levels for these offenses? If the intent is to punish more severely the officers and/or directors of savings and loans who have been proven to have looted their institutions, the language is much too broad. Many offenses not committed by the "S and L bandits" can be said to "affect a financial institution." This is an example of a proposed amendment that appears to be motivated simply by the normative views of its proponent that the punishment is too lenient; there has not been any attempt made to demonstrate that the existing guidelines are ineffectual in accomplishing the purposes of sentencing in these cases.

7. Given the extent to which drug quantities are subject to inflation simply by virtue of statements made by the undercover agent, it is dangerous to simply increase the offense levels by the amount of drugs involved. There must be a better way to characterize those persons who have a significant role in larger drug operations and, at the same time, avoid casting a net that increases offense levels for persons who play a peripheral role in the drug operation. Again, this proposal increases sentences without any apparent reliance on the Commission's own study of the operation of the drug offense guidelines.

9. Option 1 moves this guideline to real offense sentencing without any explanation or support. While the current guideline contains a limited cross-reference, the amendment results in a complete elimination of the need for this guideline in the first instance. While there may be a sound rationale, there is no explanation for this and promulgating this amendment would be inappropriate.

11. Why is the Commission eliminating "more than minimal planning" in the fraud and larceny guideline because it has proven difficult to apply consistently and adding "more than minimal planning" here?

12. The ABA believes that this amendment needs to be reconsidered in its entirety. The proposed amendment will create further inconsistencies in sentencings for currency transaction reporting violations (31 U.S.C. § 5313, § 5322), importing and exporting of monetary instrument violations (31 U.S.C. § 5316, § 5322), and violations of the IRS cash reporting rules (26 U.S.C. § 6050I; 26 U.S.C. § 7203, § 7206(I)). As currently drafted, the failure to file a Form 8300, or the filing of a false Form 8300 will be treated as part of §

2S1.4, with a base offense level of 9. A failure to file a currency transaction report would have been a base level of 5 under § 2S1.3, and the filing of a fraudulent currency transaction report would have been a base level of 13 pursuant to § 2S1.3. Structuring transactions for purposes of avoiding the IRS cash reporting rules or the currency transaction reporting rule would be treated as a level 13 pursuant to § 2S1.3, but the structuring of an importing and exporting currency transaction would have been a base level 9 pursuant to § 2S1.3. The ABA can discern no rational difference for the differing treatments by and among these statutory provisions.

13. As initially proposed in 1987, the tax guidelines substantially increased the prison time for offenders convicted of criminal tax offenses. These guidelines were amended in 1989 and increased in prison terms again. Due to the delay in prosecuting tax crimes, offenses for the 1987 and 1988 years involving the first set of guidelines are just now emerging from investigation, while the second set of guidelines will not be construed or analyzed for at least another one to two years (when offenses relating to the 1989 year are first brought). Until the Commission has time to analyze empirical data resulting from the initial sets of tax guidelines, the ABA recommends that no new and drastic amendments to the tax guidelines occur. In particular, these guidelines raise issues of proportionality by treating misdemeanor and felony offenses on identical levels. They also create "rebuttable presumptions" which subject the guidelines to constitutional attack or otherwise may be ill-advised. We recommend that a working group be established to coordinate amendments to the tax and the money laundering guidelines during the next guideline cycle.

14. This is an amendment which again illustrates our concern that the Commission is moving in an ad hoc manner toward pure real offense sentencing. If this amendment is promulgated by the Commission, the government could charge and convict a defendant of tax evasion and, by simply introducing evidence at sentencing concerning drug involvement, set the minimum guideline sentence at level 17 -- a much higher level than might apply to the offense of conviction. The Commission has gone on record, based upon a convincing report, as being opposed to mandatory minimum sentences promulgated by Congress. To establish a mandatory minimum guideline sentence seems equally ill-advised, especially where the mandatory minimum guideline is based on conduct proven by a mere preponderance of evidence instead of beyond a reasonable doubt.

15. Given the presumably small number of cases to which this adjustment will apply, is this proposed amendment not better left to the court's authority to depart? Chapter Five already contains a suggestion for an upward departure for

terrorism. Furthermore, this amendment is inconsistent with the general intent of Chapter 3 adjustments, which are meant to apply across all offenses. This proposal is the type of over-amending that we commented upon earlier.

18(A). We do not understand the justification for eliminating the three-level adjustments. As for the amendments to the Commentary, this is one of the few amendments for which the format obscures the proposal. However, to the extent we understand what is being proposed, we are concerned that the amendment tries to specify every circumstance possible for mitigating role and limits the application in non-drug cases to too many factors. We resist the idea that to qualify for a minimal role adjustment, a defendant must prove all five factors listed in Note 3. We would prefer leaving the courts some discretion in the area of applying Chapter 3 role adjustments. (We note that these amendments are for the most part directed to drug cases. Might not it be better to propose these amendments to Section 2B1.1?)

Issues for comment:

(1) The assessment of mitigating role should be in the context of the typical defendant. A mandate of the Sentencing Reform Act was to eliminate unwarranted disparity in all federal courts, not simply disparity between co-defendants.

(2) As for function-based role adjustments, we have long favored substantial adjustments based upon a defendant's role. We do not believe, however, that function labels should be determinative. Rather than always applying a reduction or always denying a reduction on the basis of a defendant's function, we favor specifying factors that a court should consider when determining whether to give a defendant a mitigating role adjustment.

(3) We agree with the concept, but not the example. Why is someone who merely transports (a welfare mother who gets paid $200 for delivering a suitcase) not entitled to a minimal role adjustment?

18(B). The court always had the power to depart on this basis. However, this language is helpful insofar as it makes clear that where the amount of money or drugs involved bears little relation to the defendant's role, a departure is warranted. We would suggest the Commission substitute "is" for "may be."

19. The ABA has previously endorsed the concept of capping the offense levels for minor and minimal participants in quantity based guidelines such as 2D1.1. As before, we

again decline to comment on the issue of the appropriate offense level cap.

Issues for comment:

1(a). The same offense level caps should not apply to minimal and minor role offenders. Rather, the caps should be lower for minimal role, in accordance with the present definitions.

1(b). The Congress has already made distinctions between illegal substances for purposes of sentencing by adopting schedules for all illegal substances. Why not determine offense level caps by schedule?

2. The cap should limit the offense level, not the sentence, consistent with the operation of the guidelines generally. Were it otherwise, how would a court apply other adjustments such as "acceptance?" Moreover, if stated in months, the same sentence cap would apply regardless of criminal history. This produces an unwise result.

3. The "cap" concept counters the impact of quantity. The role adjustments generally are not tied to quantity. For both reasons, the cap should not be tied to quantity.

4. Mandatory minimums sentencing statutes "trump" the guidelines in any event. The caps should be set without reference to mandatories. The caps should, however, not apply if 2D1.1 (a)(1) or (a)(2) apply.

20. Option 2 is the option most likely to result in treating similarly situated offenders similarly. It recognizes that violations of the statute can involve different amounts of different substances and that the role of the defendant may be very different.

21. Issue for Comment. We have no basis to know whether or not Section 3C1.2 adequately accounts for the full range of behavior to which it is applicable. For this very reason, how can anyone endorse the options presented? Indeed, as we have noted earlier, we suggest that the Commission review the data and review determine how courts have applied the guideline before it engages in amending it.

22. Again, is there evidence that the guideline is creating anomalous results? In the absence of such evidence, there is grave danger in amending this guideline. In the first place, it is already complex and beyond the understanding of many practitioners. Second, by each amendment, the Commission creates an issue regarding the application of ex

post facto principles to the application of the amended guideline. Absent sufficient evidence, the Commission should not over-amend.

