Public Comment

Proposed Amendments

1997
VOLUME II

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

School of Law-Camden • Fifth and Penn Streets • Camden • New Jersey 08102

February 27, 1997

Alan Chaset, Chair
Committee on Federal Sentencing Guidelines
Criminal Justice Section
American Bar Association
740 15th Street, N.W.
Washington, D.C. 20005-1009

Dear Alan:

The following are my comments on the current Proposed Guideline Amendments for Public Comment -- Part I. My comments are similar to a September 26, 1996 submission to the Commission, made in my individual capacity.

I shall begin by stating my views as to the principles that should govern two of the most important subjects addressed in the proposed amendments, (1) the topic of departures (amendment number 34), especially departures based on offender characteristics, and (2) the topic of so-called "relevant conduct," along with the subtopic of acquitted conduct (amendment number 9). I consider the need for simplification of the

Guidelines to be closely related to these two topics, and I understand the Commission is considering that problem, so I shall state my views concerning it as well.

I. Departures and offender characteristics

In the long run, the Guidelines should be radically revised to permit or require judges (1) to base sentences on offender characteristics that they now are forbidden to consider or strongly discouraged from considering, and (2) to give greater weight than now to many offender characteristics judges currently are allowed to consider.

I say this should be done "in the long run," because probably it would not be practical to adopt such a radical change comprehensively within the next year or two. On the other hand, it would not be wise to delay the change entirely for a period longer than that. The best course would be to try this change for a few selected categories of offenses and offenders, evaluate the results, and then make additional trials.

My principal concern is that the current Guidelines unduly forbid or minimize judges' reliance on offender characteristics that would justify greater severity of sentences, especially longer terms of imprisonment designed to incapacitate and to deter specifically and generally. However, my reasons for suggesting this change apply also to many offender characteristics that would justify more lenient sentences in some cases. Thus my concern does extend also to the unwisdom of forbidding or minimizing reliance on mitigating facts about

offenders.

The most basic reason for this recommendation is that the predominant purpose of criminal punishment should be to protect society from future crimes, through incapacitation, deterrence, and rehabilitation. The concept of "just deserts" should serve only to place a ceiling on the penalties used to serve the purpose of public protection.

Many of the facts that are most instructive, when a judge is selecting a sentence designed to protect the public, are facts about the offender (other than facts about the crime or crimes for which he is now being sentenced). Such facts about the offender include other crimes or non-criminal, anti-social acts he has committed (whether he was convicted for them or not); his current motivations and skills; his past personal and economic experiences; and many other facts shedding light on his current and likely future character and personality, and thus on his future behavior.

Many federal judges have understood these things. Before 1987 many of them deemed crime prevention the main purpose of their sentences. They relied heavily in selecting sentences on information about crimes of which an offender had not been convicted, on various kinds of information tending to show that another offender was unlikely to offend again, and on many other types of offender characteristics that the current Guidelines place off-limits or give only slight weight. The Guidelines should be revised to permit, and in many kinds of cases to

require, that judges give great weight to many offender characteristics of various kinds.

It would be a red herring to respond that such a change would cause disparity in sentences. The word "disparity," when used to disparage differences in sentences, is always understood to mean unjustified differences. Furthermore, members of Congress and the Commission have often acknowledged that unjustified parity not only is as bad as unjustified disparity, but really is just a different manifestation of the same problems.

The most basic command Congress gave the Commission was to devise Guidelines such that every sentence would be based on all the important facts about each offense and offender, in such a way that the sentence would serve the purposes of crime prevention and just punishment as well as possible in view of economic limitations. Under revised Guidelines such as I recommend, when important differences between two offenders cause them to receive different sentences for the same type of offense, there is no unjustified disparity.

Conversely, under the current Guidelines, when important differences between two offenders are ignored or given trivial weight, and consequently the two receive about the same sentences even though one poses a greater threat of future crime, there is unjustified parity. More importantly, one of the similar sentences fails adequately to prevent crimes.

Research the Commission did before promulgating the initial

Guidelines, and its later research, have obscured the true incidence of both unjustified disparity and unjustified parity among sentences.

Before the first Guidelines, the Commission chose to focus its data collection and analysis only on hard sentencing variables, those that could be defined precisely and objectively, and measured quantitatively. Soft variables were largely ignored, despite their great importance in explaining sentences actually imposed before the Guidelines. As a result, although the initial Guidelines purported to track past practices in most respects, in fact they treated similarly cases that judges wisely had been treating very differently.

After promulgation of the first set of Guidelines, the Commission has persisted in this error. Its data-gathering and analysis have focused almost exclusively on the few, artificially defined offense characteristics to which the Commission had unwisely confined the attention of sentencing judges. Since judges' discretion to depart from the Guidelines is limited and many of them seem timid about departing (especially upward), the data gathered have necessarily given the false impression that the Guidelines have caused almost universal sentencing parity.

The result is that the Commission has overstated the incidence of unjustified disparity that occurred before the Guidelines, and has both understated the incidence of unjustified parity and overstated that of justified parity after the Guidelines took effect. If all the variables that judges

formerly deemed important in sentencing were studied, both for the period before 1987 and for later cases, one would find that the Commission has brought about a very drastic change in the criteria on which federal sentences are based, and in the average time served for some kinds of offenders (and even for some kinds of crimes). This revolution was neither commanded by Congress, nor necessary to the reduction of unjustified disparity. On the contrary, the Commission's relentless course of demanding similar sentences for dissimilar cases has impaired the effectiveness of sentencing to prevent crime, without producing a substantial net improvement in real parity of sentences.

Without doubt, there were plenty of both unjustified disparity and unjustified parity among federal sentences before 1987, for several reasons. There were no substantive standards for sentencing, not even general ones. There were almost no specified procedures. Judges did not have to give reasons for sentences. There was virtually no appellate review of sentences.

The drastic deficiency of that system and of the results it produced was not a good reason, though, for the Commission to build unjustified parity into the Guidelines by ascribing little or no significance to offender characteristics that shed light on the likelihood of future crimes. The Commission should begin expanding the power and duty of judges to rely on such facts.

The issue of offender characteristics is functionally related to that of judicial departures from the specific dictates of the Guidelines. In theory the two issues have no peculiar,

intrinsic interrelationship. However, the current Guidelines' banishing or downplaying of many offender characteristics has created a practical interrelationship between these two issues, in the sense that departures are an escape valve by which a judge can in some circumstances try to ameliorate the Guidelines' deficient treatment of offender characteristics. If the Commission were to conclude, as it should, that the current Guidelines unduly bar or restrict reliance on some important offender characteristics, the most cautious way to experiment with allowing wider and heavier reliance on them would be for the Commission expressly to invite or even encourage specified kinds of departures in this area.

Even if the Commission does so, it would be advisable also to select some kinds of offenses and some kinds of offenders as to which the Guidelines themselves would provide for weighty reliance on certain offender characteristics that the current Guidelines give little or no significance. More would be learned from an experiment with both techniques than with only the former, especially since many judges seem loath to depart, especially upward.

Proposed amendment number 34 seems to permit departures a bit more broadly than do the current Guidelines, but not enough. No proposed amendment would give offender characteristics substantially greater weight than now, in the more specific ways that should be tried. Thus this batch of proposed amendments as a whole does not represent an implementation of the approach I

recommend.

II. Relevant conduct and acquitted conduct

Phrases such as "relevant conduct" are in wide usage, and it is common for people to link the phrase "relevant conduct" with the phrase "real offense sentencing." However, I have long considered use of such phrases confusing and even misleading, for the following reasons.

All can agree that sentences should be based only on relevant facts, not irrelevant ones. Likewise all agree that, among the facts relevant to sentencing, some are best described as facts about the offense or offenses for which this sentence is to be imposed, while the other facts are best described as facts about the offender. Thus, there are relevant offense characteristics and relevant offender characterics, both of which should be considered, while irrelevant offense and offender characteristics should be disregarded.

However, the relevant offense and offender characteristics are not all facts about the "conduct" of the offender and his accomplices. This is true even when we examine only relevant offense characteristics. For example, some of these are facts about the offender's state of mind at the time that he or an accomplice engaged in a particular bit of conduct that is one element of the offense. Others are facts about the results of certain conduct, or about the circumstances existing at the time of certain conduct. Thus, even as to offense characteristics, the phrase "relevant conduct" is misleading.

The point is even plainer when we examine relevant offender characteristics. Some of these, such as prior convictions, are amalgams of prior conduct, states of mind, circumstances, and results. Others, such as an offender's traits of character and personality, are not facts about his conduct at all, but facts inferred from various sources including his conduct, his utterances, and things that others have done to him.

The current Guideline entitled "Relevant Conduct," section 1B1.3, covers not only conduct, but also resulting harm, "any other information specified in the applicable guideline," and "the conduct and information specified in the respective guidelines." The latter phrases cover numerous and various provisions, many of which describe mental states, circumstances, and results, rather than conduct.

The real function of section 1B1.3, beyond merely cross-referencing other Guidelines, is to prescribe the extent to which offenders will be held responsible at sentencing for the conduct of others and for resulting harms. This function is much narrower than the title "Relevant Conduct" suggests. More importantly, section 1B1.3 barely scratches the surface of the issues encompassed by the idea of "real offense sentencing," as the Commission discusses it in Chapter 1 Part A.4.(a) of the current Guidelines.

