The modified sentence calculation would involve a consideration of all post-sentencing changes to the guidelines or case law, any new guidelines, and a de novo consideration of any unchanged guidelines - anything which would affect the length of imprisonment,[4] including all amendments to Chapters One, Two, Three, Four, and possibly Five. The Criminal History would be calculated based on the defendant's criminal history as it was at the time of sentencing,[5] but using the current Criminal History guidelines.

In fact, by using the entire amended set of guidelines in computing a modified sentence pursuant to §1B1.10, the entire current manual is made retroactive, en masse, to any defendant whose sentence involved an amendment listed in §1B1.10. The result is that the defendant is sentenced differently than other defendants who were sentenced with the same manual.

Consideration of Other Amendments or New Guidelines

Most of the complications and disparities which result from using the entire current set of guidelines in the sentence modification process result from the application of guidelines which are either new or which have been amended since the sentencing (but not made retroactive to others defendants). This procedure generates numerous new issues of fact, potential litigation, and results in disparate applications.

Windfall Reductions, Complications, and Disparities

Often a defendant receives a windfall benefit from consideration of otherwise non-retroactive amendments during the modification process. For example, the most obvious issue already encountered in several LSD sentence modifications is that the LSD defendant would receive consideration for the possible application of the third level for acceptance of responsibility in the "current set of guidelines,"[6] even though numerous other defendants have been routinely and repeatedly denied retroactive consideration for this same amendment in numerous post-conviction motions.

The Commission has repeatedly harmonized splits in the circuits with commentary or guideline amendments which, upon a de novo recalculation of a sentence for modification, could result in a windfall benefit to a defendant (unrelated to the retroactive amendment

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[4] "Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 USC § 3582(c)(2)." U.S.S.G. § 1B1.10(a).

[5] "In considering whether a reduction in sentence is warranted...,the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time." § 1B1.10 (emphasis added).

[6] Amendment #459 effective November, 1992.

triggering the modification), to which other defendants sentenced at the time do not have access.

Similarly, one amendment that the Commission did not make retroactive to other defendants is the eight-page "clarification" to relevant conduct[7], which substantially changed (and narrowed) the computation of relevant conduct in most districts. In the case of an LSD defendant involved in a conspiracy, this may well result in wholesale reconsideration and recalculation of the drug activities of the LSD defendant - a recalculation which other defendants sentenced at the same time as the LSD defendant are denied.

There are some circumstances under which another amendment might undercut, or reduce, the amount of the reduction intended by the application of a specific retroactive amendment, which would similarly result in disparity in application between that defendant and others sentenced at the same time, not involved in the modification process.[8]

De Novo Consideration of Unchanged Guidelines

Under the current rule, complications can also arise from the reconsideration of the guidelines which have remained unchanged since sentencing. A new computation of all the guidelines invites the possibility that either subsequent facts, or a new understanding of the facts at sentencing, could result in a different computation of even those guidelines which have not changed since sentencing, generating more complications, new sentencing hearings, and potential litigation. Two examples of these kinds of issues have recently arisen in the field:

a) If a defendant originally received the adjustment for acceptance of responsibility, has subsequently filed a §2255 motion in which he denied responsibility

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[7] Amendment #439, effective November 1, 1992.

[8] The argument that the entire new book should be applied because any one amendment depends on the interaction of all others to form a coherent whole does not alone justify the new book process for modifications. Few amendments are integrally tied to other amendments, and where this is so, such a connection could be considered in the retroactive decision, where the Commission might decide to make them both retroactive or to specifically cross-reference the two when making the one retroactive. While the integration of the whole book is absolutely logical and necessary for sentencing, the modification process is not a whole sentencing and should be treated differently (see discussion, below). The integrity of the whole book used at sentencing (which remains the actual sentencing) and need for uniformity with other defendants sentenced at the same time as the defendant are best addressed with a procedure which uses only the retroactive amendment.

for the offense, and now is before the court for a sentence modification, should the acceptance adjustment be regranted?[9]

b) If the probation office has since learned that what was thought to be a "pending" other offense at sentencing was actually a conviction at that time, a de novo computation of criminal history would result in a higher criminal history category.

It is virtually certain that where a court follows the current procedure, it will recompute all guidelines, including those which have not changed. Even though it would be less likely to happen, it could be that a court might understand that it was to recompute the original guidelines, even if told to add only the retroactive amendment. Therefore, we ask that in addition to amending §1B1.10 to direct courts to use only the retroactive amendment, it should be specified that the retroactive amendment should be applied to the facts as they were at sentencing, based on the sentencing court's understanding of those facts at that time, to avoid these issues. In other words, the sentencing court's determination of all but the retroactively amended guideline should remain unchanged. We have attached, as Exhibit A, some suggested versions of how such an amendment might read.

Changes in Case Law

Using the entire new manual not only invites but probably requires consideration of current case law to interpret new or changed guidelines as well as those which have remained unchanged. Examples of potential problems are easy to imagine.

Case law has had a significant effect in defining many areas such as role, acceptance, and relevant conduct. Perhaps the most striking of these changes is the computation of relevant conduct. All circuits have gradually defined and essentially narrowed the computation of relevant conduct, a trend no doubt driven at least partly by the amendments to §1B1.3. Many defendants sentenced previously would receive a significantly different sentence if resentenced today using current calculations.

While this may be a welcome result for a particular defendant, the disparities of application are significant, and the complications are enormous. For example, several circuits have recently decided to use an arguably narrower measure of drugs to compute mandatory minimums in drug conspiracies[10]. A recomputation of all guidelines at sentence

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[9] Perhaps applying current guidelines as if they had been in effect at the time of sentencing (as provided in 1B1.10) would direct that the acceptance adjustment should remain unchanged (although this is awkward at best, given a de novo guideline computation requirement).

[10] See, e.g., U.S. v. Jones, 965 F.2d 1507 (8th Cir. 1992), cert den., 113 S.Ct. 346 (1993).

modification for an LSD defendant would result in a significantly lower drug computation for a defendant involved in a conspiracy, a windfall benefit (in addition to, and unrelated to, the reason for the modification, such as the recalculation of LSD weight).

It is difficult to justify this windfall benefit, granted gratuitously by virtue of the new-book process, when such a recalculation is denied to all other defendants sentenced at the same time as the ones receiving a modification for a particular amendment. Consideration of current case law may arguably be appropriate or even necessary where it is directly involved with the calculation of a retroactive amendment, but less clear when involved with changes unrelated to the actual retroactive amendment.[11]

Procedural Problems

The use of the current set of guidelines generates new factual issues that complicate the sentence modification proceedings and raise procedural issues, which potentially generate litigation.

New Factual Issues and More Evidentiary Hearings

New factual issues arise whenever it is necessary to determine either guidelines or amendments which did not exist at the sentencing, or changes in application determined by case law. Nearly all examples mentioned above involve potential new issues to be determined, including for the additional acceptance adjustment, not in existence prior to November, 1992, and the sweeping clarifications to relevant conduct that have had immense impact on the calculations of drug amounts for defendants in drug conspiracies.

It is obvious that any procedure which introduces new facts to be detrmined is more likely to necessitate hearings than a procedure which does not do so, or does so to the least extent possible. Under the current procedure, hearings might well be needed to determine, for example, the new third level for acceptance of responsibility, or new interpretations of relevant conduct. These hearings complicate the sentence modifications and potentially generate more litigation, and represent what is an unnecessary burden on the system - particularly if a retroactive amendment in the future is even more widely applied than any now currently listed in §1B1.10.

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[11] An example might be evolved interpretation of role or firearm adjustments, in the modification of LSD weight-calculation. Application of only the retroactive guideline avoids most of these issues.

If a sentence were modified by the simple application of only the retroactive amendment listed in §1B1.10, new issues of fact are kept to a minimum, as is the need for evidentiary or protracted sentencing hearings.[12]

Presence of Defendant

Rule 43(a), Federal Rules of Criminal Procedure, provides that the defendant "shall be present at...the imposition of sentence, except as otherwise provided by this rule." However, the defendant's presence is excused "at a reduction of sentence under Rule 35," to avoid (Rule 43(c)(4)).[13] This exception to the rule was made to avoid bringing

> "the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved."[14]

The rationale for exempting defendants' presence at a sentence reduction applies equally to a sentence modification, especially if the modification proceeding involves few if any contested facts. However, use of the entire new manual is substantially more likely to require the defendant's presence by invoking new factual issues, and becoming more like a sentencing and less like a Rule 35 reduction of sentence.[15]

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[12] The only issues arising so far in the LSD amendment modifications where only the amendment is applied is the legal issue of the mandatory minimum computation (whether Chapman requires use of the actual weight to determine the statutory penalty).

[13] The Notes of the Advisory Committee to Rule 43 explain the rationale of excusing the defendant's presence at Rule 35 sentence reductions:

> "4. The purpose [of Rule 43(c)(4)] is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved."

In addition, presumably many defendants who have more time to serve prefer not enduring the uncomfortable long travel and housing at detention facilities to attend a hearing.

[14] Advisory Committee Notes to Rule 43(c)(4), Federal Criminal Code and Rules, 1993 Edition.

[15] Of course a Rule 35 reduction was totally different, but it was often uncontested and did not involve new factual determinations, and typically involved a one-factor analysis (whether the defendant's progress in custody merited sentence reduction). New Rule 35 is

Where a court accepts a defendant's waiver of his or her presence at a §1B1.10 modification of sentence under current procedure, the defendant might later challenge the procedure in a §2255 motion, especially if any new facts are determined to the defendant's detriment in the defendant's absence, or where the defendant shows he or she might have raised issues regarding changes to the entire current manual which were not raised.

Reported Experience with §1B1.10

Most courts which have modified sentences pursuant to §1B1.10 to date apparently have not employed the entire current set of guidelines, but have applied only the retroactive amendment, usually without a hearing, and issued an amended Judgment and Commitment modifying the sentence. See, U.S. v. Woolston, 840 F.Supp. 1 (D.Me. 1993)(applying the LSD guideline); U.S. v. Crosby, 762 F.Supp 658 (E.D. Pa. 1991); U.S. v. Kahn, 789 F.Supp. 373 (M.D. Ala. 1992).