23. Accepting responsibility for the offense of conviction ought to be worth two levels and there is much in the working group report that supports the need for a "bright line" rule. However, we endorse the concept incorporated into several proposed options that the acceptance reduction not be limited to two levels. The amount of further reduction should not depend on only one factor, such as the severity of offense level. Rather, we can envision a guideline that would allow courts to grant an additional level (or levels) reduction depending on multiple factors, which may include the offense level involved, the acceptance of responsibility for all relevant conduct, other demonstrations of acceptance. In other words, the acceptance of responsibility guideline should "guarantee" every defendant who pleads guilty before trial a two level reduction, but authorize larger deductions where the court is satisfied that other signs of genuine remorse was present. Our approach represents a combination of Options 3 and 4 of the proposed options.

26A. Structured departures for criminal history scores greater than Category VI are appropriate. Commission guidance is useful because the disparity created by departures at this level can be significant. Option 2 appears to be appropriate.

26B. The clarification appears to be appropriate for the reasons stated in the 1990 Recommendations of the Judicial Conference of the United States.

26C. A departure by definition is based upon a finding by the court that the guidelines are inapplicable. While downward departures may be rare in those cases in which the Career Offender or Armed Career Criminal guidelines apply, we do not think it is wise for the Commission to rewrite the Sentencing Reform Act on the court's departure authority.

28A. A zero category would have the tendency to favor white-collar offenders. Similarly, there is potential for abuse in such a category: is a prior arrest of a peaceful demonstrator a basis to deny zero category treatment? Instead of a zero category, should not the Commission simply expand the categories of offenders for whom alternatives to incarceration are available?

28B. We are in favor of structured departures, instead of a new category VII. However, this proposal is not supported by the data collected by the working group and should be shelved for that reason alone.

29. Making sentencing options available to a greater number of defendants is the single most important issue before the Commission. There is currently very little flexibility in the sentencing options available at the lower end of the guidelines table. The table presumes the imposition of a sentence of imprisonment for almost all but the most minor offenders. The current table is clearly sending many more first offenders to prison than was the case prior to the adoption of the guidelines.

Importantly, the initial guidelines table failed to follow the clear statutory directive of the Sentencing Reform Act. That Act, specifically 24 U.S.C. § 994(j), provided that the guidelines should reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or otherwise serious offense. Far from compromising the structure of the guidelines, adopting the amendment options proposed will do much to bring the guideline back into sync with this Congressional directive.

In particular, we urge the adoption of Option 2, Option 3, and Option 5. These options should be adopted without limitation as to their application by offense. While white collar offenders may benefit more than blue collar offenders by these amendments, most offenders will still serve some limited period of imprisonment even under these amendments.

The Report on Alternatives to Incarceration provides compelling evidence that the guidelines have resulted in the overuse of imprisonment.

As for the additional issues for comment:

31. We have previously criticized the Commission's promulgation of the "cost of imprisonment" fine and urge its elimination.

33A. We endorse this proposal for the reasons stated in the 1990 recommendations of the Judicial Conference of the United States. The Senate Report to the Sentencing Reform Act contains substantial justification for this amendment.

33B. We endorse this proposal for the reasons stated in the 1990 recommendations of the Judicial Conference of the United States. The Senate Report to the Sentencing Reform Act contains substantial justification for this amendment.

33C. The Commission should worry less about providing guidance for departures and more about eliminating barriers to departures it has erected.

33D. For the reasons that amendment 33(B) is appropriate, this amendment is inappropriate.

34. We have long endorsed this amendment.

35A. This amendment is helpful, as far as it goes. The Commission should go further by either requiring the government to disclose this information prior to execution of the plea agreement or press for an amendment to Fed. R. Crim. P. 16 to accomplish this.

35B and C. It is appropriate that conduct dismissed as part of a plea agreement may nevertheless be considered at sentencing. This is consistent with the modified real offense system originally developed by the Commission. However, acquitted conduct should be disregarded for all purposes as a matter of fairness or the appearance of fairness.

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COMMENTS REGARDING PROPOSED AMENDMENTS TO SENTENCING GUIDELINES

The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense attorneys. In the pages that follow, we address a number of proposed amendments of interest to our organization.

At the outset, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. We would also like to acknowledge our familiarity with and high regard for the work performed by the Judicial Conference, which recommended a number of the proposed amendments endorsed by our organization.

Proposed Amendment 29: § 5C1.1 - Imprisonment and Alternatives to Imprisonment

We support this amendment, which consists of six options that, individually and in combination, redefine the "split sentence" and enlarge the number of defendants eligible for an increased number of alternatives to imprisonment.

In formulating its position on these options, the NYCDL sought the views of judges sitting in the Southern and Eastern Districts of New York. Twenty-one judges responded to questionnaires posing fifteen questions, which addressed the components of the six options regarding alternative sentencing. A great majority of the judges were in favor of the Commission (1) increasing the flexibility available to sentencing judges at the lower guideline ranges, particularly with regard to non-imprisonment options for less serious first offenders; (2) expanding the menu of options available to judges at sentencing to include additional alternatives to imprisonment; and (3) enlarging the pool of offenders eligible for alternatives.

As we stated during our appearance at the Commission's meeting on December 12, 1991, we strongly endorse Option 1 of the proposed amendment, which redefines the "split sentence" to require service of at least one month of incarceration rather than the current requirement of at least one-half of the minimum term. This option would implement Judicial Conference Recommendation 1 and is supported by the Staff Working Group. Such a change would enable sentencing judges to fashion sentences that more closely approximate the often used pre-Guideline "split sentence" alternative.

We likewise support Option 4, which amends the Guideline ranges to permit straight probation at three additional levels (currently 1-7 months in Criminal History Categories I-III). We see no reason why judges should not have this increased flexibility in sentencing first offenders.

We also support Option 5, which expands the availability of split sentences to Guideline ranges with a minimum of twelve months or less rather than the current range of ten months or less. This amendment would expand Zone C Guideline ranges to provide one additional level (six cells at 12-18 months) at which a split sentence is available. Judges should have this option available to them.

Accordingly, the NYCDL recommends that the Commission adopt Option 6, which incorporates Options 1, 4, and 5. We feel that this combination of options, which represents the consensus recommendation of the Staff Working Group, would not compromise the structure or purpose of the Guidelines and would give sentencing judges flexibility without inviting undue disparity in the sentences imposed.

The NYCDL also supports the adoption of additional programs that might be utilized by sentencing judges as alternative sentences to incarceration. In our survey, a majority of judges responded favorably to specific questions regarding the availability at sentencing of additional alternative programs such as "residential incarceration" (24

hour restriction to the residence), day reporting centers (reporting to a day facility with restriction to the residence at night), public service, or boot camp (shock incarceration). Programs such as these would expand the range of reasonable and appropriate alternatives to incarceration now available to sentencing judges.

Moreover, we believe that the alternatives to imprisonment should apply to all defendants at the offense levels specified. We urge the Commission to eschew an offense-by-offense approach that might, for example, exclude white collar offenders. Such an approach would hardly serve to provide certainty and fairness by avoiding unwarranted disparity -- goals that the Guidelines are purportedly designed to realize.

Proposed Amendment 23: Chapter Three, Part E - Acceptance of Responsibility

Proposed Amendment 23 contains four alternative modifications of § 3E1.1, the Guideline that governs the "credit" (i.e., reduction in offense level) to be afforded a defendant who accepts responsibility. The NYCDL strongly endorses the two similar approaches embodied in Options 3 and 4, which contemplate varying degrees of reduction, depending upon the presence of different factors that demonstrate acceptance of responsibility. Option 2, which provides for a greater (i.e., three- rather than two-level) reduction if the offense level is 30 or above, is, in our view, not as

attractive as Options 3 and 4 but is preferable to the current version of § 3E1.1, which allows only a two-level reduction. Finally, we strongly oppose Option 1, which would deny any sentencing reduction under § 3E1.1 unless the defendant accepts responsibility for relevant conduct as well as for the offense of conviction.

