As a result of the 1993 amendments to Part T of Chapter 2 of the Federal Sentencing Guidelines, the Tax Table's proportionate relationship to the Sentencing Table is expected to ensure that sentences rendered in regard to tax offense convictions will include some type of confinement, which is necessary to achieve general deterrence and essential to effective and efficient tax administration. It is because of the significant tax administration accomplishments of the 1993 Amendments to Part T of Chapter 2 of the Federal Sentencing Guidelines, that we are particularly concerned about and opposed to proposed Amendment 12(C) as it pertains to the Tax Table. Since the Sentencing Table and the Tax Table were most recently amended in November of 1992 and 1993, respectively, we believe that further changes will only serve to complicate the sentencing process as prosecutors, the defense bar, probation officers and judges struggle to determine which of the several Tax Tables apply to a particular offense. We strongly urge the Commission to apply judicious restraint in amending the Sentencing Guidelines and agree with the Commission that frequent amendment of the Sentencing Guidelines only makes their application increasingly more difficult. The IRS readily agreed that last year's changes would be the last advocated for several years, thus providing a consistent framework upon which their effectiveness could be determined.

Beyond my general conviction that no amendment should be made to the Tax Table, I am of the opinion that there is no justification to support the adoption of either Option proposed by Amendment 12(C). Although both Options provide for a more uniform slope throughout the range of tax losses in the Tax Tables, there is no evidence that a more uniform slope is desirable in the Tax Table or that the present slope reflects such an unfair distinction between convicted tax violators so as to justify an amendment, especially so soon after the most recent amendment cycle. In fact, proposed Amendment 12(C) seems to be contrary to the position shared by the Commission and the IRS, that tax crimes are serious matters.

The current Tax Table provides for a Zone B sentence of confinement for at least one month for tax offenders with a tax loss of at least $13,501, even with a two-level reduction for acceptance of responsibility. Under Options 1 and 2 of proposed Amendment 12(C), these threshold amounts are increased to at least $15,001 and at least $25,001 respectively. These significant modifications, especially in Option 2, would clearly place these threshold Tax Table amounts and corresponding offense levels beyond the amounts of

tax due on the majority of returns filed by taxpayers each year. As a matter of fact, based on the 28% rate utilized in the Guidelines, taxpayer who accept responsibility for their actions can already evade the payment of tax on $48,214 in additional net income without being sure of receiving some period of confinement. If Option 1 were adopted, the figure would jump to $53,571 of additional unreported income and up to $89,285 of additional net income under Option 2. Increasing the level allowed for unreported income by over $5,000 as suggested in Option 1 or by $41,000 as suggested by Option 2 would be contrary to the Commission's intent to treat tax crimes as serious offenses and could seriously impair the Service's efforts to effectively address the issue of widespread non-compliance.

Proponents of proposed Amendment 12(C), suggest that the two-level incremental increases as provided by Option 2, would reduce the number of contests concerning tax loss computations because there would be fewer points at which an increased or decreased tax loss will change the offense level. Since, after conviction, the defendant's objective will still be to avoid confinement, we believe that the two-level incremental increases would have little or no effect on the number of tax loss contests and might increase the intensity at which the challenged ones are contested. We are also am unconvinced that the single increments of the Tax Table create an appearance of complexity, especially when compared with the voluminousness of the Drug Table. We do not believe that the current Tax Table should be converted to two-level increments simply because the Drug and Alien Tables incorporate that type of progression. Consequently, we believe that <u>no</u> changes to the Tax Table should be made.

Another area of the proposals published by the Sentencing Commission which cause me concern is the area relating to money laundering. This is important to the internal Revenue Service because a number of taxpayers involved in a plethora of illegal activities are investigated by special agents of our Criminal Investigation Division relative to their failure to correctly report the income derived from their illegal endeavors. In addition to gathering evidence pertaining to tax evasion, our investigators frequently develop evidence of money laundering as the defendants attempt to hide or conceal their ill gotten gains. I realize there has been substantial dialogue between your Staff and the Department of Justice and that the Department of Justice is the appropriate spokeperson

for the government in the money laundering arena, but I feel it is important for you to know that the Internal Revenue Service is indeed very concerned about Proposal 11.

If there appears to be any significant disagreement among the members of the Sentencing Commission concerning our opposition to Amendment 12(C), we would be pleased to provide additional information or, in the alternative, formally present oral testimony.

Sincerely,

Michael P. Dolan
Deputy Commissioner

cc: The Honorable Julie E. Carnes
The Honorable Michael S. Gelacak
The Honorable A. David Mazzone
The Honorable Ilene H. Nagel

049

Phone: (508) 653-7101

INFORMATION SECURITY CONSULTANTS 5 Keane Terrace, Natick, MA 01760 FAX: (508) 650-0157

Written Testimony Submitted to the United States Sentencing Commission In Support of the Proposed Amendment Regarding Computer-Related Offenses

Sanford Sherizen, Ph.D.
President
Data Security Systems, Inc.
Natick, MA

March 15, 1994

[252]

March 15, 1994

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, DC 20002-8002
Attention: Public Information

Dear Commissioners of the United States Sentencing Commission,

I would like to go on record as encouraging the Commission to support the proposed amendment regarding computer-related offenses. It is imperative that the Commission act favorably on this amendment during this period when computer crime problems are becoming increasingly serious.

For purposes of identification, I write to you as an information security professional actively engaged in consulting, conducting seminars, and writing books and articles. I have written analyses for the Office of Technology Assessment (OTA) and testified before U.S. Senate as well as state legislative committees on computer crime and privacy issues. My information security consulting has been with businesses as well as Government agencies and I have lectured around the U.S. as well as internationally.

Based on the twelve years that I have involved with information security and the prior ten years in criminological research and university teaching, I find that computer crime has grown into a complex legal and social problem and current trends are quite worrisome. Computer crime can best be understood as the computerization of traditional crimes. While new crimes are possible with the use of computers (such as those criminal acts for which laws have not been defined or which are so unique that they are not possible without the technology), the majority of computer crimes are well known crime activities that existed prior to computerization. There is a need to differentiate between new information crimes that are possible only because of the existence of a new technology (computer viruses) from traditional crimes using new technology (desktop publishing fraud and forgery).

The computer criminal has changed from the "old days" of just a few years ago. In the majority of financial offenses which I have come across, computers are essential to the act or play a major role in the occurrence. Hackers who break into computer and phone systems and those who develop and spread viruses are still a problem today. Yet, there are now new and potentially more destructive computer criminals, including competitors who want product designs, angry employees seeking revenge for downsizing, inside traders searching for strategic plans, professional criminals

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manipulating credit information and criminal histories, and journalists investigating scandals. More types of "new" computer criminals are expected.

Yet, despite these threats, information security in many organizations has failed to keep up with technological advances and information vulnerabilities. Few senior executives realize that they have to fulfill information security responsibilities in order to meet legal and fiduciary requirements. Relatively few organizations have achieved a level of information security sufficient to meet today's skilled computer criminal.

With these comments as background, I view the proposed amendment as an **interim but important response** to computer-related offenses. The next phase of the Commission's treatment of computer-related offenses should be to revisit this issue and, as suggested by the Working Group in cooperation with the Department of Justice's Computer Crime Unit, consider more specific action, such as a new computer guideline regarding these offenses. I would hope that the drafting of a new guideline will not be overly delayed since, as the Working Group correctly indicates, new cases (and, I would add, new harms) will almost certainly surface soon.

It is important for the Commission to develop a sentencing approach to computer-related crime which does not focus on harsh punishment, since that alone will not solve the computer crime problem. In research which I have recently completed on the effectiveness of deterrence, a review of the relevant empirical social science studies leads to the conclusion that deterrence is much more complex than theory (and common sense) suggest. Criminals may not act as rationally as the theories assume, there are complicated rules affecting how an individual perceives risky situations, and many individual as well as organizational factors intervene between the threat of legal sanctions and behavioral outcomes.

Even though there are state and Federal computer crime laws, there have only been a handful of criminal prosecutions to date. If the perception of the certainty and severity of punishment is a key variable in explaining deterrence, then the law has not been an effective force in controlling computer crime. Deterrence of computer crime should focus on tailoring penalties to computer crime severity, with special attention being paid to key information processes, industries, and types of violations.

Deterring computer crime will require careful consideration of the seriousness of computerrelated crime for sentencing purposes. The Commission might weigh the larger number of harms beyond invasion of privacy and consequential recovery costs. Computerrelated crimes can add significant burdens to organizations and individuals who are victimized. These include direct financial losses as well as the less direct costs of additional information security personnel, security access control and identification products, system redundancies and other additional operating expenses due to security, and staff time spent cooperating with investigating law enforcement personnel.