I therefore suggest different terms in which to frame the issues that people usually have in mind when they use phrases such as "relevant conduct," "acquitted conduct," and "real

offense sentencing." The essential concerns regarding these issues are procedural. That is, on what kinds of evidence should a finding be based that certain alleged facts are true, when a sentencing court will rely on the finding? See, e.g., United States v. Shonubi, 1997 WL 2540 (2d Cir. 1997). How heavy a burden of persuasion should the proponent of the finding carry? See, e.g., United States v. Gigante, 94 F.3d 53 (2d Cir. 1996). Otherwise what procedures should be used to make the finding? See, e.g., Bullington v. Missouri, 451 U.S. 430 (1981); Specht v. Patterson, 386 U.S. 605 (1967). Whatever the answers are to those questions, is there unfairness in letting the government propose such a finding where the offender has obtained an acquittal of a charge in which the government alleged the same or similar facts?

Terms such as "relevant conduct" are misleading ways in which to refer to these procedural issues, because the same procedural concerns should be raised not only when the facts to be found are covered by the "relevant conduct" guideline (e.g., acts committed by the offender during the offense of the current conviction (sec. 1B1.3)), but also when the facts to be found are facts about offender characteristics. Under the current Guidelines, for example, they might be facts (a) about other crimes of the offender (e.g., the offender's prior similar crimes not resulting in conviction, sec. 4A1.3(e)), (b) about the offender's lack of legitimate economic resources (e.g., his dependence on criminal activity for a livelihood, sec. 5H1.9), or

(c) about his mental and emotional condition (sec. 5H1.3).

Consequently, one should not refer to this as an issue of "relevant conduct." This phrase would not be apt unless expanded to cover various other kinds of facts, e.g., "relevant harms." Nor should one refer to it as an issue of "real offense" sentencing. This phrase would likewise have to be expanded to cover the analogous question of "real offender" sentencing: should we, for procedural reasons, make judges close their eyes to some facts about the offender that bear on the risk of his offending again?

Instead of using these misleading phrases, one should simply address this topic as a set of interrelated issues in the law of sentencing procedure. There are constitutional limits, and within such limits these issues of procedure should be resolved as a matter of policy.

This is not a semantic quibble; these choices of terms have practical consequences. Discussion of these issues of policy and of constitutional law is impeded by use of misleading phrases such as "relevant conduct" and "real offense sentencing." The persons who initially chose these phrases apparently believed in the implicit premise they convey: that the sole or dominant purpose of sentencing is to give offenders their "just deserts," that is, sentences designed entirely to be proportional to the specific crimes for which they are being sentenced. However, the premise that "just deserts" are the purpose of sentencing is unsound, as Congress, judges, and most experts have recognized

for most of American history. I shall explain below why the premise is unsound. For now, it suffices to observe that, for those who view the primary purpose of sentencing as prevention of future crimes, phrases such as "relevant conduct" and "real offense sentencing" impede rational discussion of issues of sentencing procedure.

The discussion is facilitated when the procedural issues are identified more precisely: What kinds of evidence should be usable? What burdens of production of evidence and of persuasion should each party bear? What other procedures should be used? Are crimes of which an offender was previously acquitted a special case for these purposes? What does the Constitution require on each point?

The proper starting place to address these issues is recognition of the functions of procedural rules. In the context of sentencing, there are two principal functions.

First, the procedures should strike a wise balance between (a) reducing the risk of error by using thorough, careful procedures, on the one hand, and (b) reducing delay and expense by using simple, informal procedures, on the other hand. The most important factor in striking this balance is that federal sentencing is done by judges, not juries. Federal judges generally are good at evaluating evidence and applying informal procedures in a sensible and fair manner. For that reason, it has been wise for Congress and the courts to conclude, as they always have, that the rules of evidence applicable in trials

should not govern sentencing, and that simple, informal procedures are wise.

The second principal function of rules of sentencing procedure is to allocate the risk of error between the parties. Since errors will certainly occur under any set of procedures, the procedures should wisely allocate the risk of such errors as between the parties.

The most important factor in allocating the risk of error is that (a) errors in favor of the offender typically increase the danger of future crimes by him and by other prospective offenders, due to inadequate incapacitation and deterrence, while (b) errors in favor of the prosecution typically increase the punishment of an offender above the optimal level, i.e., the level that best achieves crime prevention while limiting the economic costs of punishment and preventing greater punishment than is fair to the offender.

Sentencing procedures should be designed to place most of the risk of error on the offender, rather than on the public. After all, this problem of allocating the risk of error in sentencing would never have arisen but for the offender's admitted or already proven criminal behavior. His presumption of innocence has been waived or rebutted. The current Guidelines unwisely refer to him as the "defendant," a term that ignores the crucial change in his status when he pled or was found guilty. That misleading appellation tempts one to draw unsound analogies between sentencing procedures and trial procedures.

Contrary to the implication carried by the word "defendant," the offender being sentenced is guilty of the crime for which he is about to be sentenced. The prospective victims of his and others' future crimes are innocent, or at least strongly presumed so. Wise procedures would be designed, in cases where facts and predictions bearing on the sentence are in doubt and errors may occur, to protect innocent members of society more than may be necessary, rather than to give convicted offenders undue leniency.

This principle should lead us, for example, to establish burdens of persuasion of sentencing facts different from the preponderance standard currently endorsed by the Commission (sec. 6A1.3) and used by most federal courts. When a convicted offender tries to prove a fact that would mitigate his sentence, he should have to prove it by more than a preponderance. Clear and convincing proof might wisely be required, for example.

Conversely, when the government tries to prove a fact that would support a more severe sentence, the burden of persuasion should be less then a preponderance. There are, of course, other contexts in which a standard lower than a preponderance is used. See, e.g., Kyles v. Whitley, 115 S. Ct. 1555 (1995) (holding that a defendant claiming a violation of the prosecutorial disclosure requirement articulated in United States v. Bagley, 473 U.S. 667 (1985), need only adduce less than a preponderance of evidence that the undisclosed evidence would have been likely to prevent a conviction). "Substantial likelihood" of an aggravating fact

describes pretty well the showing that should justify greater protection of the innocent public from a guilty offender.

Congress has not forbidden this general approach, i.e., allocating most of the risk of sentencing error to offenders. It remains to be seen what constitutional limits the courts will set on the resolution of most specific issues of sentencing procedure. Certainly the Supreme Court has not categorically rejected the general approach I suggest. The Commission, the Congress, and the courts should do all in their power to adopt sentencing procedures that limit the risk of error to the degree that best makes practical sense, and that then allocate most of the remaining risk to the guilty offenders who have created the problem.

An acquittal should not be treated as a special matter for this purpose. Current constitutional precedents make it quite clear that it need not be so treated. See, e.g., United States v. Watts, 117 S.Ct. 633 (1997); Dowling v. U.S., 110 S. Ct. 668 (1990). All an acquittal shows is that the government failed, under the especially rigorous rules of procedure and evidence that govern the trial of one who is presumed innocent, to prove at least one element of the charged offense beyond a reasonable doubt. The acquittal creates no reasonable expectation in the defendant (who later becomes the offender being sentenced for another crime), or in the public, that the same misconduct will not later be proven under less rigorous procedural and evidentiary rules, to a lower degree of probability, at the

subsequent sentencing.

All three of the options in proposed amendment number 9 are unsatisfactory, even Option 3. It provides no articulation of the "substantial concerns of fundamental fairness" that supposedly might arise. Attempts by courts and commentators to identify and explain the nature of any perceived unfairness have not been specific or cogent. There should be no general invitation to depart downward on such a vague ground and, unless the Commission can articulate the purported unfairness specifically and persuasively, there should be no such invitation at all.

III. Simplification of the Guidelines

It may seem that my suggestion to add more offender characteristics is incompatible with simplification of the Guidelines. The impression that my views are contrary to simplification may be strengthened when I add that, in my view, the current Guidelines unduly limit the number of offense characteristics courts can consider, and their ways of doing so. It may also seem that the Congressional limit on ranges of terms of imprisonment to the lesser of six months or a 25% span obstructs simplification.

Despite these likely impressions, simplification is indeed possible and desirable. The Commission's attempt to simplify the Guidelines should be based on the following fundamental observations and principles.

Criminal behavior is enormously voluminous, varied, and

complex. Likewise, the character traits and other personal qualities that lead offenders to commit crimes are extremely varied, complex, and subtle, and the facts about an offender's life that shed substantial light on these traits and qualities are even more numerous, varied, and complex.

Crime prevention is extremely important. Therefore, it is wise to design the criminal justice system so that the public actors (e.g., legislatures, prosecutors, judges, and jurors) who make decisions about criminal law, prosecutions, convictions, and sentences can consider every important fact about each crime and each defendant. Only in that way can crime prevention be made as effective as practically possible, while at the same time unjust convictions and excessive sentences are avoided.

However, it would be impracticable to consider every significant offense and offender characteristic at every stage of the criminal process. Dealing sensibly with information that is so voluminous, varied, complex, and subtle requires great flexibility and discretion to handle every case in a unique way. The presumption of innocence and other important procedural protections would be impossible to enforce adequately if every stage of a criminal case were handled with great flexibility and discretion.

The basic solution to this problem that the federal and all state governments have followed for most cases, for almost the entire history of the Republic, is as follows. To protect the presumption that one accused of crime is innocent until proved

guilty by overwhelming evidence under rigorous procedures, the middle stage of the criminal process, that of formal adjudication of guilt, is designed in peculiar way.

First, the facts to be proved at this middle stage relate only to the charged offense, not to the character or personality of the defendant. Then, those facts are deliberately selected and worded so as to be few in number and relatively simple and specific in content. These elements are chosen and defined in such a way as to make them provable in a very technical and rigorous trial process; the other side of the same coin is that these elements lack realistic richness and subtlety. For example, the defendant is alleged to have possessed something specified (burglar tools, or a specified drug, for example) with a specified state of mind (e.g., the intention to make an unauthorized entry of another's property, or to transfer the drug).