As the Commission noted in the Background comments to § 3E1.1, "[t]he reduction of offense level provided by this section recognizes legitimate societal interests." Courts have long acknowledged that the first step along the road to rehabilitation involves a recognition and affirmative acceptance of personal responsibility, and that therefore a defendant who takes such a step may appropriately be rewarded with a lower sentence than one who has not accepted responsibility. Also underlying § 3E1.1 are important practical considerations: society has a legitimate interest in creating incentives to guilty pleas, without which our already overburdened criminal justice system could not function. Accordingly, our analysis of the proposed amendments to § 3E1.1 is premised on the notion that the Guideline should be drafted in such a way as to maximize these important societal interests.

Option 1, which denies any credit at all unless the defendant also accepts responsibility for relevant conduct, would undermine society's interest in encouraging guilty pleas. A defendant wishing to obtain a reduction may be

willing to admit to all the elements of the crime charged -- all that is required to constitute a legally sufficient guilty plea. However, the same defendant may be understandably reluctant to admit to all the relevant conduct alleged by the government; as noted by the Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States, in order to accept responsibility for related conduct, a defendant might have to acknowledge wrongful conduct that would automatically raise his offense level and more than offset the two-level reduction under § 3E1.1. Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines (1991) (hereinafter "Judicial Conf. Rep."), Appendix p. 10. In these not unusual circumstances, the defendant would have little or no incentive to plead guilty. Thus, Option 1 would exacerbate the currently existing problem identified by the Judicial Conference: "The two-level reduction [in § 3E1.1] is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels." Judicial Conf. Rep., at App. 10.

Accordingly, we urge the Commission to reject Option 1. That is not to say that a defendant's willingness to accept responsibility for relevant conduct should be disregarded; rather, we believe that a defendant who not only pleads guilty, but also admits to his involvement in relevant

conduct, has demonstrated a degree of acceptance of responsibility that may warrant a reduction greater than two points.

This is the approach embodied in Options 3 and 4, which we urge the Commission to adopt in one form or another. Though structurally different, both options would afford an automatic two-level reduction to a defendant who enters a plea of guilty (or nolo contendere) prior to the opening of the government's case at trial. The certainty of this two-level reduction would enhance whatever incentive to plead guilty currently exists.

Equally important, Options 3 and 4 follow the suggestion of the Judicial Conference that the Guidelines "utiliz[e] a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance." Id. at App. 11. Specifically, Options 3 and 4 grant an additional one-level reduction for other forms of acceptance (such as voluntary restitution, surrender, or assistance to the authorities), and thereby enable a defendant to obtain a reduction of up to three levels. These proposals therefore "recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty." Id. We believe that § 3E1.1 ought to perform this function, and we therefore embrace the approach taken in

Options 3 and 4.[1] Notably, nearly every judge in the Southern and Eastern Districts of New York who responded to a questionnaire distributed by the NYCDL favored a sliding-scale approach to acceptance of responsibility.

With respect to Option 2, the only effective change would be to increase the § 3E1.1 reduction from two to three levels where the offense level is 30 or above. The Judicial Conference recommended that "greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial." Judicial Conf. Rep. at App. 10-11. While we agree with the foregoing rationale, we prefer an amendment that provides a sliding scale based on the presence of different factors demonstra- ting acceptance of responsibility -- i.e., Options 3 and 4. Defendants with high offense levels, like all defendants, would be able to qualify for a three-level reduction in certain circumstances. If a greater incentive to plead guilty is needed at the higher levels, the Option 2 approach could be incorporated into Option 3 or 4 by

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[1] Ideally, we would like to see a combination of the two options, which have slightly different features. Option 8 would provide for a one-level reduction where the defendant pleads guilty after the opening of the government's case at trial; without this provision, a defendant would have no incentive to change his plea once the government's case has opened. On the other hand, Option 6 provides a one-level reduction for a defendant who goes to trial and affirmatively demonstrates his acceptance of responsibility after verdict. We believe that each of these features provides useful incentives that should be incorporated into an amended § 3E1.1.

affording defendants at the higher levels an additional one-level reduction beyond the reduction they would otherwise receive.

Amendment 34: § 5K1.1 - Substantial Assistance to Authorities

We wholeheartedly support this proposed amendment to § 5K1.1, which would eliminate the requirement of a government motion as a condition precedent to a downward departure based on the defendant's substantial assistance to the authorities. While we agree that the government's evaluation of the extent and value of the defendant's assistance is entitled to deference by the court, we do not believe that judicial consideration of the appropriateness of a downward departure for cooperation should be foreclosed unless the government consents -- the situation that in effect exists under the current version of § 5K1.1. For this reason, in connection with the 1991 amendment cycle, we supported a proposed amendment to the provision and urged the Commission, in a letter dated August 28, 1991, to revisit the issue in 1992.

As we have stated in our previous testimony and submissions, the requirement now embodied in § 5K1.1 enables the government in most cases to foreclose entirely the court's consideration of the appropriateness of a downward departure on the basis of a factor generally agreed to be highly pertinent to the sentencing decision: the defendant's

cooperation with the authorities. Although some judicial decisions have dispensed with the need for a government motion in the rare case in which the government is found to have acted in bad faith, this limited exception is, in our view, unduly narrow, in that it precludes the sentencing court from considering the propriety of a downward departure where the government unreasonably declines to make the requisite motion, but where no claim is made that the government acted in bad faith. Thus, as presently written and interpreted, § 5K1.1 invites defense challenges to the bona fides of the government, but leaves without any redress those defendants who seek to litigate only the reasonableness of the government's position. In our view, the interests of justice are not served by so circumscribing the court's authority to grant downward departures under § 5K1.1.

The proposed amendment would rectify this situation by eliminating the requirement of a government motion and replacing it with a requirement of a judicial finding that the defendant has provided substantial assistance. The proposed amendment also anticipates, and takes into account, the argument most often advanced in support of the government-motion requirement -- i.e., that "the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance . . . ." United States v. White, 869 F.2d 822, 829 (5th Cir. 1989). The proposed amendment expressly

acknowledges the special role of the government in making assessments of this nature: it elevates into the § 5K1.1 Policy Statement the admonition presently contained in the Commentary, directing the court to give "substantial weight . . . to the government's evaluation of the extent and value of the defendant's assistance . . . ." Moreover, proposed new Commentary specifically provides that a downward departure "generally" will be based on a government motion. Accordingly, even under the proposed amendment to § 5K1.1, the government's opinion as to the value of the defendant's cooperation would continue to be afforded substantial deference, and a sentencing court would presumably decline to grant a downward departure over the government's objection, unless the government took a plainly unreasonable position.

In short, as presently drafted, § 5K1.1 goes beyond merely affording the government a reasonable degree of deference, and instead enables the government to preclude judicial consideration of a downward departure absent a showing of bad faith. The NYCDL strongly embraces Proposed Amendment 34, which would drop the government motion requirement, except for departures below statutorily mandated minimum sentences.

Proposed Amendments 2(A) and 2(B):
§ 1B1.8 - Use of Certain Information

Two amendments have been proposed with respect to § 1B1.8, which relates to the use of incriminating information pursuant to an agreement with the government. The first amendment clarifies the operation of the Guideline and further details the Commission's policy that a cooperating defendant not be penalized as a result of having provided incriminating information pursuant to an agreement with the government. The second amendment would broaden § 1B1.8 to apply to information provided by a defendant concerning himself and would thus eliminate the requirement that to qualify for protection under § 1B1.8, the information provided relate to the activities of others. Both of these proposed amendments have the unqualified support of the NYCDL.