The lack of compliance with the new-book may be due to a misunderstanding of the current procedure,[16] or perhaps resistance to the complication which it entails.[17] At any rate, it is not difficult to imagine that some of these cases which have not followed the new-book procedure might see future litigation over the lack of a hearing and the defendant's presence, because of the many possible issues which were not raised involving current guidelines (such as the extra acceptance level).

The lack of the application of the new book largely explains why the problems noted herein have not already become apparent. Also, many of these problems have remained latent in the LSD cases because the mandatory minimum issue overrides any guideline

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similarly one-factor (e.g. how much reduction in sentence the defendant's substantial assistance merited). Any factual determinations were and are narrow.

[16] The Bureau of Prisons' Memorandum of Operations sent to all institutions notifying defendants of the LSD amendment included a sample "Motion to Reduce Term of Imprisonment" which refers to applying only the amended guideline to a previous sentence. See Exhibit B. This may have contributed to the mixed procedures in applying the LSD amendment, so far.

[17] Even though § 1B1.10 itself is a Policy Statement, which allows some discretion in application by the courts (see, e.g., U.S. v. Park, 951 F.2d 634, 636 (5th Cir. 1992)), this particular Policy Statement carries extra authority by specific reference in the statute, 18 USC § 3582(c)(2). Furthermore, if a court undertakes to perform a § 1B1.10 modification, disregard of the Application Note directing the procedure to be used would likely be reversible error, in view of the strength the Supreme Court has given to the Commission's commentary. U.S. v. Stinson, 113 S.Ct. 1913 (1993).

application issues.[18] These problems are most likely to generate litigation in the future, when more courts understand and comply with the new-book requirement, as more amendments accumulate, and some retroactive amendments receive broad application.[19]

Clarifying Amendments

Some confusion might arise regarding how the use of clarifying amendments fits into either the current practice or our proposal.

All Amendments Are Not Clarifying

It would not be accurate or logical to argue that the entire current set of guidelines should be applied upon modification because all amendments to the guidelines are essentially clarifying.

First, some amendments are clearly substantive and not clarifying. These include the third level for acceptance of responsibility, some increases in the firearm guidelines, the "authorization" to make acceptance of responsibility available to career offenders, and any change made to accommodate changes in statutory penalties.

Second, the Commission has made a distinction between "clarifying" and "substantive" amendments by specifically providing in some amendments that the purpose is to "clarify", and by distinguishing the use of clarifying amendments from substantive amendments in §1B1.11.[20] Third, there is a clear distinction between truly retroactive amendments listed in §1B1.10 and all other amendments, including "clarifying" ones.

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[18] Where there was no mandatory minimum, the new calculations are so low that the defendants are released for time-served; where the actual weight triggered a mandatory minimum, it is so much higher than any guideline computations that the defendant's only remedy is to appeal the mandatory minimum issue.

[19] One other, relatively minor, possible confusion with using the whole-book rather than merely the particular guideline derives from the various sets of guidelines which might conceivably be used. The use of the "guidelines currently in effect" would most probably be interpreted to mean those in effect at the sentence modification, although some might claim it to be those in effect when the defendant's motion is filed, or when the retroactive amendment became effective.

[20] The guidelines in effect at sentencing should be applied in their entirety. "However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive." §1B1.11(b)(2).

Clarifying Amendments Are Not "Retroactive"

Truly "retroactive" amendments are distinctively different than all other amendments, clarifying or otherwise. Only those listed in §1B1.10 trigger a post-sentencing modification,[21] and can be applied post-sentencing or even post-appeal.

"Clarifying" amendments generally do not affect previously sentenced defendants. A defendant cannot successfully receive the benefit of a clarifying amendment adopted after his or her sentence, which is not listed in §1B1.10.[22] Some circuits have allowed the application of a "clarifying" amendment adopted while a defendant's direct appeal was pending,[23] while others do not allow such so-called "retroactive" application of "clarifying" amendments.[24] Even where allowed, the subsequent clarifying amendment is related to the issue before the court on appeal.[25]

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[21] Policy Statement §1B1.10 states, "If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 USC §3582(c)(2) is not consistent with this policy statement." §1B1.10(a).

[22] There simply is no authority for such an application: §1B1.11 allows application of clarifying amendments to an earlier set at sentencing, and §1B1.10 allows modification of an earlier sentence based on listed amendments. The only possible authority would be 28 USC §2255, contending that the sentence was "illegal," in light of current law. However, the "Savings Statute" (1 USC §109) provides that defendants have no right to post-sentencing reduction of sentence when a penalty is subsequently reduced.

[23] See, e.g., U.S. v. Maseratti, 1 F.3d 330 (5th Cir. 1993)(pet. for cert. filed 12/21/93)(allowing the post-sentencing application of the "clarification" of § 1B1.3); U.S. v. Colon, 961 F.2d 41, 44-46 (2d Cir. 1992)(District court has discretion whether to apply amendments beneficial to defendant adopted while a direct appeal is pending).

[24] See, e.g., U.S. v. Williams, 905 F.2d 217 (8th Cir. 1990), cert. den., 111 S.Ct. 687 (1991)(refusing application of amendment #266, adopted during the appeal of the case, which would allow an acceptance of responsibility adjustment for career offenders); U.S. v. Mooneyham, 938 F.2d 139, 140 (9th Cir.), cert den., 112 S.Ct. 443 (1991)(also disallowing the post-sentencing application of #266, and discussing the circuit split over whether to allow application of amendments effective at appeal, and noting that one reason to disallow resentencings using such amendments adopted post-sentencing is to discourage the filing of specious appeals, in the hope that subsequent, favorable amendments might be enacted during the pendency of the appeal).

[25] See, e.g., U.S. v. Maseratti, 1 F.3d 330 (5th Cir. 1993)(considering the intervening clarification to relevant conduct in deciding what the proper scope of relevant conduct for the defendant should be). This is entirely different than remanding for the district court to apply new, clarifying amendments which are unrelated and not integral to the issue before the appellate court, which would, in effect, give full, actual post-sentencing "retroactive"

At any rate, it is not consistent with the system otherwise, or with the distinction between clarifying amendments and retroactive amendments to apply all amendments along with the retroactive amendment to modify a sentence. Our proposed procedure, to allow only the use of the retroactive amendment itself to modify a sentence, would in fact reinforce the distinction between "retroactive" amendments listed in §1B1.10 and all others kinds of amendments.

Use of All Clarifying Amendments Not Justified

Nor would it be consistent with the use of clarifying amendments to propose that only clarifying amendments in the new book be used to modify a sentence, along with a retroactive amendment. Such a procedure would be as, or more, complicated as the current procedure of using the whole new book.

As noted, clarifying amendments have a specialized use in the sentencing context in certain cases (where the use of the manual in effect at sentencing would present an ex post facto problem), pursuant to §1B1.11. This limited use of "clarifying" amendments serves to preserve portions of the manual in effect at sentencing (the statutorily preferred manual, pursuant to 18 USC §3553), even when that manual is not being used. However, to use clarifying amendments from the new book to "modify" the original sentencing book would have the opposite effect - of adding additional changes to the sentencing book - contrary to statutory preference.

Moreover, all changes to the sentencing manual further increases the disparity in sentencing between a "modified" defendant and other defendants sentenced at the same time.

Nor could one argue that fairness dictates that a defendant receive all post-sentencing favorable amendments, whenever a modification is computed. The "Savings Clause" (1 USC §109) prevents the retroactive application of post-sentencing reductions in penalties.[26] The exception is where a penalty reduction is specifically made retroactive, like those listed in §1B1.10.

Finally, the law is too unsettled regarding clarifying amendments to justify broadening the use of clarifying amendments to the sentence modification context. For example, as noted, the courts disagree whether clarifying amendments can be used upon resentencing

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force to a clarifying amendment (not listed in 1B1.10), about which there is no pending appeal. As far as can be determined, this has not been done.

[26] See, e.g., U.S. v. Jacobs, 919 F.2d 10 (3d Cir. 1990)(holding that ineligibility for probation is a type of penalty, and therefore the savings statute prohibited the application of the amendment to defendant), cert den., 111 S.Ct. 1333 (1991); U.S. v. Garcia, 877 F.2d 23 (9th Cir. 1989)(holding that a special parole term is a penalty and therefore the amendment to 21 USC §841(b) is not retroactive).

when in effect at the time of a direct appeal.[27] This is partly because they even disagree on when an amendment is actually clarifying: that is, an amendment passed to "clarify" a split in the circuits is only "clarifying" to the circuits which have held in concert with the amendment; however, it represents a substantive change in the law to those circuits which have held contrary to the Commission's clarification. Therefore, some circuits hold that an amendment cannot be clarifying (regardless of its own terms) if it conflicts with prior circuit law.[28]

Nor can any useful analogy can be drawn from when courts vacate a sentence and order a "resentencing", because a) the courts do not agree on resentencing procedure,[29] and b) a resentencing is only partially analogous to a sentence modification procedure, where the original sentence is not vacated but merely modified. If a complete new book is not applied at a resentencing following a vacation of the original sentence, it is even less likely to be applied at a sentence modification.

Of course, in the rare case where a clarifying amendment is directly and integrally involved in the application of a retroactive amendment, it would be applied while applying the retroactive amendment.

Therefore, to allow all clarifying amendments to be applied during a sentence modification process along with the retroactive amendment would complicate rather than streamline the process, and would still result in disparity among defendants sentenced under

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[27] See notes 23 and 24, supra; also, see discussion by J. White, dissenting on denial of certiorari in Early v. U.D., 112 S.Ct. 330 (1991). The Supreme Court in Stinson v. U.S., 113 S.Ct. 1319 (1993), held that commentary is binding on subsequent circuit law, but did not decide whether a clarifying amendment can be applied "retroactively" upon appeal to a prior sentence.