There is also a need to review wire and mail fraud laws so that they will more directly apply to new technological development. These fraud laws, as well as other statutes, have often been used by prosecutors in place of weak or outdated state and federal computer crime laws. Prosecutors have expressed concern that computer crime legislation does not take into consideration their prosecutorial needs and, as a result, they are often forced to "shoehorn" computerrelated crimes.

The Commission can assist with computer crime prevention by highlighting the importance of the issue and by providing direction for judges. In this symbolic as well as functional role, the nation can gain an increased protection. In a similar sense, the guidelines' model program provides senior executives with a clear view of their responsibility for crime control. Information protection must become a priority business and agency requirement. Senior executives must realize that they now have a major obligation to ensure that information is adequately protected. Deterring computer crime will require the Congress to pass improved legislation and for Government agencies and the private sector to develop and implement appropriate security measures.

I thank you for this opportunity to present these comments as written testimony and I stand ready to assist the Commission in this important effort.

VIDEO NUMBER	HEADER	LENGTH (MIN'S/SEC'S)
11	06-13-91 SEATTLE, WA VOLUME MAIL THEFTS USING COUNTERFEIT ARROW KEYS	1:45
12	05-13-93 SEATTLE, WA VOLUME MAIL THEFTS OF CREDIT CARDS	3:25
13	02-22-94 SEATTLE, WA VOLUME MAIL THEFTS INVOLVING CHECK WASHING VICTIMS INTERVIEWED	2:30
14	02-23-94 SEATTLE, WA VOLUME MAIL THEFTS INVOLVING CHECK WASHING VICTIMS INTERVIEWED	2:00
15	02-25-94 SEATTLE, WA POSTAL SERVICE MODIFYING COLLECTION BOXES	4:30

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Hon. William F. Hall, Jr.
United States Magistrate Judge
Eastern District of Pennsylvania

March 25, 1994

Mr. Michael Courlander
Public Information Specialist
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Washington, DC 20002-8002

RE: Federal Bar Association - Criminal Law Committee

Dear Mr. Courlander:

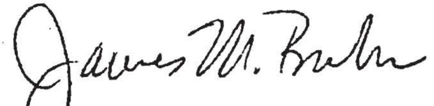
We are writing on behalf of the Criminal Law Committee of the Federal Bar Association's Philadelphia Chapter to express our strong support for two proposed amendments under consideration by the Commission during the 1994 amendment cycle.

First, we strongly support the proposed amendments to U.S. S.G. §§ 2S1.1 - 2S1.2 pertaining to money laundering offenses for the reasons stated in our comments upon a similar proposed amendment during the 1993 amendment cycle. Our earlier comments are enclosed.

Second, we strongly endorse proposed Amendment 12(A) concerning the specific offense characteristic for "more than minimal planning." Courts generally have found "more than minimal planning" to be present in virtually all cases, even relatively simple, unsophisticated ones. The result is that the two level upward adjustment for "more than minimal planning" is automatic, and does not provide a meaningful specific offense characteristic capable of

differentiating cases according to the planning and preparation involved. The proposed amendment, which would define the specific offense characteristic for planning in terms of "sophisticated planning" will help to narrow the range of cases in which the upward adjustment for the level of planning is applied.

Respectfully,



James M. Becker
Jeffery M. Lindy

JMB/kg

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March 16, 1993

VIA TELECOPY AND FEDERAL EXPRESS

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Public Information Specialist
United States Sentencing Commission
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Re: Proposed Sentencing Guideline Amendments for Public Comment - 1993 Amendment Cycle

Dear Mr. Courlander:

I am writing on behalf of the Criminal Law Committee of the Federal Bar Association's Philadelphia Chapter. Our Committee consists of federal criminal law practitioners in the Eastern District of Pennsylvania. The Committee has reviewed the proposed guideline amendments for public comment published in the December 31, 1992 edition of the Federal Register. This letter constitutes our comments on the proposed amendments. The Committee has not undertaken to comment on all of the proposed amendments. Rather, we have selected only a few on which to submit comments. They are as follows:

1. Amendment No. 20 - Money Laundering.

The Committee strongly supports the proposed amendment to U.S.S.G. §§ 2S1.1 through 2S1.4 applicable to money laundering offenses. The amendment would tie the base offense level for money laundering violations more closely to the underlying conduct that is the source of the illegal proceeds.

This represents a significant improvement in the money laundering guidelines. Our Committee is aware of cases in this District and elsewhere in which the money laundering guidelines have allowed the government to obtain a

significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. An example in our District is United States v. Brian M. Maier, Criminal No. 91-00235, (E.D. Pa.). This was a fairly simple fraud scheme in which the "loss" within the meaning of U.S.S.G. § 2F1.1 was between $40,000 and $70,000. The total offense level for the mail fraud offense was 13, which yielded a guideline prison range of 12-18 months. However, by adding a violation of 18 U.S.C. § 1957, based solely on the defendant's removal of some of the fraud proceeds from the bank account into which they had been deposited, the government successfully increased the total offense level to 19 and the corresponding guideline prison range to 30-37 months. The Commission's October 14, 1992 Working Group Report on Money Laundering has apparently identified numerous other examples nationwide of this form of "count manipulation." The money laundering charges in these cases often involve "monetary transactions" normally not thought of as sophisticated "money laundering."

With the government's increasing emphasis on forfeiture, the number of cases in which violations of 18 U.S.C. §§ 1956 and 1957 are added to fraud and other charges will only increase. This is because violations of 18 U.S.C. §§ 1956 and 1957 are among those for which civil and criminal forfeitures are authorized under 18 U.S.C. §§ 981 and 982, even though forfeiture may not be available as a remedy for the underlying offense.

Proposed Amendment No. 20 is a significant step toward elimination of the unfair treatment that can result from manipulation of money laundering charges. One concern we have arises from proposed § 2S1.1(a). This provision requires that in non-drug cases the greater of the following base offense levels be applied: (a) the offense level for the underlying offense from which the funds were derived; or (b) eight plus the number of offense levels from the table in § 2F1.1 corresponding to the value of the funds. The offense level for fraud offenses is six. Thus, in fraud cases in which the government adds a money laundering charge, the base offense level under § 2S1.1(a) will always be two levels higher (i.e., the difference between eight and six), simply because the government has added the money laundering charge.

The Committee believes this is inappropriate. In many ordinary fraud cases, the conduct giving rise to a violation of 18 U.S.C. §§ 1956 or 1957 does not, in any meaningful way, make the defendant more culpable or deserving of punishment than the defendant who happens not engage in a "monetary transaction" within the meaning of §§ 1956 and 1957. Accordingly, the Committee recommends that § 2S1.1(a)(3) be changed to read: "six

plus the number of offense levels..." instead of "eight plus the number of offense levels..." Offenses involving relatively sophisticated "monetary transactions" can properly be dealt with through the specific offense characteristics set forth in proposed § 2S1.1(b).

2. <u>Amendment No. 5 - Fraud, Theft and Tax - More than Minimal Planning/Use of Sophisticated Means</u>.

This amendment would eliminate "more than minimal planning" as a specific offense characteristic under §§ 2B1.1(b)(5), 2B1.2(b)(4)(B) and 2F1.1(b)(2) and use of "sophisticated means...to impede discovery of the nature or extent of the offense" as a specific offense characteristic in tax cases under §§ 2T1.1-2T1.4. Instead, the amendment would modify the loss tables under the applicable guidelines to incorporate gradually an increase for "more than minimal planning" and use of "sophisticated means."

The Committee strongly opposes this approach. The underlying premise apparently is that offenses involving a certain amount of "loss" necessarily involve these specific offense characteristics. Therefore, they should be uniformly applied through appropriate increases in the loss tables. Thus, for example, offenses involving a "loss" in excess of $40,000 will have offense levels two levels higher than under the 1992 guidelines.

The Committee believes this premise is seriously flawed. Monetary "loss" does not measure in any meaningful way the degree of planning or sophistication involved in a particular offense. A theft or fraud involving a loss of $100,000 can often be as simple as a similar offense involving only a few thousand dollars. Good examples are cases in the Eastern District of Pennsylvania in which the government prosecutes relatives of deceased Social Security beneficiaries for receiving and cashing social security checks after the payee's death. These cases usually involve little or no planning. The relative is often surprised to learn that the government continues forwarding Social Security checks, even after the payee's death. The theft continues, and the "loss" increases, as long as the government continues to forward the checks and the relative cashes them. The amounts can often exceed $40,000. Nevertheless, few would argue seriously that such offenses involve any significant degree of planning or sophistication. There are countless other examples of theft and fraud offenses in which the "loss" may be relatively high and the degree of planning relatively low.