The provisions of § 1B1.8 first became effective on June 15, 1988, more than a year and a half following the effective date of the Guidelines. Essentially, § 1B1.8 seeks to preserve the ability of government attorneys and defense counsel to enter into agreements whereby a defendant who volunteers information to the government is appropriately assured that his truthful disclosures will not be detrimentally used against him, either to further prosecute him or to increase his sentence, provided that he has otherwise complied with the terms of his agreement with the government.

Although § 1B1.8(a) protects against the use of such information "in determining the applicable guideline range," the current version of Application Note 1 advocates much broader protection, and sets forth the policy of the Commission that a cooperating defendant "should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose." Proposed Amendment 2(A) clarifies this Application Note by making clear the Commission's policy that information provided under § 1B1.8 not be used by the court either in considering an upward departure or in selecting a sentence within the applicable guideline range. We believe that the proposed language is a thoughtful and necessary means of further ensuring that a defendant not be unfairly penalized for his or her truthful disclosures to the authorities.

Proposed Amendment 2(B) would remove the limitation in § 1B1.8 that now makes it applicable only to disclosures by a defendant concerning the activities of others. In our testimony and written statement to the Commission last year, as well as in our letter dated August 28, 1991, the NYCDL urged the Commission to expand the coverage of § 1B1.8 to encompass those few instances in which the defendant, in truth, can offer no evidence implicating anyone other than himself. As we previously stated:

> To be sure, the government rarely enters into cooperation agreements except with defendants believed to possess

> information concerning the unlawful activities of third parties. However, there are occasions on which the government may elect to enter into an agreement with a defendant to provide information about his own criminal activities -- either to enable the government to close out its investigative files or as part of an agreement by which the defendant will voluntarily make restitution to the victims of his various misdeeds. Where the parties thus agree that the information provided by the defendant should not be used against him in imposing sentence, we perceive no policy reason to exclude such agreements from the ambit of § 1B1.8. The government and the defense should be permitted to enter into such agreements with the knowledge that the Guidelines and the court will effectuate the parties' intent.

Accordingly, the NYCDL recommends that the Commission adopt both proposed amendments to § 1B1.8.[2]

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[2] In last year's submission to the Commission, we noted that at least one prosecutor's office has refused across-the-board to afford any cooperating defendant the protection embodied in § 1B1.8. We recommended then -- and do so again -- that this issue be considered in connection with the next amendment cycle. We also again urge the Commission to consider amending Application Note 3 to § 1B1.8, to express the view that the Guideline applies to so-called "proffer agreements," by which many defendants provide self-incriminating information prior to entering into more formal cooperation agreements with the government.

Proposed Amendment 5:
§§ 2B1.1 and 2F1.1 - Larceny/Theft and Fraud/Deceit Tables

We oppose any changes in the theft and fraud tables that would increase the base offense level for a particular defendant solely because of the amount of the alleged loss. We believe that no need has been shown to increase the sentences already mandated for loss-based offenses.

Moreover, we oppose proposed changes in the theft and fraud tables that would create a "cliff effect" as the amount of loss increases (e.g., table 3, which increases the base levels by 2 points at a time), and encourage the continuation of theft and fraud tables that provide for more graduated increases (for example, table 1).

We recognize that one of the reasons for increasing the base offense levels in the theft and fraud tables is the proposed elimination of the "more than minimal planning" offense characteristic. We believe that this factor should be retained.

The stated reason for eliminating this offense characteristic is because it has "proven difficult to apply consistently in practice." However, rather than simply eliminating this characteristic and leaving the base offense levels where they currently are, the proposed amendments would increase the base offense levels in the theft and fraud tables across the board. This effectively removes from judges their ability to differentiate defendants who have

committed the same crime but with different levels of planning and sophistication. The current Application Notes to 1B1.1, in our view, appropriately contemplate that distinction ("more than minimal planning 'means more planning than is typical for commission of the offense in a simple form.'"). Although we recognize that the goal of the Sentencing Guidelines is to promote uniformity in sentencing, surely (for example) an unsophisticated fraud by a desperate defendant should not receive the same sentence as a pre-planned and sophisticated fraud of venality, which coincidentally resulted in the same amount of loss.

Proposed Amendment 6:
§ 2F1.1 - Fraud and Deceit

A proposed amendment of § 2F1.1 would increase the base offense level four levels "[i]f the offense affected a financial institution." We oppose this proposed amendment.

Section 2F1.1(b) already provides for a four-level increase if the offense "substantially prejudiced the safety and soundness of a financial institution." That provision allows substantial additional punishment for high-level banking crimes, and itself accomplishes the stated purposes of this proposed amendment, "to reflect the increase by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violation of Title 18 bank fraud and embezzlement offenses." Even without any increase in the fraud tables, the simplest false statement on

an application for a relatively modest loan would require a prison sentence. We are unable to see any law enforcement need for this.

Proposed Amendments 18(a) and (B): § 3B1.2 - Role in the Offense

We oppose eliminating the option currently available that permits a three-level reduction under § 3B1.2 if the court finds that a defendant's role in the offense falls somewhere between minimal and minor conduct. We believe that the court should continue to have the option to sentence defendants between the two levels, so that defendants who have different levels of culpability are sentenced to appropriately different sentences.

We endorse the proposed amendment to the Application Notes in § 3B1.2 that would allow the court to depart downward, below the applicable Guideline range, when a defendant's minimal participation exists to an extent not otherwise contemplated by the Guidelines.

Issue for Comment 28(A): Chapter Five, Part A - Sentencing Table

The NYCDL opposes the proposed creation of Criminal History Category 0 as currently promulgated in the relevant Working Group Report. We agree that proposed Category 0 would appropriately recognize that there should be a beneficial effect in being a "first offender" and we thus endorse the concept of Category 0. As promulgated by the

Working Group, however, Category 0 would have a disproportionate impact on racial minorities and should be viewed with extreme caution.

The Working Group's definition of a "true first offender" with zero points and with no known criminal history of any kind is, we believe, unfair. As undoubtedly demonstrated by empirical data, inner-city youth is more susceptible to arrest or charges later found to be without substance than are white defendants. Many of these charges are dismissed before they go to court. Others are dismissed after they go to court. Some of these are perfectly consistent with true innocence.

The notion that a dismissed charge should prevent the defendant from being considered a "true first offender" simply presumes that if he were truly innocent, he would not have been in harm's way and is therefore somehow less redeemable than someone who was never arrested at all. This concept does not account for the fact that there are areas subjected to increased police surveillances and to police action that is not racially balanced -- in contrast to white middle-class communities, where a stop or an arrest generally will not occur absent true probable cause.

While it is not clear that the disproportionate impact on racial minorities would, if unintended, be sufficient to set aside the Guideline under a strict scrutiny

test, it would certainly be subject to divisive and unnecessary litigation. See Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Consequently, we believe that to be denied the benefit of Category 0, the defendant should have a prior arrest that, at a minimum, resulted in some accountability, even if less than a crime (e.g., a conviction of a violation, or an offense). Such a factor could then legitimately be considered in depriving a criminal defendant of the benefit of Category 0 without taxing that defendant with charges as to which he or she may well have been blameless.

This approach would be more consistent with the Working Group's theory that prior contact with the criminal justice system that has not resulted in a conviction within the meaning of the current Guidelines would nonetheless seem to indicate a propensity towards some criminal behavior that should deprive the defendant of the benefit of Category 0.

It should be noted that there is little, if any, authority nationally for consideration of an arrest in sentencing enhancement. While courts, on sentencing, have traditionally been permitted to consider acquittals, they have only been allowed to do so upon a finding (by a preponderance of the evidence) that the defendant in fact committed the crime. In contrast, the Working Group's proposal would penalize the defendant for an arrest that resulted in a dismissal, without any fact-finding requirement

as to the defendant's guilt or innocence.[3] The dangers of racial disparity and violation of due process are too great to justify any perceived benefit that might be gained.