[28] For discussion of this and other points, see "Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues", FJC, August 1993, §1(E), comparing, e.g., U.S. v. Saucedo, 950 F.2d 1508, 1512-1517 (10th Cir. 1991) and U.S. v. Prezioso, 989 F.2d 52,53-54 (1st Cir. 1993),with U.S. v. Fitzhugh, 954 F.2d 253,255 (5th Cir. 1992) and U.s. v. Caballero, 936 F.2d 1292, 1299 (D.C.Cir. 1991), cert den., 112 S.Ct. 943 (1992).

[29] Some courts have held that new factors could be considered upon resentencing, and the sentence is determined de novo, where a sentence has been vacated and remanded for resentencing. See, e.g., U.S. v. Smith, 930 F.2d 1450, 1456 (10th Cir.), cert den., 112 S.Ct. 225 (1991). Other courts do not allow de novo sentencing, but a narrower "modification", similar to a § 1B1.10 proceeding. See, e.g., U.S. v. Apple, 962 F.2d 335 (4th Cir. 1992); U.S. v. Prestemon, 953 F.2d 1089 (8th Cir. 1992). In U.S. v. Maseratti, 1 F.3d 330 (5th Cir. 1993), the court allowed the application of the "clarification" to §1B1.3 upon resentencing, but directed specifically that "the revised guidelines are not applicable to the Appellants" upon resentencing, and that the resentenced should be done only "in light of the clarification" at issue. Id. at 340.

the same book, originally. The application of only the retroactive amendment (and any clarifying amendment directly involved with its application) maintains the integrity of the original sentencing guidelines to the maximum extent possible.

Reconsideration of Use of the New-Book in §1B1.10

Statutory Authority

The Commission clearly has statutory authority to determine the procedure for making certain amendments retroactive. 28 U.S.C. §994(u) provides:

> "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

This authority appears to be broad enough to allow the Commission to decide either that the entire current manual be used or that only the retroactive amendment be used in effecting a sentence modification. However, 18 USC §3553 requires the court to apply the guidelines in effect at sentencing. Therefore, to apply only the retroactive amendment comports with retaining the manual in effect at sentencing more than does the application of a new manual. Thus, current practice does not conform as closely to statutory authority as does our proposal.

The statutes regarding modification appear not only to allow, but to support, the use of only the retroactive amendment, because they refer to reducing (28 U.S.C. §994(u); 18 U.S.C. §3582(c)), or modifying (18 U.S.C. §3582(c)) a term of imprisonment. "Modification" and "reduction" imply a specific change to an otherwise unchanged whole, rather than the creation of a new whole.

Retention of One-Book for Sentencing

It is undisputed that the "one-book" rule (use of an entire set of guidelines), as set out in §1B1.11(c), is appropriate for the sentencing process, in order to "preserve a cohesive and integrated whole."[30] Our proposal would not affect or diminish the "one-book" rule for sentencings in any way, because procedures under §1B1.10 are not sentencings. In fact, we believe our proposal would actually reinforce that rule, by preserving the manual which was used at the actual sentencing to the maximum extent possible. Our proposal would allow a specific, narrow modification of a previously imposed sentence which remains

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[30] U.S. v. Stephenson, 921 F.2d 438 (2d Cir. 1990).

unchanged in all other respects.[31] This also, to the maximum extent possible, preserves uniformity between the sentencing of this defendant and that of all the other defendants sentenced at the same time as this defendant.

A sentence modification using the entire new manual allows the possibly dangerous interpretation that the modification is a complete resentencing, with any number of possible implications which may result. The original sentencing is not vacated. Only the imprisonment component is involved.[32] The facts of the defendant's criminal history are those not at the time of modification, but those at the time of the (actual) sentencing.[33] Also, as noted, to use the new manual is actually contrary to the statutory mandate to use the guidelines in effect at the sentencing.

Any symmetry or consistency gained in trying to apply an entire new book to modifications as well as to sentencings is outweighed by the increase in disparate applications and complications created by doing so. As noted, we believe that to apply only the retroactive amendment, in a "laser-beam" modification procedure, better preserves the original, otherwise coherent, sentence. Moreover, a streamlined retroactive procedure would also pose less of an administrative burden to be factored into the decision on retroactivity by the Commission. Our proposal would also help to avoid the paralysis of the system which could result from application of future amendments (such as strong modifications to drug computations) which are potentially very broadly applied, if such amendments are made retroactive.

Further, as a policy matter, as well as a matter of expediency and clarity, the wholesale reconsideration of an entire sentence under the auspices of the retroactive application of a single guideline to modify a sentence should not be permitted. Further, the current procedure not only complicates proceedings, but does not appear to support Congress's efforts to bring finality to the process (for example, by repealing the "old" Rule 35 which allowed reconsideration of any aspect of a sentence).

Finally, perhaps the most troublesome problem with the current procedure concerns simple fairness and uniformity of application - certainly one of the main goals of the guideline system. Applying the current manual generates disparity in guideline application

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[31] In the rare situation where two amendments or guidelines actually cross-affect each other, and one is made retroactive, rather than make the whole book retroactive the Commission could designate both guidelines as retroactive.

[32] However, the more drastically and profoundly a sentence is modified by applying a de novo calculation of the guidelines, other factors such as offense classification and fine calculation can also be affected.

[33] In considering whether to reduce the sentence, the court should "consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time." § 1B1.10 (emphasis added).

among defendants. Defendants sentenced pursuant to the set of guidelines in effect, for example, in 1991 are all sentenced according to the same rules. Those defendants should remain sentenced under that same set of rules in all respects other than the application of a specific amendment which has been expressly made retroactive. The current system would lift those few 1991 defendants out of the 1991 book, and apply the subsequent (e.g. 1994) book to them for all respects, including many aspects of which are not only unrelated to the reason for the modification, but denied to all the other 1991 defendants sentenced at the same time as these few defendants.

Conclusion

A reconsideration of the procedure for applying amendments specifically made retroactive is needed, now that several years of amendments have been developed, and some of the amendments are being more widely applied. Problems which were not apparent prior to years of accrued amendments or mass applications, are now becoming evident.

The reasons the current procedure needs modifying involve major concerns for the guideline system, first, avoidance of unnecessary complication, hearings, or litigation, and secondly, avoidance of disparate application of the guidelines.

For all these reasons, the Judicial Conference Committee on Criminal Law, through the Subcommittee on Criminal Law and Sentencing Procedures, asks that the Commission amend Policy Statement §1B1.10 to provide that only the amendment made retroactive by that Policy Statement be used to compute the modified sentence. The attached Exhibit A contains some suggested versions of how such a procedure might be worded, along with some suggested commentary.

Proposed Amendment to §1B1.10 U.S.S.G.[1]

§1B1.10

(b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. §3582(c)(2), the court should consider the sentence that it would have originally imposed had the AMENDED guidelines, as amended, been in effect at that time.

[or: the guideline, as amended, been in effect at that time]
[or: the guideline listed in (d), been in effect at ...]

Commentary, Application Note 1 to §1B1.10:

1. Although Eligibility for consideration under 18 U.S.C. §3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section. The amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect) SUBSTITUTING THE AMENDED GUIDELINE FOR THE EXTANT GUIDELINE USED AT THE SENTENCING, AND RECOMPUTING THE SENTENCING RANGE, WITH ALL OTHER ASPECTS OF THE SENTENCE CALCULATION REMAINING UNCHANGED.

[Suggested addition to commentary: THE AMENDED GUIDELINE, INSERTED INTO THE ORIGINAL SET OF GUIDELINES USED AT SENTENCING, SHOULD BE USED TO CALCULATE THE MODIFIED SENTENCING RANGE, BASED ON THE LAW AND FACTS AS RELIED UPON, AND DETERMINED BY, THE SENTENCING COURT, IN ORDER TO EFFECT A NARROW AND SPECIFIC MODIFICATION OF THE ORIGINAL SENTENCE IMPOSED, RATHER THAN A NEW SENTENCE OR A RESENTENCING.]

Other optional versions or additions to commentary:

ALL OTHER ASPECTS OF THE GUIDELINE COMPUTATION ORIGINALLY USED AT THE SENTENCING WILL REMAIN IN EFFECT. OTHER (BUT NON-LISTED) AMENDMENTS PASSED SUBSEQUENT TO SENTENCING WOULD NOT BE APPLIED IN DETERMINING THE MODIFIED SENTENCING RANGE.

THE USE OF AN AMENDED GUIDELINE IN THE CONTEXT OF AN EARLIER SET OF GUIDELINES FOR SENTENCE MODIFICATION DOES NOT AFFECT, AND IS NOT CONTRARY TO, THE RULE IN §1B1.11(b)(2) U.S.S.G. APPLIED TO SENTENCINGS, THAT "THE GUIDELINES MANUAL IN EFFECT ON A PARTICULAR DATE SHALL BE APPLIED IN ITS ENTIRETY." A MODIFICATION OF A PREVIOUSLY IMPOSED SENTENCE PURSUANT TO THIS POLICY STATEMENT IS NOT A SENTENCING.

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[1] Underlined language is to be removed, capitalized language is to be inserted.

EXHIBIT A

THIS IS ONLY AN ILLUSTRATIVE PLEADING. INMATES SHOULD CONTACT THEIR ATTORNEYS AND ARE RESPONSIBLE FOR DRAFTING THEIR OWN MOTION.

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Case No. CR-1-90
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

MOTION TO REDUCE TERM OF IMPRISONMENT

Comes now the defendant John Doe, and moves this Court to reduce the above named defendant's sentence of imprisonment, and as grounds therefor states as follows:

1. On December 1, 1990, defendant John Doe was sentenced to the custody of the Bureau of Prisons for Eighty months, plus a Four year term of Supervised Release, pursuant to his plea of guilty of Distribution of LSD, in violation of 21 U.S.C. § 841.

2. The defendant is currently incarcerated at F.C.I. Fort Worth.

3. Effective November 1, 1993, the United States Sentencing Commission amended U.S. Sentencing Guideline 2D1.1(c), which establishes the offense levels for LSD offenses, and voted to make that amendment retroactive.