These few facts, deemed the elements of the crime, must be proved to a very high probability, through rigorous evidentiary and procedural rules. Harmful errors in application of these requirements can almost always be identified and remedied on direct or collateral review of the conviction.

As a result of these rules for the stage at which guilt is adjudicated, it is extremely rare for innocent defendants to be convicted of crimes. A collateral result is that, during this middle stage of the criminal process, the decisionmaker (the judge or jury deciding whether guilt has been proven) learns very

little about the defendant's character and personality. In addition, the decisionmaker makes findings that describe even this particular crime in a peculiar way: the findings leave out many significant facts about the crime, and they oversimplify or state very generally even the facts the findings do cover.

For example, the jury returning a guilty verdict may find only that the offender possessed at least one object designed to open a locked door. The jury may find it unnecessary to decide whether the offender also possessed a large kit of other, highly sophisticated devices indicating great professional skill at such a crime. He may or may not, as far as the verdict indicates, have possessed also equipment for disabling alarm systems, a case designed for transporting valuable crystal without damage, and the like.

In the other hypothetical case mentioned above, the jury may find only that the offender possessed heroin, not also facts about its quantity, purity, and packaging that indicate his role in its distribution. In neither of these two cases does the jury find the offender's ultimate motive for the crime, nor his character or propensity to commit similar or different kinds of crimes in the future.

Thus, in the stage of a criminal case where guilt is adjudicated, an unrealistically simplified presentation is made of some of the key facts about the crime. No facts at all are presented about other offense characteristics or about the characteristics of the offender that should inform the selection

of a punishment.

This partial blindness and complete oversimplification during the middle stage of a criminal case did little harm in the traditional American system, because the first and third stages allowed consideration of all relevant facts, as well as discretion to respond to all of them. At the first stage, that of charging, the prosecutor had almost complete discretion (1) not to charge at all, (2) to charge a less serious offense than the evidence would justify if the narrow view taken during the middle stage governed, or (3) to accept a bargain for a lesser conviction. He could base such leniency on details of the offense that are ignored or oversimplified in the middle stage, and on facts about the offender that could not be proved at all at trial.

In view of these facts, the prosecutor could be lenient when more aggressive prosecution would strike an unwise balance among competing factors such as the seriousness of the offense in all its real, complex details; the degree of likelihood that the defendant or others would commit future crimes of various kinds in the absence of any criminal conviction or punishment; the likelihood that the defendant would respond well to probation or various kinds or treatment or training; and various other facts and predictions too numerous, varied, complex, and subtle to be considered during the much more formal and structured middle stage.

Similarly, the third stage of a criminal case, sentencing,

traditionally allowed another consideration of any kind of information bearing on the whole gamut of offense and offender characteristics. Cases that appeared identical, if one looked only at the indictment and verdict, were examined again at the sentencing stage and found to be very different, as the judge took a more thorough and subtle look at the facts of the offense, as well as his first thorough look at the character of the offender. This system thus had a first and third stages in each of which a decisonmaker had discretion to consider and act upon all relevant information about the offense and the offender, and a middle stage where artifically narrow factual allegations must be proved through rigorous evidentiary and procedural methods.

This system is excellent in conception. It allows potential criminal defendants to be screened out of the process before being tried or even charged, or to receive other forms of leniency, where the specifics of the offense or the offender make this a wise resolution of the competing demands of crime prevention, economy, and justice. This system also minimizes the chance that an innocent defendant will be convicted, by requiring very strong proof of just a few important facts under very demanding procedures. And then it creates an opportunity for wise crime prevention and punishment of the guilty offender, by basing the sentence on all significant information about the crime and the offender.

Under this basic, traditional system, sentencing should not be simple. There are methods by which to achieve simple

sentencing, but each of them fails to accomodate adequately the needs for effective crime control, economy, and justice.

One such failed method is embodied by the current Guidelines. The Guidelines preclude or strongly discourage consideration of many facts, such as an offender's unadjudicated crimes dissimilar to the one for which sentence is to be imposed, that are of substantial importance in selecting a sentence to prevent future crimes. As to facts the Guidelines do allow judges to consider, i.e., the offense characteristics comprising most of the current Guidelines' great bulk, they are defined in ways that are artifically narrow and discontinuous; they inadequately reflect the true variety and subtlety of such facts. The result is that the Guidelines unduly restrict and oversimplify sentencing criteria.

Consequently, the current Guidelines set a task for sentencing judges that is much more technical than before the Guidelines, but is also simpler in substance, for two reasons. First, judges must ignore or give trivial weight to much important information. Second, even the information that the Guidelines do make significant in sentencing is broken into artifically defined and discontinuous bits, and given predetermined interrelationships. Judges must use this information more to make a calculation than to make a judgment.

Thus, the difficult and complex judicial sentencing process, which formerly involved weighing many, varied, interrelated factors having different degrees of importance, is replaced in

the current Guidelines by a computation. This computation has only the technical complexity of a math problem, not the substantial complexity of an attempt to evaluate human behavior and character, to predict criminal conduct and the reactions of criminals to sanctions, and thus to prevent and punish crime with optimal effectiveness.

The ultimate results of the current Guidelines are that crime prevention is less effective than it should be, that unjustified disparity and unjustified parity of sentences are unduly frequent, and that all we gain is an illusion of sentencing parity.

It is also true that the pre-Guidelines system of federal sentencing was grossly inadequate. There, too, unjustified disparity and unjustified parity were both rampant. Also, many sentences were surely ill-designed to prevent crime or to punish wisely. Sentencing was lawless, unreviewable, and insufficiently explained. There were inadequate processes for Congress and courts to create data, analyze them, and improve sentencing by learning from experience.

The concepts of Guidelines to be announced and then amended regularly, of limits on departures from the Guidelines, of stated reasons for sentences, and of appeals by both parties were sound. These concepts could have led to a great improvement in sentencing. Instead, the Commission has implemented these concepts in a way that (1) has definitely impaired crime prevention and just sentencing by barring or minimizing reliance

on some important sentencing factors, (2) has probably increased the problem of unjustified parity, (3) has not necessarily reduced that of unjustified disparity, and (4) has produced sentencing law that is excessively technical and complicated.

The wise approach to simplification, which also is the wise approach to solving the other problems just mentioned, would be as follows. Sentencing cannot be both simple and wise. We therefore must choose between having either (1) relatively simple Guidelines or (2) relatively simple judicial application of them. So far, the Commission has made the latter choice.

The Commission designed the initial Guidelines, effective in 1987, so as to limit courts to simple functions of factfinding and technical application of relatively precise rules. It tried also to make the Guidelines themselves rather simple, by leaving out important sentencing factors and by unduly quantifying the ones it put in. Even so, the initial Guidelines were rather complicated. Then the Commission promulgated annual sets of amendments making the Guidelines ever longer, more precise, and more complicated. At present, we therefore have a system where the judicial function is more mechanical (and thus easier in substance) than before the Guidelines; where the Guidelines are so technical as to be hard to use; and where, ironically, these complicated Guidelines are so much more simple than the real world of crimes and criminals that they do not produce sufficiently effective, economical, and fair crime prevention and punishment.

At this time, the Commission should begin experimenting with an approach that is virtually the opposite of the approach it has used to date. To be cautious, it should try this new approach at first only for a few kinds of offenses and a few kinds of offenders. The Commission should replace some of the current provisions with new ones so designed that the new Guidelines will be relatively simple and their use by the courts will be as complex as good crime prevention and just punishment demand.

Application of this approach should begin with the following observation: Although the statute requires that each range of imprisonment prescribed by the Guidelines cannot be wider than the greater of 25% or six months (sec. 994(b)(2)), the act does not require that the Guidelines employ narrow or specific factual categories or calculations in the preceding steps by which a judge considers facts relevant to the sentence. Offense and offender characteristics can be described in general language. The numerical values assigned to them can consist of ranges.

For example, the Commission might choose to experiment with this new approach by replacing the Guideline for the offense of Failure to Appear by Offender (sec. 2J1.6). The Commission might also create a new Offender Characteristics Category Guideline to apply to this offense instead of the current Criminal History Category Guideline (sec. 4A1.1).

The new Failure to Appear Guideline could begin, as does the current one, by making 11 the base offense level for failure to report for service of sentence, and 6 the base level otherwise.

Then the new Guideline could authorize the sentencing judge, for example, to "decrease the offense level by 4 levels or less, or increase it by 6 or less, because of offense characteristics warranting the decision, including but not limited to the gravity of the charge or conviction in the case in which he failed to appear, the stage of the proceedings when he failed to appear, the kind of facility to which a sentenced offender was ordered to report, how long after he was scheduled to report he surrendered or was apprehended, and the circumstances under which he surrendered or was captured."

This draft adds offense characteristics that the current Guideline omits, such as the gravity of the offense for service of whose sentence the offender failed to appear. It also eliminates arbitrary discontinuities in the weight given to offense characteristics covered by the current Guideline, such as the 3-level difference between a pending charge punishable by 15 years imprisonment and one punishable by any less. In addition, it eliminates the unjustified parity of giving the same significance to a pending capital case as to a pending case where the maximum punishment is as little as 15 years.

The new Guideline for Offender Characteristics, to be adopted only for use with the new Failure to Appear Guideline, could direct the judge to determine the offender's "offender characteristics points" in a similar fashion. The court would choose from a wide range of points by considering a wide variety of facts, such as the nature, seriousness, and recency of prior

convictions and sentences and of prior crimes established for the first time in this sentencing proceeding.