Proposed Amendment 35(A):
§ 6B1.2 - Sentencing Procedures and Plea Agreements

We support the addition of Commentary to § 6B1.2 that would encourage the government to disclose to the defendant, prior to entry of a guilty plea, the government's analysis of the application of the Sentencing Guidelines. Such disclosure by the government would reduce the uncertainty that currently prevents some defendants from pleading guilty, and might also have the effect of reducing litigation over the application of the Guidelines. For this reason, courts have sought to persuade the government to make such disclosure, see United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991), and at least one prominent United States Attorney's Office (i.e., the Southern District of New York) has in the past year instituted a policy whereby prosecutors, if requested, will advise a defendant, in writing, of the government's analysis under the Guidelines. We believe that the Commission should endorse this approach by amending § 6B1.2 as proposed.

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[3] Moreover, in the event of an inaccuracy, police arrest records -- which might well be the only records reflecting a dropped charge -- would be extremely difficult for the defense to counter years later.

Issues for Comment 35(B) and (C):
Chapter Six - Sentencing Procedures and Plea Agreements

In response to Issue for Comment 35(B), we oppose any amendment of the Guidelines that would allow consideration on sentence of conduct that is described in a count dismissed by plea agreement and does not fall within the scope of relevant conduct under § 1B1.3.

Prior to the Guidelines, a defendant's "relevant conduct" could be but was never required to be considered in imposing sentence. Section 1B1.3's relevant conduct provisions, and particularly those of § 1B1.3(a)(2) involving acts that were "part of the same course of conduct and common scheme or plan as the offense of conviction," already serve to increase sentences substantially, and thereby to increase the prosecution's power over sentences.

Those offenses that do not, under the present Guidelines, allow for the consideration on sentence of other uncharged or unconvicted conduct should not be changed, so as to permit upward departures on the basis of such conduct. Under the Guidelines structure, the very reason that sentencing levels for such offenses do not take into account non-offense conduct is that these offenses can "readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." Background comment, § 1B1.3. For example, when one of a defendant's two robbery counts is dismissed, none of the factors that the Commission has

concluded warrant increasing the offense level for uncharged or dismissed "relevant conduct"[4] supports a court's consideration on sentence of the facts involved in a "discrete," dismissed robbery count.

Allowing prosecutors to charge additional unprovable offenses and then seek upward departures on the basis of dismissed counts would substantially do away with this basic distinction and would result in further, unwarranted control by the prosecution over sentencing.

With respect to Issue 35(C), we oppose any Guideline provisions specifically addressing any of the enumerated possible uses of conduct for which the defendant has been acquitted. While we understand that pre-Guidelines courts sometimes took such conduct into consideration on sentence, they did so very rarely, and we believe that encouragement of this use by any specific Guideline provisions would be inappropriate.

Proposed Amendment 36(T):
§ 3B1.3 - Abuse of Position
of Trust or Use of Special Skill

We support this proposed amendment and agree that it provides a fairer and more workable definition of that conduct which justifies an adjustment on the basis of an abused position of trust.

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[4] E.g., additional quantities in a drug case, or additional loss amounts in a mail fraud case.

Proposed Amendments 33(A) - (D):
Chapter Five (Departures)

We support all of the proposed amendments that would expressly permit downward departures in those situations in which offender characteristics that are ordinarily not relevant to a departure either are present to an unusual degree or in combination present an unusual circumstance meriting a downward departure. Proposed Amendments 33(A) and (B) incorporate recommendations of the Judicial Conference, which noted that in particular cases, the present Guidelines have produced unduly harsh results that are inconsistent with the rehabilitative purposes of sentencing. We believe that the recommendations of the Judicial Conference, which reflect the combined experience of sentencing judges across the country, should be adopted.

In a similar vein, we believe that a court should be able to consider a defendant's lack of youthful guidance, history of family violence, or a similar factor as a ground for departure, where such factors are present to an unusual degree or are combined with other factors. We would also welcome an amendment that permits a downward departure, in appropriate circumstances, for a defendant of an advanced age.

#43

NEW YORK COUNCIL OF DEFENSE LAWYERS
60 EAST 42ND STREET
SUITE 950
NEW YORK, NEW YORK 10165
(212) 682-7000
FAX (212) 972-4930

March 26, 1992

VIA FACSIMILE

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

Attn: Mr. Michael Courlander
Public Information Specialist

Dear Mr. Courlander:

The New York Council for Defense Lawyers respectfully submits this letter to supplement our testimony before, and prior written submission to, the Sentencing Commission. Our earlier comments did not address Proposed Amendments 1(A) and 1(B), which deal with Relevant Conduct. Our views on these proposals are as follows:

In general, we continue to have concerns about the relevant conduct provision and the breadth of its application, which we believe can lead to unintended results and insufficient distinction between major and minor actors in complex schemes. We therefore support the proposed amendments, which attempt to clarify and limit the scope of relevant conduct that must be considered under the Guidelines.

At the same time, we believe that further clarification is necessary, and we therefore propose that the Commission make explicit that the relevant conduct considered by the sentencing court must be limited to the reasonable scope of the individual defendant's involvement in the scheme.

NEW YORK COUNCIL OF DEFENSE LAWYERS

We thank the Commission for the opportunity to be heard on these proposals.

very truly yours,

Frederick P. Hafetz

FPH/gpm

[redacted]

NACDL

[redacted]

#17

STATEMENT OF
JEFFREY S. WEINER
PRESIDENT
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE
UNITED STATES SENTENCING COMMISSION

FEBRUARY 25, 1992

Mr. Chairman and Commissioners, it is my privilege to appear before you today as President of the National Association of Criminal Defense Lawyers, on behalf of 25,000 dedicated private lawyers, public defenders, law professors, law students and related professionals who are members of NACDL and its 54 state and local Affiliates.

We appreciate this opportunity to testify today, to continue a process of NACDL working with the Commission which is as old as the Commission itself. Though we may not always see eye to eye, I want to express our most sincere appreciation for your ongoing openness to our input. You have labored mightily at a difficult and important task, under an often contradictory statutory mandate, and have excluded no one.

We extend our deepest appreciation to the Commission

for establishing the Practitioners' Advisory Group, as a channel for the criminal defense bar to work more closely with the Commission. We hope that the input the Commission has received from the Advisory Group has been useful in identifying problem areas in the guidelines and advancing our common goal of sentencing rationality and fairness.

We urge one more important step in this direction, however. Of the three basic components of the criminal justice system--defense, prosecution and judiciary--two have been generously represented among the membership of the Commission since the beginning. The authorizing legislation mandates three seats for federal judges and one ex officio seat for the Justice Department, and in fact, prosecutorial experience has been well represented in various members of the Commission.

But as commendable as the Commission has been in bringing the defense bar into the process through outreach such as the Practitioners' Advisory Group, the fact remains that the defense bar--the third necessary, coequal and in fact <u>constitutionally mandated</u> branch of the criminal justice system--is not yet an equal partner in the process. No criminal case in the nation can go forward without a defense lawyer participating, and yet these guidelines which bind every defendant and defense lawyer in the federal system have been written for years with no direct participation by any person with significant practical experience in the representation of people accused of crime.

We ask the Commission to throw its weight behind seeking a public or private defender member of the Commission. Obviously,

the final appointment power rests in the White House. But if the Commission were to take the position that the addition of a defense member would enrich the Commission's deliberative process and improve the chances of producing guidelines which require less subsequent refinement and correction, we have no doubt that such a position would be considered most seriously at both ends of Pennsylvania Avenue.

We also suggest that the Commission make a formal recommendation to Congress for legislation establishing a non-voting defense seat equivalent to that provided for the Justice Department--an ex officio seat, that is, either for a federal public defender or a representative of the Defender Services Division of the U.S. Judicial Conference.