4. Applying the amended Guideline may result in a shorter prison term for John Doe.

EXHIBIT B

WHEREFORE, it is respectfully requested that the Court reduce defendant's term of imprisonment pursuant to Title 18 U.S.C. § 3582(c)(2), and in conformity with amended U.S. Sentencing Guideline 2D1.1(c).

DATED:

Respectfully submitted,

_____

John Doe

029

JENNIFER K. ANDERSON
ATTORNEY AT LAW

1230 S.W. FIRST AVENUE, SUITE 300
PORTLAND, OREGON 97204
TELEPHONE (503) 224-0282
FACSIMILE (503) 224-0517

March 7, 1994

Attn: Public Comment
U.S. Sentencing Commission
One Columbus Circle, NE #2-500
Washington, DC 20002-8002

Re: U.S. Sentencing Guideline Amendment/Marijuana Weights

To the U.S. Sentencing Commission:

I am an attorney in Portland, Oregon, and am writing in support of the proposed guideline amendment regarding weights of marijuana plants.

I firmly believe that the current method of assigning weights to marijuana plants should be replaced either by the 100 grams-per-plant valuation or by an amount established by a scientific study of marijuana plant yield. The current weight system is not only unfair to individual defendants, but is also a major contributor to the burgeoning prison population.

Please consider and adopt an alternative weight schedule for marijuana plants.

Very truly yours,

Jennifer K. Anderson

[81]

030

STEPHEN A. HOUZE
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
SUITE 1150 • 1001 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1199
TELEPHONE 503/299-6426
FAX 503/299-6428

March 7, 1994

ATTN: Public Comment

U.S. Sentencing Commission
One Columbus Circle, N.E. #2-500
Washington, D.C. 20002-8002

Dear Sir or Madam:

I am writing at this time as a concerned citizen and criminal defense attorney with much experience in the sentencing guidelines. My particular purpose in writing to you is to urge you to seriously consider proposals which have been made regarding the amelioration of the harsh guideline treatment in the area of marijuana possession, cultivation, and sale.

Although Oregon is a federal district in which federal marijuana prosecutions are common, the harsh treatment accorded such offenders under the guidelines is clearly disproportionate. Moreover, the end result of these harsh penalties is to fill our federal facilities with precisely the wrong individuals. Because prison space is such a rare commodity, that space should be reserved for the most serious and violent of offenders in our system. Instead, the system is being filled to overflowing with these generally nonviolent first offenders.

Without attempting to engage in a debate on the merits of the so-called War on Drugs, I would hope that common sense would prevail at the Sentencing Commission regarding this very critical issue.

Thank you very much for your consideration of my remarks.

Yours very truly,

Stephen A. Houze

SAH/cb
cc: Sue Wiswell

[82]

McDonough & Associates, p.c.
ATTORNEYS AND COUNSELORS AT LAW

031

March 7, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N. C.
Suited 2-500, South Lobby
Washington, D. C. 2002-8002-

Dear Mr. Courlander:

As federal criminal defense practitioners in Houston, Texas. We write in response to the United States Sentencing Commission's request for public comment upon proposed amendments to the Sentencing Guidelines published in the December 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §]§ 2S1.1 and 2S1.2 governing money laundering offenses.

We strongly recommend adoption of proposed amendment number 11 with modifications. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. The suggested modifications are intended to help ensure this result.

The current Guidelines encourage prosecutors to seek money laundering convictions in non-narcotics related money laundering cases because the resulting sentences under the money laundering sentencing guidelines are much harsher than for the underlying offense, and asset forfeiture (which is not taken into consideration under the current Guidelines) is available.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are proscribed by §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime. *United States V. Montoya*, 945 F. 2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. § 1956 based upon the deposit into his personal checking account of a single $3,000.00 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a § 1956 and § 1957 count. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's stated goal of "eliminating unfair treatment that might flow from

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TELEPHONE: (713) 223-3600 FAX: (713) 223-8110

count manipulation." U.S.C.G., Chapter 1, Part A, Paragraph 3.

While we support the Commission's objective, we strongly urge the Commission to make the following modifications to the proposed amendment. First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed §2S1.1 (a) (2) or (3). This offense level then would be increased by any specific offense characteristics under proposed §2S1.1 (b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1 (a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, we would strongly urge the Commission to make the base offense level in proposed § 2S1.1 (a) (3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, we would suggest changing proposed § 2S1.1 (a) (3) to a base offense level of 6 plus the number of offense levels from the table in § 2 F1.1.

Very Truly yours,

MCDONOUGH & ASSOCIATES, p.c.

Edward McDonough

William L. Bowers, Jr.

Mark S. Dube

EMcD/bjr

MICHAEL TANAKA
090140 7
SCP PMB 352
POB 2650
JESUP, GA 31545-
2650

032

US SENTENCING COMMISSION
ONE Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

ATTORNEY SUZANNE HASHIMI
GEORGIA NORTHERN PUBLIC DEFENDER
101 MARIETTA TOWER SUITE 3310
ATLANTA, GEORGIA 30303

DEAR ATTORNEY HASHIMI / UNITED STATES SENTENCING COMMISSION

I READ AN ARTICLE IN THE ATLANTA CONSTITUTION THAT STATED THAT YOU ARE PREPARING A CHALLENGE TO THE EXISTING CRACK LAW.

THE SENTENCING GUIDELINES MAKE 1 GRAM OF CRACK EQUIVALENT TO 100 GRAMS OF POWDER COCAINE. I AM CHEMIST. WHEN COCAINE IS PROCESSED IN COLOMBIA IT IS CHANGED FROM THE LEAVES TO A COCAINE BASE CALLED BASURO. THEN, THE COCAINE BASE IS PROCESSED TO COCAINE HYDROCHLORIDE BY ADDING HYDROCHLORIC ACID. THE CHANGE TO THE HYDROCHLORIDE FORM IS MADE FOR TWO REASONS. ONE, THE HYDROCHLORIDE GIVES THE PRODUCT A GREATER SHELF LIFE. TWO, THE HYDROCHLORIDE MAKES THE COCAINE SOLUBLE IN WATER. THE COCAINE BASE IS NOT WATER SOLUBLE.

COCAINE FREE BASE(CRACK) IS MADE BY ADDING A BASE SUCH AS AMMONIA, SODIUM HYDROXIDE, OR SODIUM BICARBONATE(BAKING SODA) TO THE COCAINE HYDROCHLORIDE. THE HYDROCHLORIDE IS AN ACID WHICH IS NEUTRALIZED BY THE BASE. THE RESULT IS COCAINE FREE BASE. THE REASON THAT ONE CONVERTS THE HYDROCHLORIDE TO THE BASE IS THAT THE HYDROCHLORIDE VAPORIZES AT A TEMPERATURE OF APPROXIMATELY 190°CENTIGRADE; WHEREAS, THE FREE BASE VAPORIZES AT 95°CENTRIGRADE. SO, THE FREE BASE CAN BE CHANGED INTO A SMOKE AT A LOWER TEMPERATURE. THE STOCHIOMETRIC CHEMICAL EQUATION IS LISTED BELOW.

$C_{17}H_{21}NO_4.HCl$	+	$NaHCO_3$	-------	$C_{17}H_{21}NO_4$	+	H_2O	+	CO_2	+	$NaCl$
COCAINE HYDROCHLORIDE		SODIUM BICARBONATE		COCAINE FREE BASE		WATER		CARBON DIOXIDE		SODIUM BICARBONATE
339 GRAMS				303 GRAMS						

THE CHEMICAL EQUATION SHOWS THAT 303 GRAMS OF FREE BASE IS PRODUCED FROM 339 GRAMS OF COCAINE HYDROCHLORIDE. THE RATIO OF POWDER COCAINE(HYDROCHLORIDE) TO FREE BASE(CRACK) IS 1.11 TO 1, NOT THE 100 TO 1 RATIO STATED IN THE GUIDELINE.

COCAINE CAN BE USED IN THREE WAYS. IN ORDER TO BE EFFECTIVE, COCAINE MUST ENTER THE BLOODSTREAM. COCAINE THAT IS INHALED IS ABSORBED THROUGH THE NASAL MUCOSA IN THE NOSE AND THROUGH THE ALVEOLAR-CAPILLARY MEMBRANE IN THE LUNGS, MAKING ITS WAY INTO THE BLOODSTREAM. COCAINE THAT IS SMOKED PASSES THROUGH THE ALVEOLAR-CAPILLARY MEMBRANE TO THE BLOODSTREAM. HOWEVER, WHEN COCAINE IS INJECTED INTRAVENOUSLY WITH A NEEDLE, IT GOES DIRECTLY INTO BLOODSTREAM.

POWDER COCAINE CAN BE USED IN ALL THREE WAYS. IT CAN BE INHALED AS A POWDERED SUBSTANCE. POWDER COCAINE CAN BE SMOKED DIRECTLY AS IT COMES IN THE HYDROCHLORIDE FORM, OR IT CAN BE CONVERTED TO FREE BASE AND SMOKED. SINCE POWDER COCAINE IS READILY SOLUBLE IN WATER, IT CAN BE USED IN THE MOST DIRECT AND POTENT WAY. POWDER COCAINE CAN BE DISSOLVED IN WATER AND INJECTED DIRECTLY INTO THE BLOODSTREAM. SMOKING COCAINE IS THE SECOND, NOT THE FIRST, MOST POTENT WAY OF USING COCAINE.

COCAINE FREE BASE CAN BE USED IN ONLY ONE WAY. SINCE COCAINE FREE BASE IS NOT WATER SOLUBLE, IT CAN ONLY BE SMOKED. THE FREE BASE CANNOT BE USED IN THE MOST POTENT WAY--INJECTION. ONLY COCAINE HYDROCHLORIDE(POWDER) CAN BE DISSOLVED IN WATER AND INJECTED DIRECTLY INTO THE BLOODSTREAM. ALSO, COCAINE FREE BASE CANNOT BE INHALED BECAUSE IT IS INSOLUBLE IN THE FLUIDS OF THE NOSE AND LUNGS. IF COCAINE FREE BASE WERE INHALED, IT WOULD REMAIN IN THE NOSE AND LUNGS AS INSOLUBLE PARTICLES.