To combine this new set of offense levels with this new set of offender points, the Commission could use a Sentencing Table very similar in substance to the current one. However, for this offense the vertical column would be headed "offender charactistics category," not "criminal history category."

These proposals are simpler than the current Guidelines, and they encourage judicial consideration of all significant offense and offender characteristics in their true subtlety and interrelatedness. They facilitate use of the kinds of procedures I recommend in the previous section of these comments, because they treat most sentencing facts as evidentiary rather than ultimate facts. They thereby confine the issue of burdens of persuasion, as well as other crucial procedural issues, to a manageably narrow scope of application.

At the same time, my proposals confine and guide judicial discretion vastly more than the pre-Guidelines law of sentencing. Coupled with the requirement of stated reasons for sentences, the authorization of appeals from sentences, and the roles of the Commission in gathering data and learning from experience, Guidelines drafted in this manner could promote effective sentencing while making unjustified disparity of sentences much less common than before 1987, and unjustified parity of sentences much less common than after 1987.

It would at least be worthwhile experimenting with this

approach. The current Guidelines comprise a lurch from the pre-1987 extreme of completely lawless sentencing, to the current extreme of artificial, unrealistic sentencing. It is time to try a more humble, cautious, and incremental method of reform.

It must be clear by now how interrelated are my views on the three sets of issues addressed above. Federal sentencing will not become as effective as it should be to prevent crime until offender characteristics are made much more important determinants of sentences than under the current Guidelines, nor until offense characteristics are described more comprehensively and in terms that encompass all their important variations. The only way the Guidelines can adequately cover all important offense and offender characteristics, and cover them with language that is reasonably simple, is to describe them in general terms and to provide ranges of numerical values for them. Procedures for finding sentencing facts and for applying Guidelines to the facts should be relatively informal, and should place most of the risk of error on convicted offenders, not on a public entitled to protection from crime.

This approach is so different from the current Guidelines that it should be tried in small steps. The results of both approaches should be studied carefully. In the long run, it will be found that the current Guidelines produce only illusory parity and indiscriminate prevention of crime, while the new approach produces more effective crime control, fairer sentences, relatively little unjustified parity or disparity, and a more

workable system.

Very truly yours,

Russell M. Coombs

HERBERT KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5653
T.D.D. (202) 224-4464

United States Senate

WASHINGTON, DC 20510-4903

COMMITTEES:
APPROPRIATIONS
JUDICIARY
SPECIAL COMMITTEE ON AGING

March 14, 1997

Mr. Richard P. Conaboy, Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Information

Dear Mr. Conaboy:

I applaud the Commission's efforts to revise the Sentencing Guidelines for white-collar criminals. Although the Sentencing Guidelines originally increased the sentences for white-collar criminals, these proposed amendments address discrepancies between white and blue-collar criminals that have come to light since the Guidelines' enactment. For example, litigators frequently assert that the Guidelines allow for criminal antitrust defendants to receive shorter sentences than blue-collar criminals who have committed offenses of equal severity. We must eradicate this kind of sentencing disparity to foster public confidence in the Guidelines and to create a legal system in which justice is truly blind.

Although all of the proposed amendments deserve careful scrutiny before enactment, my comments speak to only a few of the proposals. Specifically, my comments address proposed Amendments Number 18 for Sections 2B1.1 and 2F1.1, the Theft and Fraud provisions respectively. These proposed amendments effectively work toward equalizing sentences for theft and fraud offenses, so I support the Commission's enactment of these changes.

COMMENT ON AMENDMENT NUMBER 18

The Commission should agree to eliminate the "more-than-minimal-planning" enhancement found in Sections 2B1.1 and 2F1.1 and other guidelines. The Commission found that judges apply the enhancement unevenly, resulting in "unwarranted disparities." To correct this problem, the Commission proposes a corresponding increase in the loss tables, and creates a two-level increase for criminals who use "sophisticated means" to impede discovery or determining the extent of the offense. This amendment reflects the common-sense notion that more planning and mental preparation on the part of criminals should result in longer sentences.

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451

MADISON OFFICE:
14 WEST MIFFLIN STREET
SUITE 312
MADISON, WI 53703
(608) 264-5338

EAU CLAIRE OFFICE:
402 GRAHAM AVENUE
SUITE 206
EAU CLAIRE, WI 54701
(715) 832-8424

APPLETON OFFICE:
4321 WEST COLLEGE AVENUE
SUITE 235
APPLETON, WI 54914
(414) 738-1640

The Commission should also agree to amend the base offense level of Section 2B1.1 from level four to level six. By making the base offense level for theft cases equal to that of Section 2F1.1 Fraud cases, this amendment would take an important step toward redressing the disparity between light sentences received by white-collar criminals relative to their blue-collar counterparts.

I also urge the Commission to enact Option One of the revisions to the loss tables. Although most base offense levels and specific offense characteristics increase by at least two level increments, the current loss tables increase by only a one level increment. Option One responds to this discrepancy by changing the current one-level increment in the loss tables to two-level increments. Option Two only contains a combination of one and two-level increments, and Option Three retains the old one-level increment. Thus, in order to make the Theft and Fraud loss tables more consistent with other guidelines, the Commission should choose Option One's two-level increment.

In addition, only Option One provides for severity levels at higher loss amounts, permitting loss amounts up to $90 million. In contrast, the loss amounts for options two and three stop at $50 million and $40 million respectively, making no distinction between a defendant who stole $40 million and one who stole $100 million. It makes sense to increase the severity level for defendants who steal more because their actions result in significantly more harm. Ultimately, Option One, unlike either of the other two options, responds to the most severe theft and fraud cases with a punishment that fits the crime.

In closing, I would like to reiterate my appreciation to the Commission for undertaking the difficult task of reassessing the Sentencing Guidelines. The proposed amendments, if enacted, are a significant next step towards eradicating discrepancies in sentences among criminals and improving public confidence in the fairness of our judicial system.

Sincerely,

Herb Kohl

Herb Kohl
U.S. Senator

HK:rjk

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION)

MAR 21 1997

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Dear Mr. Courlander:

Enclosed is an 8-page document prepared by Office of Chief Counsel, Criminal Tax Division. It contains technical explanations and legal citations which support our position on the proposed 1997 amendments to the Federal Sentencing Guidelines.

Simply summarized, the enclosed document expresses our long-standing position that criminal tax offenders should be sentenced to longer periods of incarceration at lower tax loss thresholds. We believe that the existing guidelines do not always provide adequate punishment for white collar crimes in general, and tax crimes in particular.

The document also expresses our position that the loss tables for tax offenses should be set at identical amounts as those for theft and fraud. By the same token, we oppose any amendment which would measure the offense level based on the amount of potential benefit to the perpetrator rather than on the potential harm to the victim(s).

Thank you for the opportunity to comment on these matters. If you need further information, please contact Ed Delehanty, Office of Tax Crimes (CP:CI:O:T) at 202-622-5755.

Sincerely,

Ted F. Brown

Ted F. Brown

Enclosure

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

MAR 21 1997

MEMORANDUM FOR TED F. BROWN, ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION) CP:CI

FROM: Office of Chief Counsel
Criminal Tax Division

SUBJECT: Public Comment on Proposed 1997 Amendments

This document expresses the Internal Revenue Service's views on the proposed 1997 non-emergency amendments to the sentencing guidelines. As an overview, we wish to point out our perspective when examining sentencing issues relating to federal criminal tax statutes.

The Service has increased efforts to help taxpayers comply rather than relying solely on after the fact enforcement. However, we recognize that, despite our most aggressive efforts, some segments of the population refuse to voluntarily comply. To this end, tough but fair sentencing rules permit courts to send the message, tax offenses are serious, and intentional violators will be punished seriously.

With this view in mind, our comments are offered in regard to the following proposed amendments:

Proposed Amendment 9 - Relevant Conduct (§1B1.3)

Proposed Amendment 9 addresses the issue of whether acquitted conduct may be considered for sentencing purposes. Option 1(A) adds language providing that acquitted conduct shall be considered if established independently of evidence admitted at trial. Option 1(B) invites the use of acquitted conduct as a basis for an upward departure. Option 2 excludes conduct from consideration in determining the guideline range unless such conduct is established by the "clear and convincing" standard. Option 3 provides that acquitted conduct should be evaluated using the same standards as any other form of unconvicted conduct.

The Service supports the traditional view of sentencing, i.e., acquitted conduct may be considered by a sentencing court because a verdict of acquittal demonstrates a lack of proof sufficient to meet "beyond a reasonable doubt" standard, a standard higher than that required for considering relevant conduct at sentencing. United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991). Cf. United States v. Karterman, 60 F.3d 576, 580 (9th Cir. 1995). Consequently, we oppose any amendment that places a limit on the use of acquitted conduct either by definition or standard of proof.

Proposed Amendment 18(A) - Fraud, Theft, and Tax Offenses

Proposed Amendment 18(A), as set forth in the Proposed Guideline Amendments for Public Comment - Part I and the Federal Register (Vol. 62, No. 1, 152-19), the Sentencing Commission, inter alia, proposed to make the following changes to §§ 2B1.1, 2F1.1 and 2T1.4: (1) eliminate the more than minimal planning enhancement in §2B1.1 and §2F1.1 and other guidelines, build a corresponding increase into the loss tables, and create a two level enhancement like the one in § 2T1.4[1] for offenses involving "sophisticated means" and provide a level floor of 12 in such cases; (2) increase the base offense level of §2B1.1 (theft guideline) and §2B1.3 (property damage guideline) from level four to level six, and revise the loss tables in §2B1.1, §2F1.1 and §2T4.1 (theft, fraud and tax offenses, respectively); (3) change the current one level increments in the aforementioned loss tables to two level increments or to a combination of one and two level increments; (4) increase the severity of the three loss tables at higher loss amounts.