For this reason, the Committee believes the preferred approach to these specific offense characteristics is one

suggested in the "additional issues for comment" accompanying Amendment No. 5. Specifically, the Committee recommends that the Commission change the specific offense characteristic from "more than minimal planning" to one of "extensive or sophisticated planning." This approach would tend to eliminate a disparity which the Committee believes now exists. Section 1B1.1's emphasis on "repeated acts," along with the examples given in Application Note 1, have lead courts to conclude that the "more than minimal planning adjustment" has a relatively low threshold. As a result, individuals engaged in elaborate and sophisticated fraud schemes receive the same treatment as the individual whose planning may be "more than minimal," but is far from extensive or sophisticated. A guideline that defines the planning necessary to establish the enhancement as "extensive or sophisticated planning" would still require subjective interpretation by the courts. However, such an approach would more fairly differentiate those defendants who deserve an upward adjustment based on the degree of planning from those who do not.

The Commission should, at the very least, eliminate the references to "repeated acts." Individuals who engage in repeated acts of fraud or theft are adequately dealt with through increases in the loss tables, because repeated acts almost always result in higher loss.

3. <u>Amendment No. 23 - U.S.S.G. § 3B1.3 - Abuse of Position of Trust</u>.

This amendment would change this role in the offense adjustment to "abuse of position of <u>special</u> trust." The definition of "special trust" makes clear that the two-level upward adjustment in offense level is intended only for individuals in positions of "public or private trust characterized by professional or managerial discretion." The definition further clarifies that the adjustment is not intended for employees whose responsibilities are primarily administerial in nature."

This amendment would substantially improve the operation of this guideline. Under the current guideline, the two level upward adjustment has been applied, even when the abuse of trust involved is little more than a breach of an employee's fiduciary duty to the employer. A good example is <u>United States v. Milligan</u>, 958 F.2d 345 (11th Cir. 1992), in which the court upheld the application of § 3B1.3 to a United States Post Office window clerk convicted of misappropriation and embezzlement of postal funds. The Committee strongly recommends that this adjustment apply only to individuals, who, because of their higher level positions, have significantly more responsibility than the ordinary employee. The amendment goes a long way

towards accomplishing this objective, and the Committee therefore strongly supports it.

4. Amendment Nos. 24, 31, and 47 - U.S.S.G. § 5K1.1 - Substantial Assistance to the Authorities.

The Committee believes amendment 24 is a step in the right direction in that it would allow the district court to make the ultimate determination, in a limited number of cases, of whether or not a defendant has provided substantial assistance in the investigation or prosecution of another person warranting a downward departure. However, the Commission should go further by allowing the district court to make this determination, regardless of whether or not the defendant is a non-violent first offender. Accordingly, the Committee prefers the recommendations by the American Bar Association in proposed Amendment No. 31 and the legislative sub-committee of the Federal Defenders in proposed Amendment No. 47.

Following the Supreme Court's decision in Wade v United States, 112 S. Ct. 1840 (1992), defendants have very limited opportunity to challenge the government's refusal to file a substantial assistance motion under § 5K1.1. The Committee maintains that, as with all other determinations under the guidelines, the district court, not the government, should make the final determination on whether or not a defendant has provided substantial assistance. As a practical matter, the government will, in most cases, be highly influential in the district court's determination. In those cases where the parties disagree, defendants should be entitled to their day in court, just as they are now on the many factual and legal disputes arising under the guidelines. Access to a judicial determination of the issue should not turn on the defendant's criminal history or offense characteristics.

The government would still be protected in two ways. First, as is mentioned above, it will likely be the most influential voice on the substantial assistance question at sentencing. Second, it can appeal an adverse determination.

Finally, this issue implicates very directly the appearance of justice. Under the current regime, both defendants and the public-at-large can legitimately question the fairness of a sentencing system that allows the defendant's adversary to make unilaterally such an important determination in the sentencing process. Elimination of the requirement for the government motion would solve this problem (at least to the extent mandatory minimums are not involved) by making the substantial assistance determination no different than any other sentencing determination, that is, one ultimately for the district court.

5. Amendment Nos. 8-10, 50 - Drug Offenses.

Amendment No. 8 would provide a ceiling of offense level 32 in the drug trafficking guideline (§ 2D1.1) for defendants who qualify for a mitigating role adjustment under § 3B1.2. Additionally, it would revise the commentary to § 3B1.2 to describe more clearly cases in which the mitigating role adjustment is warranted.

These amendments constitute much needed reforms. As the Commission's synopsis of the proposed amendment suggests, existing drug guidelines have tended to overpunish certain lower level defendants in jointly undertaken activity because the sentence is driven primarily by the quantity of drugs involved in the offense. This problem has been particularly acute in the Eastern District of Pennsylvania, which has seen an increased emphasis in recent years on what are referred to as "neighborhood" drug cases. These have consisted of as many as thirty or forty defendants in one indictment. Typically, certain lower level participants have been sentenced on the basis of extremely high drug quantities because of the manner in which the relevant conduct guideline (§ 1B1.3) has been applied.

The proposed revisions to the commentary to § 3B1.2 (along with prior clarifications of the relevant conduct guideline) will improve the situation. They will help clarify the participants in jointly undertaken activity for whom the mitigating role adjustment is intended. The absence of more expansive commentary and the emphasis upon the defendant's lack of knowledge or understanding of the scope and structure of the enterprise have caused district courts to be unduly restrictive in their application of the mitigating role adjustment. The Committee strongly endorses the Commission's identification of the non-exhaustive list of characteristics identified in proposed Application Note 5 that are ordinarily associated with the mitigating role.

With regard to Application Note 7 pertaining to transporters of contraband, the Committee opposes option 3. This would prohibit any mitigating role adjustment for that quantity of contraband the defendant transported. This seems unfair to the defendant who, on the facts of a particular case, might otherwise have a strong claim that he or she qualifies for the mitigating role adjustment. As for options one and two, the Committee prefers option one because it is more flexible and easier to understand.

The Committee also endorses Amendment 9, which would restore the upper limit of the drug quantity table to level 36. Prior increases in the upper limit to level 42 reflected an undue

emphasis on quantity in determining the overall sentence. Moreover, the Committee recommends that the Commission consider further reductions in the quantity table's upper limit, along with an increased emphasis on specific aggravating offense characteristics such as the ones identified in Amendment 9.

Finally, the Committee endorses proposed amendments 10 and 50 pertaining to the definition of "mixture or substance" under § 2D1.1, Application Note 1, and the appropriate method of determining the relevant quantity in cases involving LSD.

6. Amendment No. 2 - Use of Guidelines Manual in Effect on Date of Sentencing (§ 1B1.11).

This amendment reinforces the Commission's so-called "one book rule," and extends it to multiple count cases in which the effective date of guideline revision(s) occur between offenses of conviction. The Committee opposes this amendment. The "one book rule," in our view, violates the Sentencing Reform Act. Specifically, section 3553 of Title 18, United States Code, requires the sentencing court to apply the guidelines "in effect on the date the defendant is sentenced." If the application of a particular guideline in effect on the day of sentencing would violate the *ex post facto* clause of the United States Constitution, then the district court must resort to the *guideline* in effect at the commission of the offense. It does not follow, however, that the entire guidelines manual in effect at the time of the offense must also be applied. Rather, under Section 3553, the court must continue to apply all other guidelines in effect at the time of sentencing, as long as their application does not violate the *ex post facto* clause.

7. Amendments 29 - Specific Offender Characteristics

The Committee strongly supports this proposed amendment by the Criminal Law Committee of the Judicial Conference of the United States. It would reinforce an important point. While a particular offender characteristic may ordinarily be irrelevant in determining whether a sentence should be outside the applicable guideline range, the presence of such a characteristic to an extraordinary degree (and therefore to a degree not adequately taken into consideration by the Sentencing Commission) is an appropriate reason for departure from the guidelines.

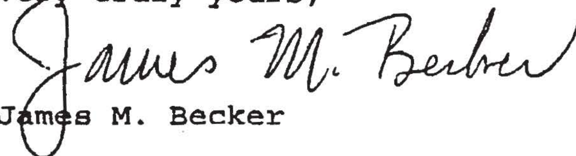
More importantly, the amendment would clarify that even though any one offender characteristic may not be present to a degree sufficient to support a departure, two or more characteristics may be present in combination to an extent that warrants a departure. This is consistent with the language of 18 U.S.C. § 3553(b), which contemplates departures based upon an

aggravating or mitigating "circumstance." Moreover, the proposed amendment will better enable district courts to accomplish the statutory sentencing goals identified in section 3553(a).

Amendment 32 calls for the Commission to invite comment on whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense and, if so, whether this should be accomplished either by: (A) providing an additional ground for departure in Chapter 5, Part K; or, (B) increasing the number of offense levels in Zone A in criminal history category 1. The Committee endorses such an amendment. There are still far too many cases involving such offenders where the guidelines require a sentence of imprisonment. The Committee believes that the recent amendments increasing the number of offense levels in Zone A in Criminal History Category I from six to eight constituted a significant improvement. However, the Commission should undertake to identify through a separate ground for departure in Chapter 5, Part K, the relevant factors that would support departures for first-time, non-violent offenders.