IF POWDER COCAINE CAN BE SMOKED, WHY IS IT CONVERTED INTO COCAINE FREE BASE BEFORE IT IS SMOKED? COCAINE IS CONVERTED FROM POWDER TO FREE BASE BECAUSE THE FREE BASE TURNS INTO SMOKE AT A LOWER TEMPERATURE, MAKING IT EASIER TO SMOKE.

IF THE SOCIAL RAMIFICATIONS ARE EXPLORED, WE CAN CONCLUDE THAT SMOKING CRACK DIVERTS USERS FROM INTRAVENEOUS INJECTION OF SOLUBLE POWDER COCAINE. FEWER INTRAVENEOUS USERS RESULTS IN FEWER CONTAMINATED NEEDLES WITH THE CORRESPONDING RISK FOR AIDS.

LET US ASSUME THAT THE SENTENCING GUIDELINES RATIO , 1 GRAM OF CRACK EQUALS 100 GRAMS OF POWDER COCAINE,IS CORRECT. A PERSON COULD INHALE APPROXIMATELY 10 TO 20 PUFFS OF SMOKE FROM 1 GRAM OF CRACK. ON THE OTHER HAND, WITH 100 GRAMS OF POWDER COCAINE, USING A DOSE OF 0.2 GRAM, A PERSON COULD INJECT HIMSELF 400 TO 500 TIMES. OR, A PERSON COULD SMOKE THE POWDER COCAINE DIRECTLY, WITHOUT CONVERSION TO THE FREE BASE. IF A PERSON DECIDED TO SMOKE 100 GRAMS OF POWDER COCAINE, HE COULD GET 1,000 DOSES(INHALATIONS), ASSUMING EACH INHALATION USES 0.1 GRAM.

IN CONCLUSION, NO SCIENTIFIC OR LOGICAL BASIS CAN JUSTIFY THE CURRENT CRACK LAW. CONSEQUENTLY, THE LAW SHOULD BE EXAMINED FOR THE POSSIBILITY OF RACIAL BIAS, WHICH SEEMS TO BE SUPPORTED BY STATISTICS.

THANK YOU FOR YOUR KIND CONSIDERATION OF THIS MATTER.

SINCERELY,

MICHAEL Y. TANAKA

033

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DONALD CARTER
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145 MAINE STREET
BRUNSWICK, MAINE 04011
207-729-1500

CRACK/COCAINE AMENDMENT

March 1, 1994

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

To Whom It May Concern:

I would like to make my opinion known concerning the current status of sentencing for crack/cocaine offenders, and the need for significant changes to be made in the sentencing guidelines as applied to offenses relating to this drug.

In my view the current sentencing scheme for crack/cocaine offenders represents an absurd waste of federal resources and is tantamount to the wholesale warehousing of human beings. While there is no dispute that crack/cocaine is a dangerous drug, there is little logic in a scheme which sentences someone to a ten fold greater sentence for taking powdered cocaine, mixing it with baking soda, heating it up on a stove so that the molecular structure can be changed such that it may be smoked rather than snorted. There is significant evidence available which shows that powdered cocaine is in fact more dangerous than crack/cocaine and is responsible for far more deaths than crack/cocaine.

It has also become extremely clear that this statute/sentencing scheme has a racially disparate impact on African/Americans. In fact recent studies show that while approximately 50% of powdered cocaine defendants are white, 96% of crack/cocaine prosecutions are against blacks. The constitutional implications of this scenario are obvious.

I hope that the Sentencing Commission will take the time to rectify this travesty of justice, and enact sentencing guidelines, RETROACTIVE to the enactment of the differentiation between powder and crack/cocaine under the guidelines, which will punish all cocaine offenders equally.

I thank the Commission for taking my opinion into its consideration.

Sincerely,

Stephen H. Mackenzie

SHM:psw

cc: Daryl Singleterry

034

Law Offices
THOMAS W. TANNER
P.O. Box 480
Covington, Louisiana 70434

Telephone: (504) 892-0202
Fax: (504) 892-9576

424 Vermont Street
Covington, LA

March 15, 1994

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

Attention: Public Information

Dear Commission Members:

As Chairman of the Louisiana Sentencing Commission, a retired judge, and now a practicing attorney, I have been following the federal sentencing guidelines and would like to urge the Commission to support the changes or amendments to the Sentencing Guidelines for United States Courts recommended by the Commission, which are the subject of the public hearing to be held March 24, 1994 and which may be reported to Congress by May 1, 1994.

I am particularly in support of, and strongly urge, that the Commission recommend the proposed amendment to Chapter Two, Part S revising and consolidating Sections 2S1.1 and 2S1.2.

I also urge the adoption of the proposed amendment to Section 1B1.10 but believe that instead of "the Court may consider a reduction in the defendant's term of imprisonment", this provision should read "the Court shall consider a reduction in the defendant's term of imprisonment" if the guidelines range applicable to the defendant has been lowered as a result of an amendment. To do otherwise would deny justice to people already sentenced merely because the date sentencing occurred was prior to the passage of the amendment.

I also favor, and urge you to recommend, that all amendments to the sentencing guidelines be made retroactive. To do otherwise would again deny justice, decency and fair play to defendants already sentenced.

I believe that an extraordinary effort should be made to recommend the proposed changes to Congress by May 1, 1994, and that the commission members do all in their power to insure passage of the recommendations.

Thanking you for your assistance and cooperation in this matter, I am,

Sincerely,

Thomas W. Tanner

TWT:ege

cc: Hon. J. Bennett Johnston
Senate Office Building
Washington, D.C. 20510

Hon. John Breaux
Senate Office Building
Washington, D.C. 20510

Hon. Robert L. Livingston
House Office Building
Washington, D.C. 20515

035

LAW OFFICES
RODRIGUE & RODRIGUE
604 EAST RUTLAND STREET
COVINGTON, LOUISIANA 70433

JULIAN J. RODRIGUE, JR.

JULIAN J. RODRIGUE
OF COUNSEL

TELEPHONE 892-3171
FAX 892-7278

March 9, 1994

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

Attention: Public Information

Dear Commission Members:

I have been a practicing attorney for forty-three years in the Eastern District of Louisiana, New Orleans Division, and I am active in criminal defense work in both State and Federal Courts, after serving as a prosecutor in State Courts for eighteen years. I strongly support the changes or amendments to the Sentencing Guidelines for United States Courts recommended by the Commission, which are the subject of the public hearing to be held March 24, 1994, and which may be reported to Congress by May 1, 1994.

I am particularly in support of, and strongly urge, that the Commission recommend the proposed amendment to Chapter Two, Part S revising and consolidating Sections 2S1.1 and 2S1.2.

I also urge the adoption of the proposed amendment to Section 1B1.10 but believe that instead of "the Court may consider a reduction in the defendant's term of imprisonment", this provision should read "the Court shall consider a reduction in the defendant's term of imprisonment" if the guidelines range applicable to the defendant has been lowered as a result of an amendment. To do otherwise would deny justice to people already sentenced merely because the date sentencing occurred was prior to the passage of the amendment.

I also favor, and urge you to recommend, that all amendments to the sentencing guidelines he made retroactive. To do otherwise would again deny justice, decency and fair play to defendants already sentenced.

I believe that an extraordinary effort should be made to recommend the proposed changed to Congress by May 1, 1994, and that the Commission members do all in their power to insure passage of the recommendations.

Thanking you for your assistance and cooperation in this matter, I am

Sincerely,

RODRIGUE & RODRIGUE

BY: _____
WILLIAM J. RODRIGUE

JJR/cvb

cc: Hon. J. Bennett Johnston
Senate Office Building
Washington, D. C. 20510

Hon. John Breaux
Senate Office Building
Washington, D. C. 20510

Hon. Robert L. Livingston
House Office Building
Washington, D. C. 20515

036

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ROBERT J. DVORAK
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ALSO ADMITTED IN PENNSYLVANIA

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March 9, 1994

Michael Courlander
Public Information Specialist
U.S. Sentencing Commission
Suite 2-500 South Lobby
1 Columbus Circle, NE
Washington, DC 20002-8002

Dear Mr. Courlander:

Regarding the Marijuana Amendment to the Federal Sentencing Guidelines, I support the Marijuana Amendment establishing a 100-gram-per-plant equivalency for fifty or more plants, regardless of how many plants are grown, and that this change be made retroactive.

As a criminal defense practitioner in federal courts, I have represented many young people accused of violation of controlled substances laws. The marijuana equivalency tables in the current Federal Sentencing Guidelines are draconian at best and make no sense when considered vis-à-vis the growing of a fewer number of plants than fifty. The extrapolation of the current guidelines from the applicable mandatory minimum is not required by statute and creates penalties wholly disproportionate to the actual harm involved.

I strongly urge the Commission to accept the amendment which establishes a hundred-gram-per-plant equivalency for fifty or more plants, regardless of how many plants are grown, to the current marijuana sentencing guideline chart.

Very Truly Yours,

Waring R. Fincke
Attorney at Law

WRF:dlt

037

BENDER & WAHLBERG, P.C.
ATTORNEYS AT LAW

DOUGLAS A. BENDER
P. DAVID WAHLBERG*
*Board Certified - Criminal Defense

1208 WEST AVENUE
AUSTIN, TEXAS 78701
(512) 474-2315

March 11, 1994

United States Sentencing Commission
One Columbus Circle, Northeast
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Changes to Federal Sentencing Guidelines

Gentlemen:

For the past several years, I have become increasingly concerned about the unreasonably harsh guidelines in drug cases, particularly those relating to marijuana. The sentences improsed and actually served are so dramatically different under the Federal Sentencing Guidelines that State law enforcement agencies actively forum shop in order to seek prosecution in Federal Court. While I feel that it is pointless, at this time, for me to address the enforcement of drug laws in general, there is one particular area that is so grossly unfair that I believe your attention is appropriate.