Subsequently, the Sentencing Commission prepared an "Unofficial Staff Alternative" combined loss table for §§ 2B1.1 and 2F1.1 which includes two options pertaining to "sophistication", and deletes more than minimal planning from both guidelines.

Considering the various loss table options and assuming that the proposed Unofficial Staff Alternative loss table will be modified so as to be applicable to the tax loss table, the latter is our preference. Our preference is based on the fact that, in most instances, tax losses result in higher offense levels in this table than in the existing tax loss table which is consistent with the Commission's intent of treating tax violations as serious crimes. We note that this proposed table incorporates two level increases as opposed to the one level increments in the present tax loss table but we do not find this objectionable. In fact, this table seems to provide a somewhat smoother progression through the loss amounts than the current table. Notwithstanding our endorsement of this proposed table if it is equally applicable to tax losses, if it is not, we oppose the Unofficial Staff Alternative on the ground that we strongly believe that identical loss amounts should be sentenced at least as severely under the tax loss table as losses are under the fraud and theft tables. Any change that would provide for higher sentences for identical amounts under the fraud and theft tables than under the tax table, would clearly send the wrong message as to the seriousness of criminal tax violations.

---

[1] The same two level enhancement for sophisticated means which the proposed amendment addresses and identifies as appearing in §2T1.4, also appears in §2T1.1 and is set forth in the subsequent text of Proposed Amendment 18(A).

If the Commission considers its original loss table options under proposed amendment 18(A)2 as opposed to the Unofficial Staff Alternative, we favor the proposed tax table for § 2T4.1 as set forth in Option One. We believe that the tax table as set forth in Option One will result in more significant periods of confinement for most of our cases, a result which is vital to our ability to maintain an acceptable level of voluntary compliance. Nevertheless, by way of reiteration, our primary preference between the proposed tables is the one set forth as the Unofficial Staff Alternative.

Proposed Amendment 18(A)1 provides for the elimination of more than minimal planning in the fraud and theft guidelines and replacing it with a two level enhancement, with a floor level of 12, for sophisticated means. This would also include a definitional amendment, concerning "sophistication," to Application Note (f) of §1B1.1. Likewise, §§ 2T1.1 and 2T1.3 which currently contain a two level enhancement for "sophisticated means" would be amended, to provide for a floor level of 12. We are in favor of this amendment.

The Unofficial Staff Alternative also contains two options for sophistication. Option One of the Unofficial Staff Alternative is virtually the same as the sophistication enhancement of proposed amendment 18(A)1, and it contains a provision for conforming §2T1.1(b)(2). We assume there will also be a conforming aspect for §2T1.4(b)(2) and, accordingly, we endorse Option One of the Unofficial Staff Alternative. However, we oppose Option Two of the Unofficial Staff Alternative because it seems to limit its scope of sophistication to the use of foreign bank accounts and transactions, thus making it an unnecessarily restrictive enhancement. Nevertheless, if it is determined that the fraud guideline is to be amended to include a specific offense characteristic with a floor level of 16 for the use of foreign bank accounts or transactions to conceal, we believe that a similar change should be made to the tax guideline.

Another area concerning sophisticated means which we would like the Commission to address is the inclusion of clarifying language that the sophisticated means enhancement is offense specific rather than offender specific. In other words, the enhancement should be applied based on the nature of the scheme and not on the defendant's role in the scheme. This clarification would resolve a circuit conflict between the Second Circuit and the Sixth Circuit. The Second Circuit has held that a sophisticated means enhancement is to be applied regardless of whether the defendant devised the sophisticated means involved in the scheme. United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996); United States v. Richman, 93 F.3d 1085 (2d Cir. 1996). By contrast, the Sixth Circuit has refused to apply the enhancement where the individual defendant's role in an admittedly complex scheme was nominal. United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996). From our perspective, if a defendant takes advantage of a scheme involving the use of sophisticated means to conceal the nature or existence of an offense, the enhancement should be applied even if the defendant had no role in devising the sophisticated means. Typically, a defendant's

role in the offense is addressed by other guidelines. U.S.S.G. §§3B1.1 and 3B1.2.

Proposed Amendment 18(C)(8) - Issue for Comment

This issue for comment is, in essence, how to deal with an intended loss pursuant to §2F1.1. More broadly stated, the issue becomes whether the current rule should be changed to provide that a loss should be based primarily on the actual loss, with the intended loss available only as a possible ground for departure or whether, if the substance of the current rule is retained, the magnitude of the intended loss should be limited by the amount that a defendant realistically could succeed in obtaining. In other words, whether the intended loss should be limited by concepts of "economic reality" or "impossibility." We believe that the current rule should be retained with no modification for the amount that the defendant realistically could have succeeded in obtaining.

Basing loss on actual loss has the potential to reward defendants for factors beyond their control. For instance, a defendant who intended a large loss but who was discovered before he/she could consummate the offense would be treated less seriously than a defendant who was not discovered until after the offense was completed. Sentencing a defendant based on the intended loss still permits courts to take into account the value of pledged collateral in cases involving fraudulently obtained loans and actual performance in cases involving falsification to obtain contracts.

In addition, basing a determination of loss on the economic reality of a defendant's scheme would require courts to make speculative judgments and quite probably would lead to similarly situated defendants being treated differently.

Proposed Amendment 18(C)(10) - Issue for Comment

This issue for comment is, in essence, whether it is necessary to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense within the meaning of Application Note 10 to §2F1.1. We believe that Application Note 10 is, in its present form, adequate to address the issue without encumbering the courts with restrictive definitions and special rules. However, we are concerned about the situation where the loss amount included pursuant to §1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant and the court might depart down to an offense level corresponding to the loss amount that the court determines to more appropriately measure the defendant's culpability. We believe that the potential harm or loss to the victim should be the measure of the seriousness of the offense rather than the actual benefit to the criminal. For instance, a defendant who prepares 100 fraudulent tax returns for $100 each, may only realize a personal benefit in the amount of $10,000 while causing hundreds of thousands of dollars of loss to the government.

Consequently, we oppose any language which advocates a downward departure based on the personal benefit derived by a defendant when it is less than the harm caused to the victim.

Proposed Amendments 24, 25 and 26 - Acceptance of Responsibility

Proposed Amendment 24 is purportedly designed to provide greater flexibility to the sentencing judge in determining whether a defendant qualifies for a reduction in sentence, particularly the additional one level reduction in subsection (b). Proposed Amendment 26 is designed to allow consideration of the additional one level reduction for defendants at all offense levels. We oppose both of these proposed amendments. In regard to Proposed Amendment 24, there is no evidence that the proposed changes are needed. Furthermore, the removal of the presently listed factors from §3E1.1(a) will make it more difficult for probation officers to make informed recommendations to trial courts concerning the appropriateness of this reduction.

We are even more opposed to Proposed Amendment 24 which, in essence, dramatically raises the acceptance of responsibility reduction in all cases from two levels to three levels. We note that the factors that would engage the additional one level reduction are of the type which would ordinarily be applicable to the basic two level reduction in its current form. More significantly, if the three level acceptance of responsibility is applied to all offense levels, the potential exits whereby a defendant's sentence can be reduced as many as two sentencing zones. For instance, if a defendant is sentenced at a Zone C offense level of 11 where he/she would serve at least four months, a three level acceptance of responsibility reduction would result in the defendant being sentenced at a Zone A offense level of 8 and possibly receiving no sentence of imprisonment. Once again, this sends the wrong message in regard to all serious crimes and, specifically, to tax crimes where the sentences often fall within the sentencing zones set forth in the foregoing example.

Proposed Amendment 25 resolves a conflict in the circuits by providing an addition to Application Note 4 that commission of an offense while awaiting trial or sentencing, whether or not the new offense is similar to the instant offense, ordinarily indicates that a defendant has not accepted responsibility for the instant offense. We support this amendment which will resolve the conflict consistent with the holding in United States v. Watkins, 911 F.2d 983 (5th Cir. 1990).

Proposed Amendment 28(6) - Issue for Comment

The issue for comment is whether and how to address the circuit conflict of whether "victim of the offense" under §3A1.1 refers only to the victim of the offense of the conviction or to the victim of any relevant conduct. If this issue is to be addressed, we favor the view of the Second Circuit in United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) which held that a vulnerable victim need not be the victim of the offense of

conviction, as opposed to the limiting view toward relevant conduct taken by the Sixth Circuit in United States v. Wright, 12 F.3d 70 (6th Cir. 1994).

We believe that Wright clearly demonstrates a situation where a victim can be a victim of an offense without being a direct victim of the offense of conviction. In this case, the defendant used the economic vulnerability of several people to induce them to participate in his scheme to defraud the government through the filing of false tax refund claims. In Echevarria, the defendant held himself out as a physician to defraud health insurance providers. The patients were victims of the offense because they believed they were receiving effective medical attention; however, they were not victims of the offense of conviction. In both of these cases, the defendant "used" individuals for their particular criminal scheme based on those peoples' vulnerability and, as such, we believe that this conduct deserves to be dealt with severely through the use of a two level enhancement. One way to resolve this conflict is making it clear in the guideline commentary that the enhancement is meant to encompass such conduct.