Thank you for the opportunity to comment on these important sentencing issues.

Very truly yours,



James M. Becker

JMB/mf/800

cc: Stanford Shmukler, Esquire
Howard B. Klein, Esquire
Co-Chairs

International Association of Residential & Community Alternatives

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James Murphy
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March 15, 1994

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Proposed Guideline Amendments for Comment

Dear Chairman Wilkins:

On behalf of the International Association of Residential and Community Alternatives (IARCA), this is to respond to your December 21, 1993 issues for comment. Specifically, I address proposed amendment number 16: the question whether and how the guidelines, policy statements and pertinent statutory provisions should be amended to provide greater sentencing flexibility or authority for modification of a previously imposed sentence of imprisonment, in the case of older, infirm defendants who do not pose a risk to public safety.

The situation in our Federal system is unparalleled: an increasing number of persons are aged and infirm. This is caused in part by mandatory minimums and a greater number of older persons receiving prison terms. (Bureau of Prisons, Long-Term Confinement and the Aging Population, Dec. 7, 1990, Forum on Issues in Corrections, U.S. Dept of Justice). About 12% of all prisoners are now over age fifty. (U.S. Dept of Justice, An Analysis of Non-Violent Drug OFfenders with Minimal Criminal Histories, Washington, D.C., Feb. 4, 1994). Given an increasing number of mandatory sentences for drug and repeat offenders, the infirm are likely to increase. The controlling statutes should be revised to expedite matters and modification of sentence process should be clarified.

IARCA urges the Sentencing Commission to hold hearings to develop clear policy statements concerning modification of a term of imprisonment for aged or infirm prisoners. Such hearings should include development of policies and guidelines under the present Statute as well as reasons for changes in the relevant statutory provisions. Of particular importance

are circumstances under which it is appropriate to require nonviolent, elderly and infirm persons to be held in a prison rather than an unsupervised release, supervised community release or residential facility.

Although 28 U.S.C. Sec. 994(t) specifies that the Commission define what may be considered as "extraordinary and compelling reasons" for modification of an infirm person's sentence, the precise test remains unresolved. Secs. 5H1.1 and 5H1.4 indicate that a below guideline departure in sentencing may be appropriate where the defendant is elderly or infirm and that home confinement may be appropriate. But applicability of this provision is unclear on the modification issue. Lack of guidance could make it difficult to screen for appropriate cases and for judges to render decisions whether proposed releases will be consistent with the Commission's policies as required by 18 U.S.C. sec. 3582 (c)(1)(a).

IARCA believes that the Commission should consider what changes are needed in the statutes governing modification of a sentence. 18 U.S.C. sec. 3582 (c)(1)(A) provides for an exception to the rule that a court may not generally modify a sentence of imprisonment. This applies where the Director of the Bureau of Prisons may by motion affirm that there are circumstances covered by 3553(a), <u>and</u> the court finds extraordinary and compelling reasons for a reduction,<u>and</u> that they are consistent with "applicable policy statements issued by the sentencing Commission." This three part test presents a number of hurdles to be overcome resulting in unnecessary delay. The statute should be reconsidered particularly as to who is permitted to make this motion Should it remain the Bureau of Prison's responsibility? Should the Public Defender be allowed to bring the motion forward?

28 U.S.C. Sec. 994(t) requires the Commission to describe what are "extraordinary and compelling reasons" for reducing a sentence. Criteria to be applied, and a list of specific examples should be developed. Applying a system of interchangeable punishment and supervision options under these circumstances would make it possible to release and supervise such inmates. Supervised release of elderly and aged prisoners could be a vehicle for introducing interchangeable punishment units to the sentencing guidelines. The remainder of the sentence to be served could be considered as a community correctional option under this approach.

Thank you for this opportunity to comment. If I can provide the Commission with additional information about residential or community-based correctional facilities, please contact me.

Sincerely,

James J. Lawrence

James J. Lawrence
President

cc: Peter R. Kinziger

KENNETH LERNER
ATTORNEY AT LAW

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PORTLAND, OR 97204
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052

March 15, 1994

United States Sentencing Commission
Attn: Public Comments Section
1 Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Dear Commissioners:

I have reviewed a proposed change in the guideline calculations for marijuana plants and am writing to comment on this proposition. I am currently a CJA attorney in the District of Oregon, and a former Federal Public Defender. I handle a great many cases in Federal Court and have had a great deal of experience with the marijuana guidelines.

I certainly encourage the commission to make an independent gradation for marijuana plants as suggested in the proposed guideline ranging, in order to eliminate the cliff effect. I think that this would be helpful, particularly in this district and others, where the practice is that U.S. Attorneys often do not allege the mandatory minimum amounts. In this circuit and in this district, this change would promote plea bargaining and avoid much undue hardship which the cliff effect creates, since the probation office in this district will not require the mandatory minimum terms of the statute under such circumstances.

I also wish to comment on some of the alternative approaches. The treatment of small seedlings, starts, clones, or other barely established plants on the same level as mature or maturing plants is particularly unjust. While all plants must certainly begin at this stage, many do not survive unless the operation is extremely sophisticated. Also, the cloning method that some growers use, never results in fully mature marijuana plants with the types of yields which government studies tend to show. These plants become growing flower stems of marijuana, harvested for their high resin content. Nevertheless, the dried weight of each plant is significantly less than 100 grams.

Let me close by saying that this is a welcome step in the right direction and I am glad that the sentencing commission is addressing this disparity.

Sincerely yours,

Kenneth Lerner

KL:jeb
corresp\sent-com.lt1

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053

J. Matthew Martin
Attorney at Law
113 East King Street
Hillsborough, N.C. 27278-2518

March 21, 1994

Willliam W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, North West
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

The Executive Council of the Criminal Justice Section of the North Carolina Bar Association has reviewed the proposed amendments to guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the December 21, 1993, Federal Register for the 1994 amendment cycle.

Our Council has also established a liaison with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The Council fully endorses the responses of the Practitioners Advisory Group to each of the amendments proposed during this cycle. The Council strongly advocates the adoption of Amendments concerning money laundering and drugs, especially the options and modifications proposed by the Practitioners Advisory Group.

The Council thanks the Sentencing Commission for this opportunity to express our views on these matters.

Sincerely,

J. Matthew Martin
Chairman
Criminal Justice Section
North Carolina Bar Association

JMM:mep

054

LAW OFFICE
JAMES F. WYATT, III
435 EAST MOREHEAD STREET
CHARLOTTE, NORTH CAROLINA 28202-2609
704-331-0767
FAX 704-331-0773

21 March 1994

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

Dear Chairman Wilkins:

The Criminal Law Section of the North Carolina Academy of Trial Lawyers has carefully studied the proposed amendments to the guidelines, policy statements and commentaries to the Federal Sentencing Guidelines published in the 2 December 1993 Federal Register for the 1994 amendment cycle.

Our Section has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The Criminal Law Section of the North Carolina Academy of Trial Lawyers fully endorses the positions taken on each of the proposed amendments by the Practitioners Advisory Group. The Criminal Law Section especially urges the adoption of those amendments and modifications endorsed by the Practitioners Advisory Group in regards to money laundering and controlled substances.

The Criminal Law Section of the North Carolina Academy of Trial Lawyers thanks the Sentencing Commission for this opportunity to express its views on the proposed amendments and remains available for future consultation on these and any other matters.

Cordially,

James F. Wyatt, III
Vice Chair
Criminal Law Section
North Carolina Academy of Trial Lawyers

JFW,III:af

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UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

March 25, 1994

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Kent Larsen
Mike Courlander

SUBJECT: Public Comment Received from Citizenry

In addition to the public comment circulated to you previously, the Office of Communications has received approximately 4,500 letters from inmates, their families and friends, and concerned citizens. Listed below are the major topics of the letters and the number received.

Support for adoption of an equivalency of 100 grams of marijuana per plant for all cases	1,686 letters
Support for discontinuation of 100:1 penalty ratio for crack:powder cocaine	1,898 letters

Letters generally criticizing mandatory minimum penalties	661 letters
Elderly/infirm health problems of incarcerated individuals	21 letters
Support for proposed changes to the money laundering guide-lines	92 letters
Support for restricting the use of acquitted conduct in determining guideline offense level	69 letters

Many of the submitted comments called for making the proposed changes retroactive.

055

OFFICE OF THE CHIEF POSTAL INSPECTOR
Washington, DC 20260-2100

April 8, 1994

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

Attention: Judge William W. Wilkens
Chairman

Based on discussions with my staff, the following proposed guideline commentary is submitted as an alternative to our two proposed guidelines (Amendments 34 and 35). We believe this commentary better fits into the current guideline framework and more directly addresses our concerns which were raised in the two proposed amendments. The commentary will be added to Application Note 6 of § 2B1.1 to determine the dollar loss in volume mail theft crimes.