Specifically, your attention is directed to that provision in Section 2D 1.1 in which it provides that in the event of possession of fifty or more marijuana plants, each plant shall be deemed to be the equivalent of one kilogram; that in the case of possession of fewer than fifty marijuana plants, each plant shall be treated as the equivalent of one hundred grams of marijuana. This provision establishes nothing more than a presumption; it is clearly not based on any factual considerations. For a person in possession of fifty marijuana plants to be punished at a rate ten times that of a person who had one plant fewer is ludicrous.

I recently handled a marijuana case involving the possession of approximately one hundred marijuana plants. Under the Guidelines, this individual was held responsible for the equivalent of more than two hundred twenty pounds of marijuana. In truth, the marijuana actually weighed forty-seven pounds.

If truth in sentencing is indeed the goal of the Sentencing Guidelines, then we should agree that this provision is not factually accurate.

FED/SHELTON/22

[94]

It is my suggestion that this provision be deleted and that the punishment for possession of marijuana plants should be based on the actual weight of the marijuana involved (excluding dirt, roots, stalks, and stems, because they are generally not consumed).

Sincerely,

P. David Wahlberg

PDW/rbp

FED/SHELTON/22

038

STATE REPRESENTATIVE
36th DISTRICT
JEANNE KOHL
MAJORITY WHIP

State of
Washington
House of
Representatives

EDUCATION
ENVIRONMENTAL AFFAIRS
JUDICIARY
TRANSPORTATION

March 17, 1994

Judge William Wilkins, Jr.
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: U.S. Sentencing Commission Hearings on Adjustment of Sentencing Guidelines on Marijuana Growing on Federal Lands.

Dear Judge Wilkins:

I am writing as a member of the Washington State House of Representatives Judiciary Committee. As I understand, the U.S. Sentencing Commission is receiving public comments through March 18 before conducting hearings beginning March 24.

Overall, I am very concerned about the present system of imposing mandatory minimum sentences of five years and ten years based on use of a cookbook list of x number of marijuana plants equaling x amount of weight determining x number of months in prison. This system seems particularly inequitable when contrasted with the penalties imposed for growing marijuana on state or private lands. Neither does it seem very practical to clog the correctional facilities with non-violent offenders, leaving insufficient space for violent offenders.

We in Washington state are currently facing this problem. Our legislature had passed the Omnibus Drug Act of 1989, requiring cookbook type of standards for sentencing. However, unlike the federal system, we do provide some discretion to the judge, an option of imposing sentences <u>below</u> the standard range on the basis of mitigating, case-specific factors (<u>not</u> because the judge believes the mandatory minimum sentence to be unfair). Even so, we now find our prisons brimming with inmates convicted of drug-related offenses, leaving insufficient room for those convicted of violent crimes.

Thus, I urge the Sentencing Commission as well as the Senate Judiciary Committee to make changes in the sentencing guidelines for drug-related offenses. The "War on Drugs" produced even more severe sentencing standards at the federal level than the already severe standards established at our state (and many other states) level. With the increasing rate of violent crimes being committed -- especially by our youth and of a random nature -- it is time to reshift our priorities and redirect our resources to deal with this deadly phenomenon.

LEGISLATIVE OFFICE: 404 LEGISLATIVE BUILDING, PO BOX 40672, OLYMPIA, WA 98504-0672 • (206) 786-7880
HOTLINE DURING SESSION: 1-800-562-6000 • TDD: 1-800-635-9993
DISTRICT: 2208 NW MARKET, # 311, SEATTLE, WA 98107 • (206) 545-0516

[90]

Also, I urge the Commission to make the changes retroactive, as was done with the change in sentencing standards for LSD possession.

As both a state legislator serving on the House Judiciary Committee and as a sociologist on the faculty at the University of Washington, I strongly believe that five- and ten-year mandatory minimum sentences too frequently reap unintended consequences that are dysfunctional for convicted individuals and for protection of our citizens. Locking up someone for five years minimum may in effect be counterproductive for his or her rehabilitation and becoming a contributing citizen, as well as resulting in taking up space that could be used for incarcerating a violent offender who presently is likely to be let off due to lack of prison space. I believe that imposition of more equitable punishments accompanied by rehabilitation efforts make more sense fiscally, and in preventing recidivism.

I thank you for considering my input. I would be please to provide further comment if you wish.

Sincerely,

Jeanne Kohl

JEANNE KOHL
State Representative
36th District

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

STATEMENT OF

MARY LOU SOLLER, CHAIRPERSON

COMMITTEE ON THE U.S. SENTENCING GUIDELINES

SECTION OF CRIMINAL JUSTICE

On Behalf of

THE AMERICAN BAR ASSOCIATION

Before the

UNITED STATES SENTENCING COMMISSION

Concerning

SENTENCING GUIDELINE AMENDMENTS

March 18, 1994

My name is Mary Lou Soller, and I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States' Sentencing Guidelines. The members of this committee include professionals involved in all aspects of the criminal justice system, including the judiciary, prosecutors, public and private defense practitioners, academics, and criminal justice planning professionals.

I appear before you today at the request of ABA President R. William Ide, III, to convey the ABA's views on the proposed amendments to the Sentencing Guidelines. Our comments are made in the context of the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures that were finalized last year.

The Amendment Process

As in prior years, we remain interested and concerned about the process employed by the Commission in the amendment of the Guidelines.

First, we are aware of a concern that has been expressed by some practitioners that the Guidelines should not be amended when the Commission does not have a full complement of members. Last year several commissioners expressed concern about taking action with a bare quorum of members. This year, that problem is potentially compounded by the fact that there are even more positions waiting for appointment. We urge the Commission to postpone its consideration of all proposed amendments until it is at full strength.

On a related point, we note that the Commission has sought comment in a number of areas in which we believe the experience of those who see examples of these cases in practice could be useful. Thus, we urge the Commission to consider holding hearings in the field after its current

vacancies have been filled. Specifically, we believe that this would be appropriate for discussions of the Commission's proposals and concerns set forth in Issues 16 (aging prisoners), 29 (criminal organizations), and 30 (criminal history).

Administrative Procedures

We would like to take this opportunity to provide comment on the procedures employed by the Commission in conducting its business.

In previous years we have recommended that the Commission adopt rules of procedure and work toward a more accountable process. We renew those recommendations. We believe the Commission's effort to systematize its process is an important part of any effort to improve federal sentencing.

As we have noted before, the Sentencing Reform Act envisioned an expert sentencing commission acting as an informed and responsive administrative agency. Although located in the Judicial Branch, the Commission has important substantive rulemaking responsibility. Because that responsibility is being exercised by unelected individuals, it is critical that those officials actually be -- and appear to be -- both open to input and accountable to the public.

We applaud the steps already taken by the Commission. However, even with the changes that have been made, the Commission remains significantly less accountable than other federal rulemaking agencies. This difference contributes unnecessarily to the controversial nature of Commission decisions. While many of the policy decisions of the Commission will of necessity be unpopular with some, Commission policy decisions become even harder to accept

when the decision makers have not provided adequate access to information, sufficient opportunity to comment, or an adequate explanation of the decisions reached.

We believe that, as a general matter, the Commission should use those procedures followed by other administrative agencies that issue substantive rules as a model for procedural regularity. While these procedures are by no means perfect, they do represent an accommodation that has been reached over time between the need for agency efficiency and the need for public accountability. The ABA Criminal Justice Section (through our Committee) and the Administrative Law and Regulatory Practice Section are currently involved in a study of Commission procedures that may ultimately lead to recommendations by the ABA House of Delegates for Congressional action to change certain aspects of the Commission's mandate.

What follows are recommendations consistent with our previous suggestions to the Commission which could be implemented without any changes in its statutory mandate. In making these suggestions, we do not intend that they would alter or expand any rights of review that may currently exist.

1. The Commission Should Promulgate Rules of Procedure.

We note that 28 U.S.C. § 994 (a) envisions that the Commission will promulgate and amend its Guidelines pursuant to "its rules and regulations." However, the Commission has not, as yet, brought together those procedures it now follows into a unified and published set of standards. We urge the Commission to publish a set of the rules and procedures to govern all aspects of its rulemaking process and to make those procedures available to the interested public.

2. The Commission Should Provide a More Detailed Statement of Basis and Purpose When Adopting Rules.

Section 553(c) of the Administrative Procedures Act ("APA") requires that an agency incorporate "a concise statement of basis and purpose" in the rules adopted. For most agencies, that requirement poses a more elaborate burden than the term "concise statement" implies. As the Supreme Court has explained, "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[1]

In the past, the Commission's explanations have not met this standard. For example, the Commission has often failed to account for factors Congress required to be considered, such as the impact of Guideline changes on prison overcrowding. It has also rarely responded to public requests to explain why a comment was being accepted or rejected. For some issues, such as the decision to make Commission changes retroactive, the Commission has supplied no explanation at all.

We urge the Commission to provide a more thorough explanation of its amendments to the Guidelines and policy statements, to explain why it chooses one option over others considered, and to explain why it rejects public comment opposed to its suggestion. If the requirement of producing this statement of basis and purpose is difficult to accomplish under the Commission's current timetable, we believe that the Commission should seriously consider moving to a two-year amendment cycle.

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[1] Bowen v. American Hospital Ass'n, 476 U.S. 610, 626 (1986).

3. The Commission Should Publish a More Detailed Regulatory Agenda.

The Commission now publishes a notice in the Federal Register identifying the issues on which it seeks comment and those on which it may adopt amendments, and we commend you for doing so. However, that notice is generally far less detailed than the notice published in the United Agenda of Federal Regulations and required of other agencies. We recommend that, to the extent feasible, the Commission should model its agenda on the United Agenda. The more information the Commission can provide to the public, the better the feedback it can expect.

4. The Commission Should Adopt Procedures for Petitions.

At present, the Commission has no written procedures concerning the solicitation and disposition of petitions. It also does not maintain a public petition file. The Commission should consider adopting procedures regarding petitions.

5. The Commission Should Comply Voluntarily With FACA and FOIA.

Conventional rulemaking agencies are subject to the requirements of the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA"). The Commission's failure to operate under these open-government provisions, or to construct acceptable analogies, frustrates legitimate public efforts to influence and learn from the Commission.