Proposed Amendment 28(14) - Issue for Comment

This issue for comment concerns the circuit conflict of whether the collateral consequences of a defendant's conviction can be the basis of a downward departure. We believe that granting a downward departure on the basis of collateral consequences undermines the Congress' goal of achieving uniformity in sentencing. Prosecution of white collar crimes often involve professionals and business persons who, as a result of their convictions and/or sentences, encounter loss of licenses and closure of businesses. To allow these defendants to take advantage of this additional potential windfall which is unavailable to nonprofessional and employee defendants, promotes the unequal treatment of the defendants that the guidelines sought to eliminate.

In addition to the cases cited in Proposed Amendment 28(14), a recent tax case, United States v. Olbres, 99 F.3d 28 (1st Cir. 1996), involved a husband and wife defendants who appealed the denial of a downward departure based on the fact that their business would fail and their 12 employees would lose their jobs if the defendants were imprisoned. The District Court denied the departure because it did not believe that business failure and third party job loss could legally serve as the basis for a downward departure. The first Circuit applying Koon v. United States, 116 S.Ct. 2035 (1996) remanded the case and noted that only a "rare case" falls outside the heartland that "the mere fact that innocent others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland."

Consequently, we believe that collateral consequences should not be the basis for a downward departure.

Proposed Amendments 37(S) and (T) - Consolidation of §§2T1.1 and 2T1.6:

Consolidation of §§2E4.1, 2T2.1 and 2T2.2

Proposed Amendment 37(S) consolidates §§2T1.1 and 2T1.6. Section 2T1.6 applies to 26 U.S.C. § 7202 (Failing to Collect or Truthfully Account for and Pay Over Tax). The consolidation of these guidelines is logical and, therefore, we have no objection to this proposed amendment.

Proposed Amendment 37(T) consolidates §2E4.1 (contraband cigarettes) with §2T2.1 (nonpayment of alcohol and tobacco taxes) and with §2T2.2 (regulatory offenses). All of these are infrequently applied guidelines and we have no objection to this proposed amendment.

MFKlotz/pt 3/12/97
MFKlotz x15 SEN-AMND.98

UNITED STATES POSTAL INSPECTION SERVICE

OFFICE OF COUNSEL

March 14, 1997

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

Attention: Michael Courlander
Public Information Officer

Dear Mr. Courlander:

The United States Postal Inspection Service respectfully submits it comments to the proposed amendments published by the Commission in the January 2, 1997, Federal Register.

Generally, we support the Commission's efforts to consolidate and simplify the guidelines, especially in the area of loss determination for theft and fraud offenses. Over the last four years, we have proposed amendments for calculating the economic loss for theft of mail generally and the theft of mail containing credit cards. In our submission this year, we again recommended changes to address these problems. In particular, we proposed alternative means to determine the economic loss for stolen credit cards and large volume mail thefts based on the principles of intended loss and risk of loss. Specific provisions that authorize an upward departure for these offenses would address the shortcomings of the current guidelines. Furthermore, there are inconsistent interpretations among the circuits in the application of the theft guidelines for stolen, but unused, credit cards that we believe the Commission should address.

Although our proposed amendments were not published, the reasons we gave in their support are similar to those cited by the Commission in its proposed amendments for 1997.

We are in favor of increasing the base offense level for theft and fraud offenses as proposed in Amendment 18. However, we have a concern with the deletion of §2B1.1(b)(3), the specific offense characteristic that provides for a two-level increase for the theft of undelivered United States mail. We do not support the elimination of this guideline and disagree with the narrative accompanying its proposed deletion: "[b]ecause the floor of 6 for offenses involving the theft of mail is unnecessary given the proposal to increase the base offense level for offenses from 4 to 6."

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2181
(202) 268-4418
FAX: (202) 268-4563

The federal statutes governing the theft and obstruction of mail differentiate United States mail from other stolen or destroyed property. We believe this distinction was the basis for §2B1.1(b)(3) when it was promulgated and feel strongly that it should be maintained in any general offense level increase proposed for the theft guidelines. The current guideline considers the inherent value of mail that cannot always be measured in dollars, the government's fiduciary role in this public communications service, and the mail as an integral part of our nation's commerce. Moreover, the commentary to the mail theft guideline states: "[t]hat the theft of undelivered mail interferes with a government function and the scope of the theft may be difficult to ascertain." For these reasons, we request the Commission maintain a two-level increase for theft or destruction of United States mail above any new base offense level established for theft offenses.

As a final matter, we agree with Amendment 37 that would consolidate the mail theft and obstruction guidelines and the corresponding change to the commentary.

If you have any questions, or need additional information, please feel free to contact me at (202) 268-4415.

Sincerely,

H. J. Bauman
Counsel
Office of Chief Inspector

Families Against Mandatory Minimums
FOUNDATION

March 17, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We are writing on behalf of Families Against Mandatory Minimums to comment on the 1997 proposed guideline amendments. The three amendment proposals which FAMM considers to be of the highest priority, acquitted conduct (Proposed Amendment 9), the cliff between offense levels 42 and 43 (Proposed Amendment 13), and mitigating role (Proposed Amendment 22), have been addressed in FAMM's previously submitted written testimony. For your convenience, this letter also includes the text of that submission. Seven additional amendment proposals of importance to FAMM are addressed herein: controlled substance transactions separated by more than one year (Amendment Proposal 8), aggravating role in the offense (Amendment Proposal 21), acceptance of responsibility (Amendment Proposals 24, 25 and 26), aberrant behavior (Amendment Proposal 28), and the effect of the safety valve on supervised release terms (Proposed Amendment 30).

Controlled Substance Transactions Separated by More than One Year
(Amendment Proposal 8)

As recognized by some courts, "careful practice [in assessing drug quantities] is essential where a defendant's sentence depends in such large measure on the amount of drugs deemed attributable to his conduct." *United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir. 1993). Application of U.S.S.G. §1B1.3 (relevant conduct) is among the guideline issues most frequently appealed and results in the greatest number of reversals. United States Sentencing Commission, 1995 Annual Report 132, 142-43. The example derived from *United States v. Hill*, 79 F.3d 1477 (6th Cir. 1996), may avert the erroneous counting of temporally remote and unrelated drug transactions. Therefore, FAMM does not oppose this amendment.

However, additional language may be required to avoid the inference that two drug deals eleven months apart are, *ipso facto*, part of the "same course of conduct." If the Commission goes forward with this amendment, the commentary should also state that even when shorter time intervals are involved (i.e., one year or less), transactions are not necessarily part of the "same course of conduct" simply because they involved the same controlled substance.

1612 K Street, NW • Suite 1400 • Washington, D.C. 20006 • (202) 822-6700 • fax (202) 822-6704 • FAMM@famm.org • http://www.famm.org

Acquitted Conduct as Relevant Conduct
(Proposed Amendment 9)

Public participation -- through the jury system -- is vital to our system of law. A sentencing guideline which nullifies the effect of jury verdicts is offensive to our participatory democracy. FAMM supports Proposed Amendment 9, Option 1B, excluding acquitted conduct from relevant conduct.

The rationale used to support the current approach to acquitted conduct, based upon pre-Guidelines cases such as *Williams v. New York*, 337 U.S. 241 (1949), is that sentencing judges have always been free to consider all relevant and reliable evidence. *Williams* held that judges in sentencing *may*, if they choose, take account of nonconviction behavior; the Guidelines, on the other hand, mandate pre-determined sentence increases for such conduct. In addition, it has been suggested that 18 U.S.C. § 3661 prohibits erecting a bar to the required use of acquitted conduct. If this were true, many other guidelines that cabin judicial discretion at sentencing would constitute impermissible limitations under 18 U.S.C. § 3661. *See, e.g.*, U.S.S.G. §5H1.12 ("Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range.").

It is often noted that people first exposed to the Sentencing Guidelines find it troubling that they require judges to calculate sentences based upon conduct that was the subject of charges resulting in acquittal. Michael Tonry, Sentencing Matters 94 (1996). This particular criminal process does not satisfy the appearance of justice. With surprising hubris, Senators Abraham and Hatch, in their letter to Commissioner Goldsmith, write that they would "be most surprised and also would be deeply concerned if an expert body, such as the Sentencing Commission, succumbed to the *untutored* reactions of such persons by modifying the Guidelines to limit the use of conduct underlying an acquittal." Criticism of the sort appearing in a recent Washington Post series is a poignant reminder that the Commission must be *seen* to do justice, even by the "untutored." Mary Pat Flaherty and Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Washington Post, October 6, 1996, at A1, A21.

The "Cliff" Between Level 42 and Level 43
(Proposed Amendment 13)

FAMM believes that life sentences without parole are totally inappropriate for drug offenses. This country's most severe punishment, save execution, should be reserved for our most dangerous offenders, for whom permanent incapacitation is the only way to ensure public safety. Through a combination of enhancements under the current Guidelines, non-violent offenders are easily ensnared by the natural life sentence mandated by offense level 43.

Submitted for the Commission's consideration is the case of Sharvonne McKinnon, who at age 27 began serving her life sentence for a crack cocaine conspiracy. *(See United States v. McKinnon*, 102 F.3d 1120 (11th Cir. 1997)). Ms. McKinnon was romantically involved with a

crack kingpin, who was also the father of her toddler son. For three years prior to her arrest, she had been employed as a bus driver. Although not reflected in her sentence, she was apparently not a sufficient threat to the community to warrant detention pending trial. Ms. McKinnon was held accountable for the total amount of crack involved in the entire conspiracy, although her alleged participation primarily consisted of counting rocks of cocaine, counting money, and acting as a lookout. With a 2-level enhancement for possession of a firearm, Ms. McKinnon's adjusted offense level was 44. She received no upward adjustment for aggravating role in the offense.