Commentary

Application Notes:

6. "Undelivered United States Mail" means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box). "Sealed mail" includes First-Class Mail, Express Mail, international letter mail, and Mailgram messages.

   In the case of the theft of undelivered United States Mail, loss is to be treated as equal to the greater of (1) the estimated number of pieces of sealed mail stolen valued at $25 each; or (2) the total actual loss from the offense determined under Application Notes 2 - 4 above.

   For the purpose of estimating the number of pieces of sealed mail stolen -

   a. if the theft is from a Postal Service relay box, the number of pieces of sealed mail shall be determined to be 1000, unless sufficient information is available to make a more accurate determination;

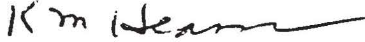
   b. if the theft is from a Postal Service collection box or delivery vehicle, the number of pieces of sealed mail shall be determined to be 400, unless sufficient information is available to make a more accurate determination;

   c. if the theft is from a Postal Service satchel or cart, the number of pieces of sealed mail shall be determined to be 50, unless sufficient information is available to make a more accurate determination;

d. if the theft is from an individual mailbox, the number of pieces of sealed mail shall be determined to be five, unless sufficient information is available to make a more accurate determination.

Background:

Because of the inherent difficulty in establishing the actual amount and value of mail taken, loss proxies for the various forms of mail theft have been included.



K. M. Hearst
Deputy Chief Inspector
Office of Criminal Investigations

March 22, 1994

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

ATTENTION: PUBLIC COMMENT

Dear Chairman and Members of the Sentencing Commission:

On behalf of the 500 plus members of FAMM (Families Against Mandatory Minimums) in the State of Colorado, I am forwarding the attached position paper for your most valued review and consideration at your March 24th hearing.

Thank you for the opportunity to provide input to your meeting.

Sincerely,

Nancy J. Richardson
FAMM, Colorado Coordinator
21990 WCR 62
Greeley, Colorado 80631

Attachment

March 10, 1994

Distinguished Members of the Sentencing Commission:

The role of judicial discretion in the sentencing process is a fundamental and inescapable issue that has been reduced to a mechanical formula with the implementation of mandatory minimum sentences that were prescribed in the Anti-Drug Abuse Act of 1986. This bill was created and enacted by politically conscious legislators in a fit of political hysteria to coincide with the sentencing guidelines that were already in effect. This poorly written bill in effect cut the legs out from under the Sentencing Commission. No thought was given to the devastating effect it would have on families or society at large. The guidelines allow judges much more leeway and are subject to judicial review, while the mandatories are "set in stone."

The intended separation of the legislative and judicial branches of government was violated by Congress when they passed the Statutory Anti-Drug Abuse Act of 1986. This Act contained the mandatory minimums and incorporated the sentencing guidelines formulated by the congressionally appointed Sentencing Commission in 1984 and enacted by Congress in 1987. In essence, Congress not only tied the hands of all Federal Judges, but also the Sentencing Commission which they created, as well as the many members of the Federal Judiciary System who should have a justifiable influence in the sentencing process.

As it stands now, the statutory mandatory minimums are denying the Sentencing Commission, again, from accomplishing their most important and laudable goals for which they were created. This would be to receive and give serious consideration to the majority of the proposals and input they will receive from reasonable and sincere people and organizations at this year's hearings, for them to study, consider and submit to Congress. Many of these proposals will not be in the Commission's final recommendations because their implementation is not feasible due to the mandatory minimum sentencing structure.

There are many people and organizations who oppose mandatory minimums, including the majority of Federal Judges who dislike mandatory sentences of any kind. One of the main intentions of creating this predefined sentencing structure was to eliminate the disparity between the sentences handed down by Federal Judges across the country under the guidelines system that was in effect. In so doing they took all the power and discretion in determining an appropriate sentence out of the hands of the judges and transferred it to the oftentimes vindictive, power hungry prosecutors, and many inexperienced pre-sentencing investigators. With the aid of a vast array of large enhancements at their discretion, they are now able to give a person what amounts to a life sentence for something a Judge might have given them five years or less for, if the power to do so were in his hands, as it should be, based upon the premise of individualized justice that is supposedly guaranteed in our Constitution. When it comes to the exercise of discretion in sentencing, are the prosecutors more to be

trusted than the Judges? There is much to be said for restoring judicial discretion to the Judges who were appointed for that purpose and who exercise it in the public's view.

The combination of mandatory minimums with the sentencing guidelines do not allow a Judge to even consider any of the ten Statutory or mitigating factors and fair criteria, such as a defendant's personal history or prospects for rehabilitation. Some of the key factors about the "offender" that are eliminated from the sentencing computation are the person's age, employment, whether or not it was violent crime or the person's history of non-violence. The fact that whether or not the person has ever been to prison before cannot be given any consideration. There are many very rehabilitative non-violent offenders who were given 15-30 years on their first prison sentence. This was the minimum time allowed under the mandatory minimums for a person, with prior felonies, no matter what type or how marginal they may have been.

The disparities created from this trend are based on non-violent factors such as race, gender, crime rates, case loads, circuit and prosecutorial practices---sentences levied under the current guideline system "often dramatically outweigh the severity of the offense." Senior Judge Myron Bright of the U.S. Court of Appeals for the 8th Circuit has claimed that "the U.S. sentencing commission in its finite wisdom, set the scales of punishment for drug crimes based on the weight of the drugs, not the criminality of the offender. In too many cases, the sentences directed by the guidelines waste the lives of men and women."

In their over-zealousness to prove that they were tough on crime, Congress took the possibility of parole and all good time incentives from everyone sentenced under a mandatory minimum. They now must serve 85 percent of these extremely lengthy sentences, regardless of how rehabilitative the person might be, even though anyone sentenced under the old guidelines are parole eligible after one third of their time. One of the results of this provision is that non-violent first time offenders who could benefit from rehabilitative sentences are given much more longer sentences than people who have committed such heinous crimes as child molestation, rape and murder. These violent offenders are frequently granted early release to make room for offenders serving mandatory minimum sentences. The national average sentence for a drug offender is 6.5 years; for manslaughter, 3.6 years.

As the nation's population swells towards 1.4 million, prison officials must release career offenders to make room for first time drug offenders. The politically popular war on drugs of the 80's has given rise to the far less attractive cell crunch of the 90's. Mandatory minimum sentences for minor drug crimes have stuffed the prisons to bursting with non-violent offenders. The U.S. Sentencing Commission has estimated that the sentencing guidelines and tougher penalties for drug law violations may result in a 119 percent increase in the Federal prison population from 1987 to 1997. In 1980 about 25 percent of the sentenced Federal population was convicted of a drug offense. Today narcotic offenders occupy 61 percent of

the beds in Federal prison. At the current rate it is projected to be 72 percent by 1997. From 1986 to the present time the average length of stay for drug offenders has increased from 21.3 to 81.5 months for low level drug law offenders currently in the Bureau of Prisons. According to the latest study on nonviolent drug offenders, released on February 4, 1994 by the U.S. Department of Justice, under the present guideline system, these individuals will serve on the average, at least 5-3/4 years before release from prison.

Dramatic increases in admissions for drug offenders and more than a threefold increase in the length of their stay has led to a burgeoning prison population. Why has the average length of stay for drug offenders increased so dramatically? The answer lies in the relationship between sentencing changes that resulted from mandatory minimum sentencing and the incorporation of these changes into the U.S. Sentencing Guidelines for drug offenders. Compounding this situation is the fact that the U.S. Sentencing Commission, to meet the provisions of the Statutory Congressional Law, has written its drug offense guidelines to be consistent with the severe penalties prescribed by mandatory minimums.

First time offenders currently make up to 56 percent of the approximately 90,000 Federal inmates. President Clinton stated more than once during his presidential campaign that we needed to get these first time offenders back on the streets. In his first televised presidential debate he also stated that the criminal justice system saved the life of his half brother Roger, who was convicted in 1984 of Federal conspiracy and cocaine trafficking charges. His brother served 16 of the 24 month sentence he received. It isn't clear whether the President thinks his brother's life would have been saved by receiving the 10 years in a Federal Penitentiary which he would get today on the trafficking charge alone. This does not include any of the vast array of possible guideline enhancements he would have been eligible for and the fact that he would have had no parole possibilities or good time incentives, if he would have been convicted after November 1, 1987. If Roger Clinton would have been convicted a few years later this would have quite obviously been a waste of a "good man's life." He went on to successfully rehabilitate himself and now leads a very useful, productive life.