FACA requires open advisory committees. Most other, more traditional, agencies have learned to operate with open meetings. An open meeting rule would permit the public

better access to the Commission's committee action and would improve the quality of its deliberations by permitting public input. Compliance with FOIA, or a Commission analogue, would permit the public easier access to Commission documents with relevance to sentencing questions.

6. The Commission Should Comply With the Sunshine Act.

Although the Commission's meetings are open to the public, the lack of notice and lack of formality concerning the meetings limits the usefulness of any open meeting policy. The Commission's current policy does not require a week's prior notice of the meeting or publication of the notice in the Federal Register, nor does the policy define what meetings are to open or limit the circumstances under which a meeting may be closed. In addition, the Commission does not make tape recordings of prior meetings available to the public. We urge the Commission to amend its meetings policy to provide greater notice of the time of its meetings, access to a record, and standards for those rare circumstances when decisions will not be made in public.

Specific Amendments

In addition to our general comments, we also have comments on several of the proposed amendments and have set forth our positions below.

I. Public Corruption

Proposed Amendment 2(A):

This proposal would result in the consolidation of § 2C1.3 (Conflict of Interest) and § 2C1.4 (Payment or Receipt of Unauthorized Compensation). For the reasons stated in the synopsis of the proposal, the ABA does not object to this proposed consolidation. However, it should be noted that for many of the statutes covered by the Guidelines, the proposal does not distinguish between non-intentional violations (which are classified as misdemeanors) and willful violations (which are classified as felonies). We recommend that the Commission add an application note to alert the court that a downward departure may be appropriate if the offense does not involve willful conduct.

Proposed Amendment 2(B):

For the reasons stated in the synopsis of the proposal, the ABA does not object to the proposed consolidation of § 2C1.2 and § 2C1.6. However, for the reasons set forth in more detail in response to Proposed Amendment 4(A) below, the ABA seeks the elimination of the specific offense characteristic that increases the offense level under § 2C1.2 "if the offense involved more than one gratuity." Additionally, the ABA is opposed to increasing the offense levels for gratuity offenses by eight (8) levels if the gratuity was given to an elected or high level decision-making official. We discuss the reason for our opposition to this specific offense characteristic in our response to Proposed Amendment 5(A).

Issue for Comment 2(C):

The ABA opposes the consolidation of the bribery (§ 2C1.1) and gratuity (§ 2C1.2) Guidelines. Any consolidation would serve only to blur the distinction between the offenses for sentencing purposes. Consolidation will neither simplify the determination of the appropriate Guideline nor ensure similar punishment for similar conduct. The definitions of the separate offenses covered by these separate Guidelines are already contained in the statutes and interpretive case law.

Issue for Comment 3:

The empirical evidence developed by the Commission's Working Group Report does not justify increasing offense levels for public corruption offenses. As reported by the Working Group, bribery defendants already have a median total offense level of 14 and thus -- absent departures -- are not normally eligible for a non-imprisonment sentence. Furthermore, an increase in offense levels that does not allow for a distinction between sentences to be imposed in public corruption cases and sentences to be imposed in non-public corruption cases is not justified. Indeed, even within public corruption cases, we suggest that a distinction be made between the sentences to be imposed on public officials and those imposed on non-public officials. Regardless, we suggest that the matter be subjected to further study. While the

Working Group report is an excellent start, a more careful review of the sentencing data is necessary before the enactment of amendments that restructure base or adjusted offense levels.

With regard to harmonizing the existing public corruption Guidelines, we generally favor equalizing base offense levels for bribery, regardless of the context, and gratuities, regardless of the context. However, we suggest that this matter be submitted to the Working Group for further evaluation.

Proposed Amendment 4(A):

The ABA favors option 2 if the proposals that address the issue of the adjustments in § 2C1.1 and § 2C1.2 for more than one incident, for the reasons stated in the Commission's synopsis. The adjustment based on "value of benefit" adequately measures the relative culpability. There is no good reason to sentence an individual whose financial condition results in his paying bribes in multiple installments more harshly than the individual whose financial condition allows him to pay the same amount in a single payment.

Proposed Amendment 4(B):

Consistent with the adoption of option 2, as noted above, the commentary discussion of the adjustments for multiple payments should be eliminated.

Proposed Amendment 5(A):

We oppose making the adjustment for value of the payment cumulative to the adjustment for high level or elected officials. Our position is influenced by the fact that the current increase for conduct involving an elected or high level government officials is eight (8) levels.

We have several objections to this provision. First, in the case of a gratuity, the eight (8) level increase results in abnormally harsh sentences, even in cases involving very minor gratuities. The payment of a meal for a high level official would presumptively be sentenced at between 18 and 24 months. Second, for any offense involving any amount of money over $2,001, the presumptive sentence would be above the statutory maximum. Thus, non-similarly situated offenders (those paying or receiving gratuities of $1,000,000 or more and those paying or receiving gratuities of between $2,001 and $5,000) are treated similarly -- i.e., they are sentenced to the statutory maximum. Finally, the adjustment for elected officials does not make any distinction between a locally elected sheriff serving a small town and a United States Senator. Not all elected officials are alike simply by virtue of the fact that they are elected; not all elected officials are "high level."

Issue for Comment 5(B):

The ABA favors modification of the eight (8) level adjustment for high level officials. Without commenting on the appropriateness of any specific range of levels, we favor a sliding-scale approach that would allow the court to distinguish between different types of truly "high level" officials. In connection with the sliding-scale approach, the maximum adjustment should be less than eight (8) levels, with truly extraordinary cases, such as those involving presidential appointees, handled by way of departure. While the Commission should set forth certain objective standards that might be added to facilitate application of this adjustment, we suggest that this be adopted as commentary and not as part of the Guideline.

Proposed Amendment 6(A):

The proposed clarifications are consistent with the definitions contained in the relevant statutes. The ABA supports the three definitional clarifications proposed.

Issue for Comment 6(B):

Regardless of which rule is the better rule of law, we question whether the Commission must act whenever a conflict of interpretation develops among the circuits. This task has generally been the duty of the United States Supreme Court. While Congress amends statutes to "overrule" Supreme Court rulings interpreting Congressional enactments, Congress generally does not so act until the Supreme Court rules. Taking guidance from this, the ABA believes the Commission should await further judicial action before amending its "legislation" to overrule decisions with which it disagrees.

Proposed Amendment 6(C):

Consistent with its standards, the ABA opposes the proposed application note authorizing an upward departure for ongoing harm. First, the phrase "risk of ongoing harm" is ambiguous. Second, there is generally little need to direct departures -- the court has authority to depart upward for any factor not adequately considered, pursuant to § 5K. Finally, in this case, a court already has departure authority under § 5K2.7 (Disruption of Governmental Function).

II. Drugs

Proposed Amendment 8(A):

This proposed amendment would revise the Drug Quantity Table to provide for offense levels that encompass the statutory mandatory minimums at the top, rather than the bottom, of the guideline range. This amendment was before the Commission last year, and the ABA continues to urge its adoption.

There are several reasons for our support. First, we have long believed that the current Guidelines overemphasize the quantity of drugs in determining an offender's culpability. Second, consistent with ABA policy, we oppose the mandatory minimum provisions themselves. This amendment would reduce the extent to which the Guidelines are distorted by the ill-considered statutes.

Finally, we adhere to the principle stated both in our Standards and in 18 U.S.C. § 3553 that punishment should be sufficient -- but not greater than necessary -- to fulfill the statutory purposes of sentencing. A recently released study from the Department of Justice documented the shocking extent to which federal prisons are populated with low-level, non-violent drug offenders. This result is caused largely by mandatory sentencing statutes and their interaction with Guideline § 2D1.1. Adoption of this proposed amendment would be a small but necessary step toward rationalizing the use of scarce prison space.

Proposed Amendment 8(B):

This amendment adds a specific offense characteristic in § 2D1.1 to address the use or possession of a weapon in drug offenses. We believe this amendment is unnecessary, because such conduct generally will be separately charged in federal drug prosecutions. If the purpose of the amendment is to relieve the prosecution of the need to prove weapons use beyond a reasonable doubt, we oppose the amendment. This burden-shifting is contrary to the ABA Standards. It also constitutes an unjustified shift from a charge-based to a real offense approach to this conduct. If there is some other purpose of the amendment, the Commission has not adequately expressed or explained it.

Proposed Amendment 8(C):

This amendment caps the offense level for defendants with a mitigating role in the offense. Consistent with the reasons of support for Proposed Amendment 8(A), we support this amendment.

The ABA does not take a position on any specific offense levels, so we will not comment on whether the cap should be set at 30 or 32.

Issue for Comment 8(D):

As noted, the ABA believes that the current Guidelines overemphasize the role of drug quantity in determining a defendant's culpability. We believe that adoption of Proposed Amendments 8(A) and 8(C) would begin to redress this flaw in the Guidelines.

Proposed Amendment 9:

This amendment sensibly clarifies the operation of the aggravating role Guideline, and we urge its adoption. We note, however, the phrase "or was otherwise extensive" in the current Guideline may no longer be necessary now that the commentary defines the meaning of the term "participant" with greater specificity. While we support judicial discretion, we believe the Commission should not employ or retain Guideline terms that are so vague they provide no guidance to judges, and thus may cause unwarranted disparity.

Proposed Amendment 10:

This amendment clarifies the operation of the mitigation role Guideline. In the past, we have urged its adoption, and we continue to support it. We believe the examples inserted in the introductory commentary to Chapter Three, Part B of the Guidelines seem to provide useful guidance to courts.

Proposed Amendment 24:

The purpose of this amendment is to address the situation in which an individual involved in a drug transaction inflates the amount of drugs he intends to buy or is capable of buying or selling in the transaction. Since the Guidelines are so driven by drug quantity, this "puffing" has led to bizarre and unjust results producing unwarranted disparity, and thus should be corrected.

Consistent with our view on the role of quantity in determining a defendant's culpability and our interest in minimizing unwarranted disparity, the ABA supports adoption of the amendment.

Issue for Comment 33(A):

The Commission seeks comment on whether it should modify the Guidelines that provide for a 100 to 1 ratio distinguishing crack cocaine from powder cocaine cases.