Although Sharvonne McKinnon may now be eligible for less than a life sentence pursuant to Guidelines Amendment 505 (capping the Drug Quantity Table at offense level 38), the Commission's staff has identified approximately 30-40 other individuals who received life sentences in cases not involving death of a person or treason. FAMM supports the proposed amendment to abolish "mandatory" natural life sentences in these cases.

Aggravating Role in the Offense
(Amendment Proposal 21)

Part A of this proposal would add the following to the introductory commentary concerning role in the offense: "the fact that the conduct of one participant warrants an upward adjustment for aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for mitigating role." For the sake of parity, the commentary should explain that the converse is also true; that is, a *mitigating* role adjustment for one participant does not require that another participant receive an *aggravating* role adjustment. Aside from this flaw, FAMM does not oppose the amendments to the introductory commentary proposed in Part A.

Because Options One and Two of Part B threaten to increase the number of aggravating role adjustments in controlled substance cases, FAMM opposes these amendments. These proposals would reduce the number of participants necessary for a four-level upward adjustment. Some observers and Commission staff have noted that the number of participants is not a reliable indicator of role because this factor varies depending upon the offense type. As illustrated in one staff discussion paper, five-person drug conspiracies are relatively common but a five-person robbery is unusually large. Reducing the number of participants required will only enhance the disproportionate application of aggravating role adjustments to controlled substance offenses.

Furthermore, while weight often overstates culpability in drug cases, calling for liberal application of mitigating role adjustments, the converse is not true with respect to aggravating role adjustments. The Guidelines' excessive reliance upon weight negates any concern that guideline sentences, combined with mandatory minimums, will fail to adequately punish higher ranking drug offenders. Therefore, aggravating role adjustments should be infrequent.

Both Options One and Two contain an application note entitled "Illustrations of

Circumstances That May Warrant an Upward Departure." Here again, this amendment lacks symmetry with the proposed mitigating role guideline. The analogous departure provision set forth in the mitigating role amendment states that "[s]uch a departure should not result, without more, in a lower sentence than would result if the defendant had received a mitigating role adjustment under this section." Upward departures for aggravating role in the offense should be limited in the same way.

Option Three adopts a flexible approach to aggravating role in the offense similar to the proposed amendment of the mitigating role guideline. FAMM does not oppose this option.

Mitigating Role in the Offense
(Proposed Amendments 21 and 22)

FAMM applauds the Commission for reducing emphasis on drug weight through a more flexible mitigating role guideline. The Guidelines often require judges to impose severe sentences on "mules" and other minimally involved participants. In such cases, drug quantity already overstates culpability and should not also preclude mitigating role reductions. Assessment of role should not, as suggested by the commentary in application note 2, be affected by drug amount. FAMM supports the elimination of this commentary.

Nonetheless, Proposed Amendment 22 remains unduly restrictive in other respects. The proposed definition, requiring that the defendant be "a *substantially* less culpable participant," inexplicably raises the current standard for the two-level reduction; that is, a minor role reduction is now authorized under the Guidelines for a participant who is simply "less culpable than most other participants." The commentary regarding burden of persuasion may also undermine the flexibility aimed for by the Commission. That is, the proposed amendment instructs, "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted." The chilling effect of this commentary may be particularly pronounced in jurisdictions where the current practice is to deny reductions for mitigating role if the defendant's post-arrest statements are the only evidence thereof. *See* Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993). This provision does not appear elsewhere in the Guidelines and is equally unnecessary in the mitigating role guideline.

FAMM also objects to the elimination of the three-level reduction. By eliminating an adjustment deemed appropriate in 298 cases in a recent year, this proposal reduces sought-after flexibility. United States Sentencing Commission, 1995 Annual Report 73. Secondly, the intermediate adjustment may facilitate plea negotiations, allowing the parties to resolve differences of opinion as to mitigating role.

Concerning the additional issues for comment, FAMM urges the Commission to expressly sanction minimal role adjustments for mules. Although these participants have no role other than delivery, wide disparity exists in the application of the mitigating role guideline to

mules. *See* Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993) (reporting that the Eastern District of New York routinely affords four-level reductions for mules, while other port cities only occasionally afford two-level reductions for such defendants). Consider the case of Donaldo Munoz-Vallejo, a mule who was arrested on a vessel in Houston, Texas, carrying cocaine-packed sardine cans. (*United States v. Munoz-Vallejo*, No. H-95-00220-01 (S.D. Tex.) (on file with FAMM)). Mr. Munoz admitted responsibility and immediately cooperated with the Customs agents, but the other participants in the offense were never apprehended or formally identified. Mr. Munoz, who had been lawfully employed on merchant ships in Colombia for several years, explained that he was approached by a man who asked him to deliver the sardine cans. As with all mules, Mr. Munoz was promised a flat fee and had no proprietary interest in the cocaine. While the probation officer and the sentencing court apparently accepted Mr. Munoz's explanation of his part in the offense, he did not receive a downward adjustment for his mitigating role. Consequently, Mr. Munoz was sentenced to 87 months imprisonment. FAMM contends that a flexible mitigating role guideline, combined with commentary explicitly identifying mules as minimal participants, would result in more appropriate sentences for individuals like Mr. Munoz.

Acceptance of Responsibility
(Amendment Proposal 24)

Based upon the Commission's 1995 Annual Report, it appears that approximately six percent of all defendants who plead guilty are denied an adjustment for acceptance of responsibility. United States Sentencing Commission, 1995 Annual Report 53, 74. A bright line rule that all defendants who plead guilty receive the acceptance of responsibility adjustment would reduce litigation and reward individuals who do not put the government to the considerable expense and burdens of trials and appeals.

Instead, Amendment Proposal 24 further complicates the operation of this guideline. For the two-level reduction, the amendment imposes a timeliness requirement and, for the extra one-level reduction, the amendment requires that the defendant demonstrate "extraordinary" acceptance of responsibility. Both of these provisions are far too restrictive and are likely to result in fewer adjustments. Another flaw is the suggestion that the defendant must provide accurate "information regarding the defendant's juvenile and adult criminal record." The connection between a defendant's accurate account of his criminal history and acceptance of responsibility for the present offense is tenuous in many cases. Moreover, this provision is simply unnecessary in light of the fact that probation officers uniformly rely upon other, generally more accurate, sources for criminal history information. For these reasons, FAMM opposes this amendment proposal.

Acceptance of Responsibility
(Amendment Proposal 25)

FAMM opposes this amendment which would effectively bar a reduction for acceptance

of responsibility based upon the commission of a new offense while pending trial or sentencing for the offense of conviction. Like the preceding amendment, this proposal would divert the sentencing judge's focus from the defendant's guilty plea. The commission of a new offense does not necessarily negate the defendant's genuine contrition for the offense of conviction. While new offenses may suggest a likelihood on the part of the defendant to recidivate, this factor may be adequately considered by the judge in determining the proper sentence within the guideline range.

Acceptance of Responsibility
(Amendment Proposal 26)

FAMM supports this amendment proposal, which eliminates the offense level threshold for the additional one-level reduction. Simply stated, low level offenders should not be denied a reduction available to higher level offenders. Inasmuch as a lower offense level indicates involvement in a small scale offense, a defendant with an offense level less than 16 is perhaps less likely to benefit from a mitigating role adjustment or a substantial assistance departure.

Issue for Comment: Aberrant Behavior
(Amendment Proposal 28)

Part Thirteen of Amendment Proposal 28 invites comment on "[w]hether multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting departure." In its proposed amendments, FAMM recommended that §5K2 include a new section to read as follows:

> If the defendant's conduct constitutes a single episode of aberrant behavior, a downward departure may be warranted. Departure from the guidelines may be justified even where the conduct is the result of some planning and preparation.

This proposal would resolve two closely-related conflicts regarding aberrant behavior departures: (1) Whether aberrant behavior must be spontaneous and unplanned, and (2) whether aberrant behavior may involve multiple acts. The current reference in the Guidelines to aberrant behavior has been interpreted too narrowly by some courts. In resolving the circuit conflict, the Commission should encourage departures in a broader category of cases where the criminal conduct involves multiple acts and/or some preparation but nonetheless is completely out of character for the defendant.

Safety Valve and Supervised Release
(Proposed Amendment 30)

FAMM supports this proposed amendment and commends the Commission for clarifying application of the safety valve.

Conclusion

FAMM appreciates this annual opportunity to propose amendments to the Guidelines and to comment on published proposals. To safeguard the value of this process, we urge the Commission to voice its opposition to mandatory minimums and other legislative measures that diminish the role of the Commission and the Guidelines.

Sincerely yours,

Julie Stewart
President

Kyle W. O'Dowd
General Counsel

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, NY 10036-6690

COMMITTEE ON CRIMINAL ADVOCACY

PHILIP R. EDELBAUM
CHAIR
100 CHURCH STREET, SUITE 1605
NEW YORK, NY 10007
(212) 571-1770
FAX # (212) 571-0860

JONATHAN D. LUPKIN
SECRETARY
45 ROCKEFELLER PLAZA
NEW YORK, NY 10111
(212) 956-3700
FAX: (212) 956-4068

March 13, 1997

United States Sentencing Commission
1 Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002
Attention Public Information

Dear Sirs:

On behalf of the Association of the Bar of the City of New York, I enclose the comments of the Committee on Criminal Advocacy, on the Proposed Amendments to the United States Sentencing Guidelines. If there are any questions feel free to contact me. Thank you.

Very truly yours,

Philip R. Edelbaum

Enc.

REPORT OF THE CRIMINAL ADVOCACY COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNING PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

INTRODUCTION

The Committee on Criminal Advocacy (the "Committee") has reviewed the proposed changes to the Sentencing Guidelines which are being considered by the Sentencing Commission. This report describes the proposed changes to the Sentencing Guidelines on which the Committee reached consensus.