We are happy for the Clintons, but many families of people sentenced to a mandatory minimum are left wondering why Roger Clinton and others were given a chance to rehabilitate themselves in a relatively short period of time when thousands of other nonviolent offenders like him across the country are sentenced to the better part of their lives in prison and denied this same opportunity. We are not saying that people ought not to go to jail for their crime, but two years, three years, not 10, not 15 and certainly not twenty plus years for nonviolent crimes of mutual concent, when, in 1990, the average Federal sentence for homicide was six years eight months; robbery, eight years and sex offenses, five years and one month.

Much has been made of family values by the last three administrations, but what is the value to the family when a first time nonviolent offender has to serve many years in prison, leaving

spouse, children and family to suffer the devastation of a wrenching separation and financial hardship. We may fool ourselves into thinking we can afford the tremendous fiscal cost of our current doomed approach, but we will never be able to pay the greatest cost of all; the social cost incurred in the needless devastation of family's lives because it is impossible to replace years spent away from children and family. The social cost is never more evident than when one visits the visiting rooms at any of the many Federal prisons across the country and sees all of the fatherless children who will suffer irreversibly from the lifelong effects of these laws.

Aside from the hidden social costs there are billions of dollars being wasted annually due to our present sentencing policies. A recent Justice Department study concluded that one in five people in Federal prison today are there for nonviolent petty drug crimes. They alone are costing the American taxpayer 326 million a year. The study also concluded that longer sentences are no more rehabilitative than shorter sentences. Mandatory minimums have an adverse affect on the economy in ways too numerous to mention. They are the main contributor in the huge increase in prison population which has doubled with mainly nonviolent offenders since their implementation only seven years ago.

Once incarcerated, along with the social costs, there are many hidden fiscal costs, as the families left behind are often forced to seek public assistance. The cost of useless incarceration of most nonviolent offenders is alarming when you consider that the average cost per prisoner has recently been approximated at $25,000.00 per year. This is made even worse by the fact that they could and should be paying taxes as productive members of society, instead of being supported by two or three taxpayers for each year of their incarceration. On top of this, at the 13 percent annual rate our jail population is rising, it will cost at least 100 million per week, for construction of new facilities alone, and we are just talking about Federal facilities here. In short, billions of tax dollars and human misery are the costs!

We applaud the Sentencing Commission's past findings and resulting recommendations to abolish the mandatory minimums. We know that your opinion is joined by the U.S. Judicial Conference which is the administrative arm of the Federal Courts and broadly reflects the thinking of the Federal Judiciary. All 12 Judicial Circuits and the Federal Courts Study Commission have come to this same conclusion. Just a few other people and organizations who oppose mandatory minimums include members of the clergy, civil rights leaders, the organized bar, prison officials, including the current Director of the Federal Bureau of Prisons, Kathleen Hawk, not to mention Attorney Janet Reno, Louis Freeh, F.B.I. Director and numerous other citizen groups across the country. We are grateful to the Sentencing Commission for the opportunity to at least have our voices heard and feelings known through written comment at these hearings. Even if most of our proposals do not have a realistic chance of being implemented due to the statutory mandatory minimums, hopefully Congress will hear our message through these hearings, and our

opinions and facts will have an impact on the elimination of mandatory minimums, which in turn, will inspire "Just and Creative" changes within future sentencing policies.

One of many issues that we would like to address, is the need for alternative sentencing for nonviolent crimes. We must consider the fact that only 25 percent of all sentenced offenders have been convicted of a violent crime and less than that on the Federal level. Despite what politicians attempt to portray, recent public opinion surveys in a number of states show that the public is supportive of alternatives to prison in appropriate cases. Nationally, four out of five Americans favor community corrections programs for offenders who are not dangerous. Attorney General Janet Reno has been instrumental in bringing alternative sentencing to the public's attention. She has been a breath of fresh air and a ray of hope. We applaud her call for a radical review of Federal crime fighting tactics and agree with her underlying view of more rehabilitation and drug treatment, rather than the "lock 'em up and throw away the key" policy in effect now, which in reality translates into, "Lock 'em up and spend thousands of dollars on them!"

Prison officials argue that the prison system would function more effectively if justice were served more swiftly, sentences imposed more reliably and space allocated more rationally. To that end Ms. Reno has suggested a much broader use of home confinement, probation with special conditions, boot camps, drug court with strict supervision and alternative sanctions as opposed to a mandatory minimum for relatively minor drug offenses. Sanctions that say you need and will get continual counseling and monitoring and if you successfully participate in these counseling and educational programs we are going to give you every chance to reintegrate into society with the resources and ability to cope as opposed to going to jail. We also feel these programs can work for the majority of nonviolent offenders provided they are provided with the resources. The resources they will need are far less than the resources that are necessary to maintain people in prison year after year.

Work programs can benefit inmates and taxpayers alike. For example, Minnesota's sentencing to service program has been putting nonviolent offenders to work in communities throughout the state since 1986. So far, it has logged 530,000 man hours, and when program costs are offset against earnings and reductions in prison costs, the effort comes up 6 million in the black. In work programs, inmates feel like they are paying back society instead of wasting away. Prison space must be allocated more judiciously; this means finding and exploring alternative penalties for nonviolent offenders.

Ms. Reno made another bold statement when she proposed dropping the automatic charges for using a gun in a Federal crime. As alarmed as every American is and has every right to be over guns and violence, they would be even more appalled to see the many instances of prosecutorial abuse involved in implementing the automatic enhancements for a gun in drug crimes. The majority of people convicted of a drug offense where a firearm was discovered along with

drugs in a search and arrest are serving more time for the firearm, which was in most cases legally purchased and never remotely used or brandished in said crime. Most of these firearm charges carry a minimum of five years and range to a minimum of thirty years without parole regardless of mitigating factors. Attorney General Reno is absolutely right again in calling for a review of these sentences and favoring a policy which would allow mitigating circumstances to be taken into account. An automatic five years in prison is too much time for a nonviolent person, legally possessing a gun.

Ms. Reno has also stated that the mandatory minimums shouldn't be used as leverage. Critics say when a person is facing a 10 to 15 year mandatory minimum, he gives up the names of his bosses. In actuality the reverse is usually true - the bosses give up the underlings or anybody for that matter. A person is likely to say most anything or prefabricate testimony to serve the prosecutor's needs in order to avoid doing the majority of the rest of their life in prison. Therefore, much of this form of testimony should be considered what it is; tainted and prejudicial. In so many cases it is a grave compromise of justice and judicial integrity.

The Attorney General has suggested returning to plea bargaining prohibited by the 1989 Thornburg Memo and giving judges and defense attorneys more input in sentencing reductions. The current rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The guidelines have limited Federal prosecutor's formal authority to offer concessions and provide much leeway in a plea bargain. In regard to the leverage issue, the new provisions under the mandatory minimums create multiple charges out of one charge in drug and firearm cases, for the additional purpose of intimidating the accused into accepting an outrageous plea bargain, as opposed to taking it to trial where if convicted on all charges with enhancements he would face what amounts to a life sentence. Many people have accepted outrageous plea bargains which must conform to the guidelines, rather than take the chance of this happening to them, and in many cases do so upon the advice of their attorneys who know all too well the consequences of taking a case to trial and losing.

An example of this and one of the most overlooked victims of the government's war on drugs is its female P.O.W.'s. The majority of these women are minor players overrun by the government's blitzkrieg. Thousands of women are in prison today as first time offenders on such bogus charges as aiding and abetting, harboring a fugitive, failure to report a crime and - the vaguest and most abused charge - CONSPIRACY. Prosecutors use it as a blackmail tool, threatening and often indicting uncooperative or unknowing partners. (The crime should be labeled, "being loyal to your spouse"). In many instances, women receive harsher sentences than the guiltiest participants, because the most active drug traders are more useful to the Feds as informants.

A perfect, but very sad illustration of several of the preceding abuses, is the case of twenty year old Nicole Richardson, who languishes in a Federal prison today, sweating out a 10 year sentence

because she passed her drug-dealer boyfriend's number to one of his LSD customers. Her much more guilty boyfriend got only half her sentence because he had information to trade with prosecutors. Jurors in the Richardson case later said they would not have convicted her had they known about the mandatory minimum sentence she faced. Lately we are starting to see the reverse effect of the mandatory minimums at work as juries understand more and more what's happening with this sentencing scheme. They are becoming more reluctant to convict a person because the sentences are too tough.

The saddest and most ironic development of the Richardson case occurred after Nicole was in prison serving her 10 year sentence. While she was on the phone to her mother a man broke into her mother's house with the intent of raping her. Nicole heard her mother pleading for her life and notified one of the correctional officers who called local authorities back home. Upon arriving at the Richardson residence, a man was caught holding a gun to Mrs. Richardson's head while committing the act of rape. The man was later convicted of first degree assault and rape, plus attempted murder. His state sentence will make him eligible for parole in four years with a good chance for release because of overcrowding and parole regulations in that state, while Nicole, the victim's daughter, will remain in prison for another five years.