First, we understand that the Commission staff has completed a comprehensive review of this subject. We strongly urge prompt publication of this report. If, as we suspect,

the report suggests that the current ratio is unjustified -- or at least overstated -- we would support amendments to rectify this error.

The fact that the current ratio is based on a statutory mandatory sentence should not be a bar to improvement of the Guidelines. In a related situation last year, the ABA supported an amendment to rationalize the definition of "mixture or substance" in LSD cases. The Commission commendably adopted that amendment because it recognized its independent obligation to ensure just sentences in cases not covered by the mandatory minimum sentencing laws.

III. Money Laundering

Proposed Amendment 11:

We strongly support the adoption of this amendment to § 2S1.1 and § 2S1.2, with several modifications.

We agree with the Commission's Money Laundering Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

Many of our members have reported to us their experience that the current Guidelines encourage prosecutors to seek money laundering convictions in cases not related to narcotics money laundering, because the resulting sentences are significantly higher than for the underlying offenses. We have also become aware of instances in which the government can influence plea bargaining negotiations merely by threatening to include a "money laundering" count in the indictment.

The proposed Amendment seems to recognize that 18 U.S.C. §§ 1956 and 1957 are so broad that they encompass cases which are not normally thought to be "money laundering" -- and indeed, in some cases, in which the underlying offense is virtually indistinguishable from the underlying crime. Adoption of the amendment would go a long way towards addressing the problems this overreaching creates.

Although this Amendment would go a long way toward correcting the current problems, we suggest that the ultimate goal of achieving fairness in sentencing would be more clearly advanced by modifying the proposal so that the base offense level for an underlying offense would be applied in all cases, not just in cases where that level would exceed the base offense level in § 2S1.1(a)(2) or (3). Further, if the Commission is intent on achieving uniformity among Guidelines by conforming § 2B1.1 and § 2T1.1 with § 2F1.1, we suggest that § 2S1.1(a)(3) should also be assigned the same base offense level as § 2F1.1.

IV. Fraud

Proposed Amendments 12 and 20:

We support the change proposed in Amendment 12(A) that would eliminate "more than minimal planning" as a guideline specific offense characteristic. By changing the definition of the specific offense characteristic to "sophisticated planning," we believe the structure of the Guidelines will be improved in two respects.

First, the continued recognition of planning (independent of actual harm), as an important factor for judging relative culpability, is consistent with the empirical analysis of pre-Guidelines sentencing practices. (See § 2F1.1 comment (background).) By refining the definition, however, the Commission has made an attempt to capture this factor more precisely. Because courts have found that "more than minimal planning" applies in virtually all cases, the concept of the heartland case -- as one in which the base offense level applies without the application of specific offense characteristics -- has been lost in the past. Adoption of proposed amendment 12(A) would advance the original concept of the Guidelines and promote fairness by allowing courts to rationally distinguish between offenders.

Proposed Amendment 12(B) seeks to raise the base offense level in § 2B1.1 to that found in § 2F1.1. We oppose this change. The ABA Standards seek to foster uniformity of sentences for similarly situated individuals charged with the same crimes. As we testified last year, the decision to sentence larceny and theft cases exactly the same as fraud and deceit cases is contrary to prior practice and appears to increase disparity by treating dissimilar offenders in a similar manner.

If the Commission believes that there is an unrecognized need to conform the base offense levels of these two Guidelines, we support the formation of a working group to study this issue. Without a thorough examination of the circumstances of the cases that has arisen under the these two Guidelines, it is impossible to determine whether a change would be made solely for the sake of facial consistency, whether such a change would result in unwarranted disparity by imposing the same sentence for truly disparate conduct, or whether such a change would be justified. If a need for harmonizing these two Guidelines is found, we would support the reduction of the base offense level for § 2F1.1 rather than increasing that for § 2B1.1.

Similarly, the Commission has sought comments on changing the increments in the loss tables for § 2B1.1, § 2F1.1, and § 2T1.1. The purported reason for such a change is that "[s]ome commentators have noted that the slope of the current loss tables is not uniform throughout the range of loss in the tables." This reason does not provide compelling justification for changing the current structure of the Guidelines. Again, we believe that before any action is taken on these proposals, the Commission should establish a working group to determine whether there is, in fact, a need or justification for the proposed changes.

Finally, we support Proposed Amendment 20A, which revises the Commentary to § 2F1.1 to provide greater consistency § 2B1.1. This revision would cure an anomaly that currently exists and, consist with the ABA Standards, would promote more fairness in sentencing.

V. Acquitted Conduct

Proposed Amendment 18:

Consistent with our position on a similar amendment last year, we support this proposed amendment because it is conforms with the ABA Standards. As set forth in Standard 18-3.6, we believe that sentences imposed should be based on the offense of conviction. We disapprove of the practice of "real offense" sentencing. We would prohibit the enhancement of sentences based on a finding by a court that -- despite the acquittal of the defendant -- he or she committed the additional offense.

We believe that any argument for basing a sentence on acquitted conduct is outweighed by the need to promote both perceived and actual fairness in the sentencing process of the criminal justice system. In our view, it is inappropriate for an individual to be punished for a criminal offense despite having been acquitted of it.

In addition, the fact that the uneven consideration of acquitted conduct at sentencing promotes disparity is also a compelling justification for enactment of this amendment. The preclusion of its consideration may actually promote uniformity.

V. Imposition of Sentence for Defendant Serving Undischarged Term of Imprisonment

Proposed Amendment 23:

The Committee opposes this proposal to revise § 5G1.3. This amendment was proposed for the stated purpose of facilitating the job of the probation department. The ABA does not believe that the mere difficulty in obtaining information is a valid justification for increasing the severity of sentences. Moreover, the better approach is found in the present state of the Guideline -- as opposed to the proposed revision -- which does not allow for differences in sentences based merely on the time of the imposition of the sentence.

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March 14, 1994

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Dear Mr. Courlander:

Pursuant to the Sentencing Commission's request for public comment on the proposed amendments to the Sentencing Guidelines published in 58 Fed.Reg. No. 243, Part V of December 21, 1993, I wish to register the following suggestions. The specific purpose of my letter is to comment on Proposed Amendment No. 11, and which would amend and consolidate USSG §§2S1.1 and 2S1.2 (money laundering offenses).

I am strongly in favor of adoption of the proposed Amendment No. 11, subject to modifications which I suggest below. The proposed amendment would tie the base levels of money laundering violations more closely to the underlying conduct which was the source of the illegal proceeds. My suggested modifications are intended to insure this result.

The Commission's proposed amendment satisfies a much needed reform. Although the current guidelines arise from concerns regarding drug trafficking, they have caused and encouraged prosecutors to seek money laundering convictions in non-narcotics related money laundering cases merely because they can gain guidelines sentences which are much harsher than those applicable to the underlying offense, as well as asset forfeitures, a factor not taken into consideration under the current Guidelines.

As the October 14, 1992 Report to the Commission Staff Director from the Commission's Money Laundering Working Group clearly demonstrates, there are cases from around the country in

which the Government, simply by adding a violation of 18 USC §§1956 and 1957 to the indictment, has been able to obtain significantly higher guideline sentencing ranges than would have been the case if the guideline for the underlying offense had controlled. Moreover, the results of the Working Group's study of Fiscal Year 1991 sentences showed that 40% of the underlying crimes in money laundering cases were not related to drug trafficking, but were characterized as "white collar" crime, and that the offense level for the money laundering conduct exceeded that for the underlying conduct 96% of the time in non-drug cases.

The proposed amendment seems to recognize that §§1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering", much less sophisticated as money laundering, but which nonetheless are proscribed by §§1956 and 1957. Indeed, in some cases, a money laundering offense is difficult to distinguish from the underlying crime. See, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991) (state public official was convicted of money laundering under 18 USC §1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.)

The current guidelines make it easy for the Government to substantially influence plea bargaining negotiations by merely threatening to include a count charging a violation of §1956 or §1957 in the indictment. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's mandated and stated goal of "eliminating unfair treatment that might flow from count manipulation." USSG, Chapter 1, Part A, Paragraph 3.

PROPOSED MODIFICATION

While I support the Commission's objective, I urge the Commission to make the following modification to the proposed amendment in order to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

First, where the defendant committed the underlying offense and where the underlying offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases in which the base offense level would exceed the base offense level as in proposed §2S1.1(a)(2)(4). The offense level of the underlying offense would

then be increased by any specific offense characteristics under proposed §2S1.1(b). To achieve this result, I suggest deleting from the instruction in §2S1.1(a) the term "(Apply the greatest)" and further suggest inserting in its place, the term "otherwise" after sub-paragraph (3).

Second, I strongly urge the Commission to make the base offense level in proposed §2S1.1(a)(3) the same as the base offense level for fraud and deceit found in §2F1.1. Accordingly, I suggest changing proposed §2S1.1(a)(3) to a base offense level of 6, plus the number of offense levels taken from the table in §2F1.1.

As a practicing criminal defense counsel who frequently appears in federal criminal trials in Philadelphia, Pennsylvania (as well as in other federal districts), I strongly support the Commission's efforts to make the Sentencing Guidelines uniform and fair.

Very truly yours,

COZEN AND O'CONNOR

BY: MICHAEL R. MCCARTY

MRM/jm

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RE: Comment to Proposed Amendment No. 11

Dear Mr. Courlander:

On behalf of our firm's Business Crimes Practice Group, we are writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Federal Sentencing Guidelines as published in the December 21, 1993, edition of the Federal Register (Vol. 58, No. 243, Part V). In particular, we wish to comment on and recommend the adoption of a form of the proposed Amendment No. 11, which would revise and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2. These sections currently govern, in most circumstances, convictions for money laundering offenses under 18 U.S.C. §§ 1956 and 1957.

The proposed amendment reflects a fundamental philosophical change in the sentencing of federal money laundering offenses. The amendment proposes to combine those two guideline sections and to tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal monetary proceeds.

Our recent experiences suggest that the Commission's proposed Amendment represents a much needed change from the