Mr. Chairman, one of the most powerful and unsettling criminal law reform documents to come forth in recent years was this Commission's extraordinarily thorough August 1991 report on mandatory minimums. Such a report we think fulfills one of the Commission's most vitally important statutory mandates--that is, to recommend to Congress, under section 994(r), legislation to help the Commission fulfill its mission of providing fair and individualized sentencing, and avoiding unwarranted sentencing disparities.

Mandatory minimums are the main obstacle to that mission. They are the bull in the china shop of sentencing reform.

We commend the Commission for dissecting this issue so conscientiously. Never has there been such a clear and well

documented understanding of the disastrous consequences of mandatory minimums. We are confident that reform will come, as it did in 1970.

The problem, as you know too well, is that political considerations may prevent quick action.

We would like to suggest a few significant related problem areas which can and should be corrected without waiting for a comprehensive repeal of mandatory minimums.

1. Race proportionality review: The first is the issue of race in sentencing. Your report found disturbing evidence of racial disparities in mandatory minimum cases. And though we realize that you may have some disagreement, Judge Heaney's study in the Eighth Circuit found some similar evidence in guideline cases. Looking at either of these findings, it is not necessary to say that either mandatory minimums or the guidelines are inherently racially discriminatory. Such discrimination as there may exist does not necessarily enter through the law but through the people who carry it out--from the law enforcement officers who investigate offenses and make arrests, to the prosecutors who file charges, to the juries and judges who hear the case. Though both Congress and the Commission have made clear that they expect race-neutrality in sentencing, indications are that racial disparities creep in nevertheless.

We appreciate that the Commission has sought conscientiously to carry out Congress's directive that the guidelines must be

neutral as to race, by providing in guideline 5H1.10 that race is simply "not relevant" in determining a sentence. Our concern is that, although the guidelines are race-neutral, other factors contributing to the sentence may not be, and the guidelines' prohibition against considering race has the unintended effect of preventing judges from adjusting sentences to correct for discrimination which has otherwise already influenced the case. Currently, a federal judge is powerless to correct a racial disparity even if he conclusively determines that the defendant's or victim's race is the sole factor responsible for a higher sentence.

We believe that the Commission can correct this problem itself, within the statutory restrictions, simply by changing the "not relevant" sentence in 5H1.10 to read: "Sentences imposed shall be entirely neutral as to race, sex [etc.]." Under this formulation, judges would be authorized to depart where necessary to avoid a discriminatory result.

Alternatively, if it is determined that the statute does not afford the Commission this latitude, we recommend that legislation be sought revising the last sentence of §994(d) to read: "The guidelines and policy statements shall contain provisions ensuring that sentences are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

This process of sentence correction can be called "race proportionality review." We have drafted legislative and

explanatory language on this issue, based upon the non-discrimination theme of the administration's "Equal Justice Act," as approved by the House of Representatives last Fall, which I will be happy to furnish to the Commission.

2. Good time. Bureau of Prisons Director Michael Quinlan has told Congress that the current automatic 54 days per year of good time does not give him sufficient tools to control discipline, particularly among inmates serving long mandatory minimums. We agree with this assesment, and with the findings of the National Task Force on Correctional Substance Abuse Strategies, published by the Justice Department's National Institute of Corrections in June 1991, which strongly recommended the establishment of incentives for inmates to initate and maintain their commitment to treatment and other correctional programs. The report particularly commended good time credits as a "powerful incentive" for good behavior.

Again, we have prepared legislative and explanatory language on this point, which we offer for the Commission's consideration in recommending to Congress. It is based upon the most thoroughly analyzed and successful good-time program in the nation--the one in Illinois. That state's 90-day per year good-time allowance was reviewed in an extensive report by the National Council on Crime and Delinquency, under contract with the state Department of Corrections, which found that the law saved the state $1.2 billion in prison costs, while having a negligible effect on

public safety--that is, only one-fifth of one percent of the offenders released committed a new offense during the period of their early release. I will provide a copy of the report to the Commission with our other submissions.

Under the Illinois program, violent offenders are not eligible for good-time consideration, and the credits must be earned, by participation in some desirable program, such as education, treatment, or job training.

Based on this report, the Illinois legislature voted to double the 90-day maximum allowance, to 180 days. We would note that if there is a concern that vesting this type of authority in the Director of the Bureau of Prisons--where current good-time authority is vested--might begin to undermine the guidelines, the new legislation could give the Commission the authority to set guidelines governing the BOP's determinations or, alternatively, the authority to make the determinations could be vested back in the sentencing judge. The bottom line is maintaining some power of rational and consistent sentencing differentiation, consistent with the principles driving the guidelines--i.e., where such differentiation is warranted and controlled by uniform factors.

3. Consistency in Drug Sentencing. The third and final issue we wish to suggest is drug-quantity disparities. The Commission is well aware of the drug-dosage disparities produced in LSD cases, because of counting the weight of the carrier, whether sugar cubes, blotter paper or some other medium. Unfortunately,

LSD is only the most egregious situation where sentencing uniformity is frustrated--if not obliterated--by the combination of arbitrary drug quantities, carriers or cutting agents, and mandatory minimums.

As Justice Stevens pointed out in his dissent in the Chapman LSD case, dose disparities are scattered throughout title 21's sentencing provisions: In his footnote 12, he notes that the defendant in Chapman actually sold about 12,000 doses of LSD and got a 20 year sentence, but that a heroin dealer would have had to sell ten kilograms--yielding between one and two million doses--to get the same sentence, a cocaine dealer would have to sell between 325,000 and 5 million doses, but a crack dealer would have to sell only 50,000 doses.

We think it is time to do two things: First, immediately change the LSD provision to exclude the weight of any carrier substance. Your letter to Chairman Biden, Judge Wilkins, on April 28, 1989, indicates your longstanding sensitivity to this issue. Ultimately, we support the elimination of the "detectable amount" standard in the title 21 mandatory minimum penalty provisions--a standard which, like the LSD carrier issue, results in low level dealers receiveing proportionately heaview sentences than their higher-ups who deal only in the pure drug.

Second, we hope that the Commission will seek a full review of the dose equivalencies in current law, with an eye to recommending to Congress that those amounts be changed to assure greater sentencing uniformity among different types of drugs.

Again, we have prepared legislative and explanatory language proposing such a review to be conducted by the National Institute on Drug Abuse--that is, as dose comparison, including any appropriate multiplier to take relative dangerousness of the various drugs into account--and we are happy to furnish this material for your consideration.

The question we would ask today is for you to consider whether this is a review that the Sentencing Commission might be able to undertake itself, in consultation with NIDA or other expert drug agencies, and then furnish a report to Congress documnenting the disparities and recommending appropriate changes in the statutory drug quantities.

I realize that the issues I have presented are a mix of legislative and guideline issues. But all affect the fundamental mission and success of the guidelines, and we hope the Commission will be as activist as possible in working for the necessary legislative changes.

We thank you for your kind consideration of these important matters.

[redacted]

Trial Lawyers

[redacted]

#9

STATEMENT OF THE FEDERAL CRIMINAL PROCEDURE COMMITTEE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS REGARDING THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

The American College of Trial Lawyers is an organization dedicated to the promotion of excellence in the trial court.

The Federal Criminal Procedure Committee ("Committee") of the American College of Trial Lawyers monitors the operation of the Federal Rules of Criminal Procedure and other Federal criminal procedural developments generally.

One of the best evaluations of the application of the U.S. Sentencing Guidelines is provided by those who must apply the Guidelines every day - the U.S. District Court Judges.

The Committee supports the recommendations made by the Judicial Conference of the United States to the U.S. Sentencing Guidelines which are discussed in this commentary. These are amendments borne of experience in the trial court, and should be given the deference accorded to the individuals who actually apply the Guidelines.

Proposed Amendment to §1B1.3, Relating to Relevant Conduct

The Committee supports this amendment regarding relevant conduct which was proposed by the Judicial Conference. The amendment will ensure that offense levels are tailored to individual culpability.