This is just one of thousands of examples of the mandatory minimums incarcerating first time, often marginal, nonviolent drug offenders for longer than many convicted murderers and rapists on the state level. There is a tremendous disparity between state sentences which tend to be on the average of a much more violent nature than the nonviolent Federal crimes where people are serving much lengthier sentences. Attorney General Janet Reno has addressed the situation we have now where there are relatively low level nonviolent offenders serving 10, 15, and 20 plus year mandatory minimum sentences in Federal prisons while in state court and state prisons, people are getting out of their sentence after serving 20 to 60 percent of their time for armed robbery and other serious violent crimes. Ms. Reno has asked the judiciary and defense attorneys to have a better dialogue over what is Federal jurisdiction and what is state jurisdiction. We support the Attorney General's invitation for a ethical deliberation on this issue and agree with her suggestion that many of these minor drug offenses would be better prosecuted by local authorities. There is no doubt that justice would be better served by this approach and it is simply astonishing that politically conscious legislators are able to continue to turn a deaf ear to this grave injustice.

We also welcome the proposals that were offered and contained in remarks made by Kathleen Hawk, the Director of the Federal Bureau of Prisons, before the Subcommittee on Intellectual Property and Judicial Administration, House Judiciary Committee in May of 1993. These proposals were the result of a study by the Federal Bureau of Prisons that was ordered by Ms. Reno and the Justice Department. One hypothetical strategy would be to shorten sentences, especially for nonviolent offenders. The proposal mentioned relating to this, would be to cut drug sentences for first time offenders by 50 percent and

other drug sentences by 25 percent. Under this scenario we recognize that obviously at least three significant changes to the current system should be considered. Number one: if not abolished, there would have to be a change to the mandatory minimum sentences. Number two: the U.S. Sentencing Commission would have to revise its drug guidelines. Number three: some kind of provision would have to be made to effect the sentences of offenders already adjudicated and in custody, for example, a re-sentencing procedure. To that end we recommend the creation of a review panel, possibly made up of selected and appointed Federal Judges to review the mitigating factors in each case, (something that they have not been able to do in the last seven years) that should have been taken into consideration in their original sentence. This provision would be to insure equity and parity, so that sentence reductions would be applied retroactively. There would be a substantial initial expense in the creation of the review board, but in the long run this would be money well spent as it would alleviate the tremendous unnecessary tax burden of the useless lengthy incarceration of many intensely scrutinized nonviolent offenders. The adoption of this proposal alone could justifiably correct some of the thousands of injustices which have occurred since the implementation of the mandatory minimums.

The second hypothetical proposal, offered by Kathleen Hawk, that we strongly recommend and favor, is that current good time awarded be increased from 15 percent (54 days a year), to 30 percent (108 days a year). This could be optional based upon an inmate's institutional behavior and record. This reward would provide a valuable incentive to encourage inmates toward self-improvement activities and successful involvement in programs designed to help them prepare for a productive return to the community. This opportunity is lost under the current system. The former and present Director of the Federal Bureau of Prisons both realized that the current minuscule good time allowance has created a time bomb that is waiting to go off. It seems that we have forgotten the original purpose and intention of the penal system, which was to punish people for their crimes by removing them from society, and in this process rehabilitate them in preparation for their return to society, instead of the current "warehousing them for life" approach. The implementation of the good time is a statutory change which could be applied retroactively through administrative processes that do not require re-sentencing.

The third hypothetical strategy mentioned by Kathleen Hawk was the diversion from traditional incarceration for carefully selected offenders who pose a negligible risk to the community. The Justice Department's long awaited report on mandatory minimum sentencing which was released February 4, 1994, concluded that long mandatory sentences for low level drug offenders don't deter crime any better than short sentences. The report also found that low level, nonviolent drug offenders account for 21.2 percent of the Federal prison population. This would mean that approximately 16,316 prisoners could be eligible for consideration to some type of diversion program which can meet specific offender needs, including increasing the opportunities for home confinement and more fully utilize halfway houses. Currently the Federal Bureau of Prison policy is to allow a maximum of six months

participation in these community programs. Why? Why not one or two years, or more? Why is home confinement used to such a minuscule degree? These programs are definite deterrents to a vast majority of nonviolent offenders. Isn't deterrence from future criminal activity one point of the criminal justice system? As history has shown, to just be tough is dumb - - and expensive.

These proposals were a small result of the Attorney General's invitation to the Federal Bureau of Prisons to assist her with identifying strategies that would better serve justice and reduce the growth rate of the Bureau of Prisons inmate population. This would be a secondary benefit of all three of these proposals. It is obvious they would all better serve justice. They lean more toward emphasizing drug treatment and rehabilitation instead of extreme punishment which inflicts tremendous social and fiscal costs yearly. It is our feeling and opinion that these alternative proposals make common sense, and should be given serious consideration by Congress. This apparently has not happened as we have heard no mention or discussion of any of these proposals since they were suggested to select members of Congress in May of 1993. It appears that opposing the mandatory minimums is too bold of a step for our politicians and the current administration, even though the evidence is in their own latest report!

There are many organizations in this country who seek to reform sentencing policies. Included in them are the Sentencing Project, the Criminal Justice Policy Foundation, and the National Drug Policy Foundation. We hope that their collective input will have some negligible influence in the shaping of future sentencing policies as they focus more on prevention and rehabilitation and less on the current "warehouse them" for punishment approach. The Research and Advocacy Group, the National Council on Crime and Delinquency also seeks to influence public policies that deal with crime and the criminal justice system. They also encourage citizen involvement in effective, humane, and economically sound solutions to the problems of crime and delinquency.

This private agency has been asked to provide input to the Clinton Administration on the issue of sentencing reform. Lee Brown, the current Drug Czar and the nation's first law enforcement professional to be named to head this department, is a former board member of the National Council on Crime and Delinquency. It is refreshing to see Janet Reno, Lee Brown, Louis Freeh and the Clinton Administration seeking input from an organization like the NCCD, because we believe that their hard answers and common sense plan will reduce crime and violence in America and save tax dollars in so doing.

In the summer of 1992 the National Council on Crime and Delinquency issued a new statement on sentencing policies in the United States. We feel that each of their 13 positions contained in this statement bear mentioning and each should be given serious consideration. Their positions are;

Sentencing Philosophy:

Position 1: Objection criteria, designed to make discretion visible and to promote the accountability of government officials, should be adopted at every stage of the sentencing process.
Position 2: The court's sentence should take into account: a) the gravity of the offense, b) the offender's current risk to public safety, c) offender rehabilitation and treatment needs, and d) the relative costs-benefits of each available sanction.
Position 3: No sentencing legislation should be implemented without a complete fiscal impact statement on the likely effects of proposed legislation on prisons, jails, probation, parole, and public safety.
Position 4: Victim's interests should be effectively represented in the sentencing decision.
Position 5: Existing alternative sentencing options should be used more fully by the courts.
Position 6: Financial incentives should be created for local governments to regulate both the number of prison admissions and sentence length, and to expand the use of alternative sentencing options.
Prison Sentences:
Position 7: Prison sentences should be principally reserved for three types of offenders: a) first time felons who have committed a violent or heinous crime, b) repeat felons whose new crimes involve a substantial threat to public safety, and c) felons whose crimes involve substantial violations of the public trust.
Position 8: In general, prison sentences should be short and determinant.

Position 9: Repeat felon offenders and/or those convicted of extraordinarily violent or heinous crimes should be given maximum terms that allow for the possibility of parole.
Position 10: The use of mandatory prison sentences and life sentences without the possibility of parole should be abolished.
The Release Decision:
Position 11: For those offenders who have been given a lengthy period of imprisonment, the main consideration in the release decision should be the inmate's risk to the community, once a satisfactory fraction of the term has been served.
Position 12: The availability of earned good time credits for inmates who participate in meaningful work, educational, and other self-improvement programs should be expanded.
Research:
Position 13: A rigorous program of research should be conducted on the effects of various sanctions on offenders, the corrections system, and crime reduction.

The last two issues that we would like to address are the ones at the forefront of discussion at this year's Sentencing Commission hearings. There are the changes in weights used to determine the length of a sentence in crack and marijuana. More specifically, the 100 to 1 ratio of crack to powder cocaine and the 10 to 1 ratio used on every marijuana plant over 50 in Federal marijuana convictions. Both of these current sentencing procedures are beyond the arbitrary and capricious that several appeals courts have ruled them to be. They border on the ludicrous and the absurd. These are just two of the

many particulars that Congress did not consider when they created the mandatory minimums with the structured, predetermined sentences for a predefined weight on drugs they knew nothing about. These fallacies in determining weights used at sentencing not only create an unbelievable disparity, but are also very racist in the case of crack cocaine because a much higher percentage of black men are convicted of crack cocaine than whites, who are convicted for a much higher percentage of powder cocaine. The current weights used in crack and marijuana make huge differences in the length of a person's sentence in related cases. This is something that we hope the Sentencing Commission will take immediate and forceful action on at this year's hearings. There are a few of the issues that represent obvious injustices that should facilitate a recommendation for change by the Sentencing Commission with some of the remaining authority vested to them by Congress.

As Janet Reno said earlier this year: "Sometimes doing the right thing is very politically unpopular. Sometimes it will be painful, or it will of necessity hurt someone." Asked what happens when the right thing conflicts with the law, Ms. Reno replied, "You try to get the law changed." We can only pray and hope that the Honorable members of the Sentencing Commission will exert their power and influence the members of Congress to "Do the right thing", and recommend the appropriate changes in these unjust Federal Sentencing Laws.

In our conclusion, we quote and wholeheartedly agree with the Honorable Judge Donald P. Lay of the Eighth Circuit Court of Appeals in his speech to the National Association of Pre-Trial Services Agencies in September of 1990.....

Judge Lay: "The public has every right to deeply resent those who commit crime. However, I respectfully submit that the "knee jerk" reactions by angry executives, politically conscious legislatures, and vindictive judicial officers is taking us down a primrose path with little success in combating crime. The resulting approach is accomplishing nothing more than exorbitantly wasting tax dollars, creating a warehouse of human degradation, and in the long run breeding societal resentment that causes more crime....."

Space does not permit discussion of another failure of our criminal justice system: the cost of the useless incarceration of persons convicted of nonviolent offenses. There exists a crying need to develop a nationwide system of intermediate sanctions for those who are convicted of nonviolent felonies. Our penology systems needs to develop work release programs, community service programs, schooling, vocational training, and other forms of supervised productivity in lieu of wasteful expenditures of tax dollars and wholesale warehousing of individuals. Punishment is one thing, but our current incarceration policies are wasteful and should be changed. Present policies breed further crime, dehumanizes individuals, and require gross expenditures of tax dollars needed for other purposes. With our nation facing both societal and fiscal crises of unrivaled proportions, we must move quickly and forcefully to overhaul the current system.

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April 13, 1994

Honorable William W. Wilkins, Jr.
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Dear Judge Wilkins:

On behalf of the Subcommittee on Criminal Law and Sentencing of the Judicial Conference Criminal Law Committee, I thank the Commission for providing us the opportunity to comment on this year's proposed amendments at the meeting on March 25, 1994. At that meeting, the Commission invited the Subcommittee's response on further drafts of certain proposed amendments. The Commission sent us new drafts of several amendments, along with staff analysis of those drafts. We appreciate this further opportunity to respond.

As you are probably aware, this specific response is that of the Subcommittee and it does not constitute a formal, direct response by the entire Criminal Law Committee, which itself meets only in December and June, and therefore has not deliberated on these latest amendment drafts. Nevertheless, our Subcommittee has a mandate to review and comment on guideline proposals.

We are aware of concern by some whether the Commission should pass any amendments this year, given questions raised about the status of the Commission membership. It would be inappropriate for us to express a legal opinion on these questions. Nevertheless, we urge the Commission to go forward on those amendments which are sound and which would improve the fairness and efficiency of the system. A blanket refusal to adopt any amendment due to questions about the Commission's status would, it seems, be tantamount to a concession that Chairman Wilkins and Commissioner Nagel are not legal members of the Commission. Moreover, even in the unlikely event that the current Commission is later found to have exceeded its authority, the result would not be appreciably worse than were the Commission simply to do nothing.

I. Substitute Amendment 14 (5K2.0 - Departures)

This amendment is responsive to the Judicial Conference's proposal that language be included to endorse a departure based on a unique combination of circumstances, under appropriate conditions. Accordingly, we strongly support it.

We request that the Commission consider one change to the substitute amendment: that the second sentence of the proposed commentary be changed from "The Commission does not foreclose the possibility of an extraordinary case that...", to "The Commission acknowledges the possibility of an extraordinary case that...." We believe that this more affirmative language better states the spirit of the Subcommittee's proposal. Otherwise, we endorse and urge the Commission's adoption of this amendment, which we believe is a much needed recognition of legitimate departure in extraordinary cases, and which has been supported in essence by the Judicial Conference for several years.

II. Substitute Amendment 19 (1B1.10 - Retroactive Amendments)

The Subcommittee has urged the Commission to adopt a procedure for § 1B1.10 which applies only the retroactive amendments(s), rather than the entire current manual of guidelines, for all the reasons given in our position paper and orally on March 25. We therefore appreciate and strongly endorse substitute amendment 19, as the Commission has drafted it.

We had proposed (in an Exhibit to our position paper) some commentary to ensure the understanding that only the retroactive amendment(s) should be used. In lieu of any of those forms of commentary, this draft utilizes one sentence at the end of proposed Note 2, which we believe is crucial and key to a clear understanding and uniform application of the intended procedure: "All other guideline application decisions remain unaffected." We believe that, as long as this sentence is retained, this draft accomplishes what the Subcommittee proposed, and we urge that the Commission pass it.

III Substitute Amendment 10 (Role)

We applaud the Commission's effort to give more guidance to the meaning of the terms "minor" and "minimal", which are among the most often-considered adjustments in the guidelines. This revised, comprehensive rewriting of the section on role in general, and on mitigating role specifically, is more detailed than our Subcommittee has had time to properly digest. Considering the complexity of the proposed amendment, and the novelty of its analytical construct, we urge you to

"field test" this proposal before making a final decision. On an expedited basis, this testing could perhaps be accomplished during the summer months. Enclosed herewith as Exhibit A are some technical suggestions and observations which we offer for your consideration. In sum, we strongly support the goal of this amendment but believe that it is not ready for adoption in its present form.

IV. Substitute Amendment 8 (D) (Commissioner Nagel's Proposal)

This proposal is much too sweeping to be digested at this time. While we do not oppose it, neither are we prepared to endorse it. Preliminarily, we note a potential issue of whether it comports with statutory authorization, and we note that it may not be as beneficial to defendants on the low end as it might be. For defendants who currently would be at a level lower than 19, the amendment actually appears to be harsher. Moreover, it cannot be an effective substitute for the role amendment, because it only addresses drug offenses, whereas courts must address role considerations in all cases.

We also believe it tactically prudent to await the fate of the mandatory minimum "safety valve" in the Congress before considering such a profound revision of the entire drug sentencing scheme.

V. Amendment 8(A) (Drug chart)

We support the Commission's suggestion that the drug chart be topped off at level 38, as a reasonable way to put a cap on how high amount, alone, can drive a base offense level.

As we discussed in our meeting, however, we have serious qualms about lowering the entire drug chart by two levels. Whether we like it or not, we cannot avoid the reality of the mandatory minimums and how they affect disposition of actual cases. A system in which a defendant has absolutely nothing to lose by going to trial, and conversely, nothing whatever to gain from entering a plea of guilty, is not only unfair but very unwise. This would be the result if the defendant's guideline level calls for a sentence significantly less than the mandatory minimum.

Sincerely yours,

George P. Kazen

EXHIBIT A

April 13 Judicial Subcommittee Letter to the Commission
Notes Regarding Substitute Amendment 10

1. Perhaps the most significant feature of the proposed amendment is the generation of a common standard of analysis for determining mitigating role (i.e., that the defendant be "substantially less culpable than a person who committed the same offense without the involvement of any other participant."). This analysis is new, and difficult to apply without thorough understanding. This could be accomplished by a more sequential presentation of the analysis, and the addition of several more examples from common cases (particularly drug offenses).

A. Organization of the analysis

Perhaps a step-by-step construct for the proposed analysis could be used, such as:

(1) The fact that relevant conduct defines the scope of role consideration should be the first point (moved up from proposed Note 1(D)), in order to set the outer boundaries of the analysis.

(2) Then, it should be made clear that the defendant should be compared to other participants within that scope.

(3) Then, any disqualifiers for mitigating role should be stated. The proposed amendment states these as qualifying characteristics at Notes 2 and 4 (e.g. characteristics ordinarily associated with mitigating role, such as "the defendant had no material decision-making authority..."). It might be easier to understand if they were stated as disqualifiers (e.g. the defendant would not qualify if: "the defendant had material decision-making authority..."). At any rate, to qualify for mitigating role, a defendant must meet (or not meet) all or most of these, as the amendment sets out in Note 1(A) and (B).

(4) Then, any defendant who passes the disqualifier test should be compared to the list of what might be called "general descriptors" of mitigating role (as currently set out in the amendment at Note 1(E)).

(5) If, and only if, a defendant is still "in the running" after the disqualifier- and general descriptor- tests, the hypothetical-defendant analysis (as explained in Note 1 and at points elsewhere) would be applied. That is, if such a defendant were then found to be substantially less culpable than a person who committed the same offense alone, he/she should receive a mitigating role adjustment.