Some courts have held that quantities of drugs or firearms possessed by co-conspirators should not be attributed to a defendant unless he or she was aware of them or should have foreseen them. There is also a limitation concerning the scope of criminal activity in which a defendant agrees to participate. However, these limitations are often over-shadowed by the common scene or plan language found in the text of the Guideline itself.

In pre-Guideline sentencing, the judge would determine the extent the individual co-conspirator had adopted to join in the entire plan and would tailor the sentence accordingly. It was common for a judge to sentence the ring leaders of conspiracies to more severe sentences than persons who only had joined the conspiracy for a limited purpose. The Sentencing Guidelines have operated to prevent this important evaluation by sentencing judges. The Guidelines should be revised to clarify that knowledge, foreseeability, and the scope of the defendant's agreement can be used to tailor the offense level, as suggested in Judicial Conference Recommendation 7. Such a revision will help prevent imposing disproportionate punishment on couriers or other minor participants in conspiracies involving large amounts of drugs or money.

Proposed Amendment to §1B1.8, Relating to Use of Certain Information Supplied by Defendant About His/Her Activities

The Committee supports the proposed amendment to this section and its commentary which permits a defendant to receive credit for

providing incriminating information about his/her own activities when he/she has no information to give about other participants.

The amendment addresses a practical problem that arises on many occasions. Often a single defendant, in a complicated matter can save the government months, even years, of investigation by pleading guilty and giving information about himself/herself. Under the present Guidelines, this cooperation will not serve the Defendant any purpose except to give him/her the two point reduction for acceptance of responsibility. As the commentary suggests, this type of cooperation should be used to support granting a §5K.1 departure, for substantial cooperation for saving the government considerable time and effort. The cooperation is especially important in income tax cases where a defendant involved in a solitary scheme to evade taxes may be the only person who can give an inside story on the amount of tax evaded. The effort may save the government considerable time in arriving at both criminal and civil penalties.

Proposed Amendment to §3E1.1, Relating to Acceptance of Responsibility

The Committee supports the amendments to this section, especially the amendment to subsection (d), entitled "Demonstrates Full Acceptance of Responsibility by Taking Timely Affirmative Steps." The amendment provides an additional one level of reduction for taking affirmative steps such as making early restitution, giving assistance to authorities, and resigning from position, or office, or position of trust which caused such a

crime. The option rewards the individual who, once having recognized his/her wrongful conduct, takes extra steps to rectify the harm done to society.

Proposed Amendments to §5B1.1, §5C1.1, Relating to Split Sentences

The Committee supports the amendments to §5B1.1 and §5C1.1 which are proposed by the Judicial Conference.

The amendments would redefine the split sentence to require at least a month of imprisonment, but not 50% of the minimum term, as now required.

In many cases, the present Guidelines force a choice between a term of imprisonment that is longer than needed or no imprisonment at all. A judge may want to give some prison time to punish the offender who is slipping back into criminal habits and to send a clear signal to the community, but one-half the minimum term is too much. Extended prison time could induce the offender to new criminal lifestyles and would tax an already crowded prison facility. After the first month of imprisonment, there are diminishing returns both in general deterrence and punishment values for certain individuals. The difference between one and five, or even three months in prison, will, for some defendants, be the difference between losing or keeping jobs, finding family to care for children, or being able to make prompt restitution.

The amendments would also remove requirements for a term of imprisonment in cells with minimum terms of seven to ten months,

thus permitting the use of the currently available substitutes to incarceration at current rates.

Proposed Amendments to Chapter 5, Part B, Relating to Expanding the Range for Which Probation May Be Given

The Commission specifically requests comment on whether the proposed amendments compromise the Guidelines as originally drafted.

Permitting probation to a small class of individuals at the very bottom end of the sentencing table cannot possibly disturb the uniformity of the Guidelines as drawn.

The original commentary to the Guidelines indicated that the Guidelines were to be amended or modified, based upon actual application experience. This particular amendment is based upon the valuable experience of the District Court judges.

The Committee disagrees with the suggestion that expansion of probation should be applied on an offense by offense approach, e.g. excluding white collar offenders.

An exclusion of this nature would do damage to the original Guidelines approach. If a certain class of individuals are eligible for probation, it would be destructive to the Guidelines to exclude those who commit less violent crimes. There is no rational basis for making such an exclusion.

Congress directed the Commission to "insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is

a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. 994(j).

The arguments presented by the Judicial Conference in support of the foregoing amendment are practical and compelling. While they are too lengthy to be repeated here, the Committee invites the Commission's attention to the rationale set out at page 11 of the "Report of the Judicial Conference" in support of this amendment.

Proposed Amendment to Chapter 5, Part H, Relating to Specific Offender Characteristics

The Committee supports the amendment to the introductory commentary to Chapter 5, Part H, which is proposed by the Judicial Conference.

The amendment provides for departures that may be appropriate when offender characteristics, that are ordinarily not relevant to a Guideline departure, are present to an unusual degree, either alone or in combination, and are important to the sentencing purposes in the particular case. This particular recommendation is addressed to unusual cases where the total picture created by offender characteristics suggest that sentencing goals could best be met with a sentence outside the Guideline range. Some defendants, who present no danger to the public, can adequately be punished by a short period of imprisonment in combination with community confinement or other non-incarcerative sanctions.

This particular amendment recognizes the importance of the trial judge in evaluating a defendant whose circumstances require a departure.

Proposed Amendment to §6B1.2, Regarding Sentencing Procedures and Plea Agreements

The amendment encourages government attorneys involved in plea discussions, prior to the Rule 11 Colloquy, to disclose to the defendant facts and circumstances of the offense and offender characteristics, known to the government, that are relevant to the application of the Sentencing Guidelines.

The commentary is a recognition of the application of Brady v. Maryland, *373 U.S. 83 (1963). The commentary urges the government to turn over, prior to a sentencing colloquy, all relevant evidence that could affect the operation of the Sentencing Guidelines.* Brady *has become important in the operation of the Guidelines and places an added responsibility on the government regarding sentencing.*

The Sentencing Guidelines require a careful evaluation of the conduct of the defendant and his criminal history. Brady *information may not affect guilt or innocence directly, but may have a profound effect on the various adjustments in the Sentencing Guidelines regarding the defendant's punishment. It is the government's burden to turn over the information at a very early stage.*

Request to Comment on Paragraph 34, Subsection C, Relating to Offenses of Which Defendant is Acquitted

The Commission requests comment on whether it should deal expressly with conduct of which the defendant is acquitted but which the court, at sentencing, nevertheless determines to have been established by a preponderance of evidence, and thus may be used for determining an offense level or as a basis for imposing a sentence above the Guideline range.

The Committee strongly opposes the use of evidence of conduct of which a defendant is acquitted to increase the punishment, and urges the Commission to reject such use in clear language.

The use of acquitted offenses to further punish a defendant would render the trial of a case a nullity. It would be a rejection of the judicial function, and is in violation of the due process clause of the Fifth Amendment to the United States Constitution.

RESPECTFULLY SUBMITTED,

Peter F. Vaira
Chairman
Federal Criminal Procedure Committee
American College of Trial Lawyers

George J. Cotsirilos
Regent Liaison
Federal Criminal Procedure Committee
American College of Trial Lawyers

CONTACT ADDRESS:

Peter F. Vaira, Esquire
Buchanan Ingersoll
1200 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103

[redacted]

Turkey - Older Prisoners

#7 REVISED

A PROPOSAL FOR AMENDING THE UNITED STATES SENTENCING GUIDELINES

Submitted by

The Project for Older Prisoners (POPS)
Professor Jonathan Turley, Director

The Project for Older Prisoners of George Washington University's National Law Center respectfully requests an opportunity to appear before the United States Sentencing Commission ("Commission") at its scheduled February 25, 1992, public meeting. On January 2, 1992, the United States Sentencing Commission invited public comment on proposed amendments to the federal sentencing guidelines, pursuant to 28 U.S.C. 994 (a), (o), (p), (x). The Commission asked for comment on "any aspect of the sentencing guidelines, policy statements and commentary, whether or not the subject of a proposed amendment." 57 Fed. Reg. 90 (1992). Among the issues for comment set forth in the Federal Register, the Commission listed a series of changes relating to the application of age as a relevant offender characteristic.[1] The Commission further invited comment on lower

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[1] Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the issues for comment was:

> [D] Issue for Comment: The Commission requests comment on whether Chapter Five, parts H and K, should be amended to authorize a downward departure where a court finds that the defendant's advanced age (e.g., age 60 or older) has reduced the defendant's risk of recidivism, provided that the defendant (1) serves a substantial portion of his sentence, (2) is not a major drug trafficker, and (3) has no current or past history of violent offenses. Comment is also requested on how such a departure, if authorized, might be structured to provide for consistency in application.

sentencing procedures for cases of "extraordinary physical impairment."[2] The following proposals focus on the applicability of age and geriatric illness to the guidelines and policy statements of the Commission. Following a short statement of institutional identification, the proposal will discuss a range of options for the Commission in light of a growing scarcity of federal prison resources and the rapidly rising older prison population.

I. INSTITUTIONAL IDENTIFICATION

The Project for Older Prisoners (POPS) is a nationally recognized pro bono organization focusing on issues related to older and geriatric offenders. Founded by Professor Jonathan Turley in 1988 in New Orleans, POPS was developed to address a growing national problem: the aging of America's prison population. The number of older offenders has been rising exponentially in the United States due to longer sentencing and elimination of parole and pardon opportunities. In 1987, a

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[2] Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the listed potential amendments is a new policy statement:

> Section 5K2.17. Extraordinary Physical Impairment (Policy Statement).
>
> If a defendant suffers from an extraordinary physical impairment, a sentence below the applicable guideline range may be warranted; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

conservative estimate of the number of prisoners over the age 55 was 20,000. By the year 2000, there will be over 125,000 older prisoners in this country. These prisoners occupy badly needed cell space and will on average cost much more to maintain than a younger prisoner.

Since its formation, POPS has become a national leader in developing new policies and legislation pertaining to the incarceration of older prisoners. With offices in New Orleans, Louisiana, and Washington, D.C., POPS works with prisons and legislators to adapt prison policies and facilities to better deal with the costs and needs of this emerging population. Among these policy changes are preventative medical care and alternative forms of incarceration. With the use of volunteer law students, POPS also evaluates particular prisoners to determine their likely recidivism. If a prisoner is statistically low risk, POPS locates housing and support for the prisoner before moving the case forward for a pardon or parole hearing.

POPS is composed primarily of law students working under Professor Turley's direct supervision. After learning of a particular prisoner, Professor Turley will usually interview the prisoner by telephone or in person. If the prisoner is a good candidate for release, a student is assigned to the prisoner to complete an extensive background report to help determine the prisoner's recidivist potential. This background material tracks recognized recidivist studies by focusing on high predictors like

age, chemical dependencies and criminal pattern. POPS has garnered a great deal of bipartisan political support precisely because the organization does not argue for the general release of older prisoners. POPS is highly conservative in actual recommendations for release and will often recommend for an alternative form of incarceration such as electronic bracelets or prison nursing homes, over actual release. Therefore, developing alternative forms of incarceration has been an emphasis in POPS legislation.

POPS comes before the Commission as a recognized leader on prison geriatric policy. After working with legislators and parole boards in various states, POPS hopes to assist the Commission in exploring the possible relevance of age and recidivism to the federal guidelines. As an organization centered on risk-assessment and the maximization of prison resources, POPS is closely aligned with the statutory purposes behind the creation of the Commission under 28 U.S.C. § 991(b)(1)(B)-(C) (1986). It is in that spirit that POPS offers the following assessment of the importance of age to the federal sentencing and prison system.

II. THE GRAYING OF THE FEDERAL PRISON POPULATION

As the Commission is aware, the federal prison population has been undergoing the most significant growth phase in its

entire history.[3] In 1986, there were 33,132 offenders confined in federal prisons.[4] By the end of 1990, the number of offenders in federal institutions increased to 59,123. This number is expected to grow to 100,000 by 1995, and to 127,000 by the turn of the century.[5] In 1990, the federal prison population increased by 10.7 percent, adding an additional 6,355 prisoners to an already overcrowded system.[6]

It is common knowledge that the average age in the country is rising and, as a consequence, public health care and support are being stretched to extreme limits. What is less commonly known is that the nation's prison population is experiencing an even greater demographic shift upward in terms of age. Older prisoners comprised only 11.3 percent of the federal prison population in 1986[7], a number which increased to 26 percent of the federal prison population by 1989. A projected one-third of

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[3] Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population", Page 41, December 7, 1990.

[4] Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

[5] Quinlan, J. Michael, Director of the Federal Bureau of Prisons. Forum on Issues in Corrections. December 7, 1990.

[6] Cohen, Robyn L. Prisoners in 1990, Bureau of Justice Statistics Bulletin, May, 1991.

[7] Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

the prison population will be 50 or older by the year 2010.[8] Overall, the number of prisoners in the federal system over the age of 50 has doubled in 5 years, increasing from 3,349 in 1986 to over 7,000 in 1991. It is estimated that approximately 17,000 federal prisoners will be over the age of 50 age by the year 2000.[9]

The stark reality of the graying of the federal prison population is that increasing resources must be expended to adequately care for the unique needs of older prisoners. The primary expense for incarcerating the older population has been rising medical and maintenance costs. Such costs for older prisoners are three times the cost for younger prisoners.[10] In 1986, the cost to maintain an older inmate in federal prison was estimated at an average of $39,486 a year.[11] In 1990, the average cost for the medical care and maintenance of inmates over the age of 50 was between $50,000 and $60,000 a year in some states.[12] Since 1980, individual inmate medical costs have

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[8] Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. December 7, 1990.

[9] Id.

[10] Zorn, Eric. "Natural life" a crime itself, Chicago Tribune, Chicagoland; Pg 1; Zone: C, January 30, 1992.

[11] Benning, Victoria. Elderly Inmates Pack Prisons; Cause Concern about Cost, Care, Gannett News Service, May 17, 1990.

[12] Foster, Mary. Prisons' Costly Dilemma: Caring for elderly prisoners; Punishment: Younger, more dangerous men are released while aging inmates sentenced to life without parole cost the system millions, Los Angeles Times, Part A; Page 2; Column 1, May 6, 1990.

doubled, while in the same time period, prison budgets allocated towards health care have increased only three percent.[13]

Under the pressure of both expanding prison populations and rising health care costs, the American prison hospital system is barely able to keep pace with required and essential services. In 1990, ninety percent of the country's 600 prison hospitals were not certified as meeting the standards established by the institutional medical profession. Prison hospitals are forced to care for inmates in facilities that are scarcely adequate to serve half the number of current prisoners. On average, prisons are operating at sixty percent above capacity while the prison hospitals are operating with only sixty percent of the rated staff.[14]

Designed for young, healthy, dangerous prisoners, most federal facilities lack any specialized support for a geriatric population and thereby fuel higher medical and maintenance costs of preventable geriatric illnesses. To properly care for older inmates, the ideal geriatric unit would need to provide many costly services to the older inmate such as special diet and nutrition monitoring; special exercises for bone deterioration; modified work schedules; monitoring of special health problems; modification of the physical environment to facilitate walkers, wheelchairs, and other physical aids; and for some inmates,

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[13] Jonathan Turley, "Why Prison Health Care is a Crime", Chi. Trib., March 19, 1991.

[14] Id.