THE PROPOSED CHANGES TO THE GUIDELINES AND THE CONSENSUS REACHED

1. The Issue of Including or Excluding Acquitted Conduct From The Calculation of "Relevant Conduct" Under Sentencing Guidelines Section 1B1.3.

The proposed changes to Section 1B1.3 of the Sentencing Guidelines ("Relevant Conduct") include three proposals which would affect the inclusion of acquitted conduct in the calculation of "relevant conduct" for sentencing purposes. As the law now stands, see United States v. Watts, 117 S.Ct. 633 (1997), acquitted conduct is included in the calculation of relevant conduct. The Sentencing Commission solicits comment on three new "options" for dealing with this issue. Under the first option, acquitted conduct would not be considered relevant conduct. A "sub-option" proposed by the Commission would exclude acquitted conduct, unless proven by independent evidence not submitted at trial. Under the second option, acquitted conduct would not be considered relevant conduct unless "established by clear and convincing evidence." (This option does not appear to require explicitly that the evidence be independent of the evidence submitted at trial). Under the third option, acquitted conduct would be considered relevant conduct, but the District Judge would be permitted to depart downward to a degree equal to the amount of relevant conduct associated with the acquitted conduct, to ensure "fundamental fairness."

The Committee believes the Sentencing Commission's Option 2 should be endorsed, with the proviso that the "clear and convincing" evidence establishing the conduct be evidence other than the evidence presented by the Government at trial. The presently drafted version of Option 2 appears to the Committee's members to permit the Court to include acquitted conduct in virtually any case in which an acquittal occurs.

2. The Proposed Amendment to Sentencing Guidelines Section 2X1.1 (Conspiracies and Attempts).

The Commission invites comment on its proposal to eliminate this section from the Guidelines, which allows for a downward adjustment of three levels in limited circumstances relating to conspiracies that are interrupted by an arrest prior to nearing the

completion of the object of the conspiracy. The Commission expresses the view that this situation may be better addressed by a downward departure, given the relatively rare circumstances in which this adjustment has been granted.

The Committee's consensus view is that this section should be left in place, and that replacing this section with a departure will add to confusion in this area.

3. The Proposal to Amend the "Financial Institution" Adjustment to the Larceny Guideline, Sentencing Guidelines Section 2B1.1(b)(6).

As presently drafted, the Larceny Guideline requires an upward adjustment of four levels if a defendant steals more than $1,000,000 from a financial institution, and a minimum base offense level of 24 in such circumstances. The Commission proposes to delete the four level upward adjustment, but keep in place the floor of a base offense level of 24. Thus, under the proposed change in Section 2B1.1 of the Guidelines, in the event a defendant steals more than $1,000,000 from a financial institution, his or her base offense level will be no less than 24, but won't be adjusted upward another four levels simply because the defendant's victim was a financial institution.

The Committee agrees that the proposed change was a good one. A base offense level of 24 requires a sentencing range of at least 51-63 months absent a downward departure, and the Committee believes this sentencing level is adequate to deter and punish a defendant who steals $1,000,000 from a financial institution.

4. The Proposal to Amend the Sentencing Table, Sentencing Guidelines Section 5A1.1.

The Commission proposes to amend the Sentencing Table to reduce the number of automatic life sentences required by the Guidelines. As it presently works, the Sentencing Guidelines Sentencing Table often requires a life sentence for serious narcotics traffickers whose base offense levels are adjusted upward for a management role, firearms and other adjustments. The proposed amendment will generally limit automatic life sentences under the Guidelines to treason and homicides, and will cap a narcotics defendant's (or other defendant's) exposure at a range of 360 months to life. Thus, the District Court will still have the discretion to impose a life sentence if it sees fit, but will not be required to do so.

The Committee agrees that the proposed amendment to the Sentencing Table was a good one, and would like to recommend the amendment to the Commission.

5. The Proposed Amendments to the Fraud Guideline, Sentencing Guidelines Section 2F1.1.

There are many proposed amendments to the Fraud Guideline, and the Committee's discussion of them was lively. The Committee agreed on the following issues raised by the Commission:

a. The Committee agrees with the Commission that repayments to victims in a Ponzi scheme or other scheme, which are made prior to the discovery of the scheme by law enforcement, should be used to reduce the calculation of "loss" under Section 2F1.1. If accepted, the amendment to the Sentencing Guidelines that would express this view would effectively overrule United States v. Mucciante, 21 F.3d 1228 (2d Cir.), cert. denied, 115 S.Ct. 361 (1994) and its progeny. The Committee believes that it is unfair to extend a defendant's prison term for monies he has already repaid.

b. The Commission raises the issue of whether, in certain fraud schemes, the "retail market," "wholesale market" or "black market" prices of goods, and consequential damages and costs should be used in calculating loss in a fraud. The Committee was of the view that either the "retail" or "wholesale" market value of goods can be appropriate measures of loss in some cases, but the Committee was also of the view that the "black market" measure of loss would be impossible to prove and should not be incorporated in the Guidelines. The Committee was also of the view that consequential damages, costs and interest should not be included in the measure of "loss" under the fraud guideline. The Committee believes that a simple, "bright line" measure of loss is best, and will reduce the amount of litigation and confusion that exists in this area.

c. The Commission also raises the issue of whether "gain" to a wrongdoer should be used to calculate the base offense level in some frauds rather than "loss" to a victim. The Commission invites comment on whether a disparity between "gain" and "loss" should be a ground for an upward departure in cases where the gain to the wrongdoer exceeds loss to his victim. The Committee agreed that the Guidelines should permit "gain" to be used as a substitute measure to determine a defendant's base offense level, where there is a significant disparity between the wrongdoer's gain and a victim's loss or the intended loss. The Committee further proposes, that a gross disparity between "gain" and "loss" might also be a basis for a downward departure in some circumstances -- for example, where an employee of a business operated as a Ponzi scheme knows the full extent of the scheme, but gains only his salary from the fraud, and the amount of the loss caused by the scheme vastly exceeds the amount of salary obtained by the employee.

COMMITTEE ON CRIMINAL ADVOCACY

Philip R. Edelbaum (Chair)
Jonathan D. Lupkin, (Secretary)*

Peter A. Adelman, Esq.
Charles D. Adler, Esq.*
Hon. Herbert J. Adlerberg
Ellyn Bank, Esq.
Vivian O. Berger, Esq.
Roger J. Bernstein, Esq.*
Anthony J. Bosco, Esq.
Laura A. Brevetti, Esq.
Hon. Richard D. Caruthers
Nicholas D. Defeis, Esq.
Peter Joseph Driscoll, Esq.*
Nina S. Epstein, Esq.
Lynn W. L. Fahey, Esq.
Lawrence Feld, Esq. **
Robin A. Forshaw
Maranda E. Fritz, Esq.
Alan S. Futerfas, Esq.
Mark Pierre Goodman, Esq.
Nicholas A. Gravante, Jr. Esq.*
Hilary L. Hochman, Esq.
Hon. Nicholas J. Iacovetta
Hon. Rae Downes Koshetz
Roseann B. Mackechnie, Esq.
Avraham C. Moskowitz, Esq.
Leonard E. Noisette, Esq.
Adam D. Perlmutter, Esq.
John L. Pollak, Esq.
Sheryl E. Reich, Esq.
Roland Gustave Riopelle, Esq.
Stephen L. Saxl, Esq.
Jeffrey B. Sklaroff, Esq.
Hon. Charles H. Solomon
Roger Lee Stavis, Esq.

**Subcommittee Chair
* Subcommittee member

Members of Subcommittee from Committee on Federal Courts
Michael Manley
William Pollard III

Dated: New York, NY
March 13, 1997

LAW OFFICES
ARTHUR L. WALLACE III

120 EAST CONCORD
ORLANDO, FLORIDA 32801

TEL: (407) 422-2127
FAX: (407) 422-2312

February 11, 1997

Dear Commissioners...

I write regarding §5C1.2, limitation on applicability of statutory minimum sentences in certain cases, commonly referred to as the "safety valve" provision.

The guideline became effective on September 23, 1994 however it was not made retroactive. The Congress and the Commission recognized the injustice inherent in the original law, however by only allowing the safety valve to be applied to sentencings after September 23, 1994, certain individuals received excessively harsh punishments right up to that date, with no recourse.

I represented an individual named Jorge Espinal in the Middle District of Florida, Tampa Division, Case No. 93-255CRT-25B who was sentenced on April 12, 1994 to a minimum mandatory 10 years for violation of Title 21 U.S.C. § 841(a)(1) involving cocaine hydrochloride.

Mr. Espinal had a guideline exposure of 87-108 months and would have otherwise qualified for the safety valve. Since he had the misfortune of being sentenced in April, rather than after September 23, he received the excessive time by default.

Rather than rely on good fortune, I believe the commission should allow the court to decide whether or not §5C1.2 should apply to this defendant.

Should you need further information, please feel free to contact me directly.

Cordially,

Arthur L. Wallace III

Richard P. Conaboy
United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002-8002
Attention: Public Information Office

JOHN M. ECONOMIDY
ATTORNEY AT LAW
6100 BANDERA, SUITE 508
SAN ANTONIO, TEXAS 78238-1653

TELEPHONE
(210) 521-7843

Board Certified - Criminal Law
Texas Board of Legal Specialization

February 3, 1997

U.S. Sentencing Commission
Attention: Public Information
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Comment on USSG on Consideration of Acquittals

Gentlemen:

I am responding to the January 2, 1997 Federal Register proposal on considering in sentencing prior charges for which a defendant was acquitted.

I have recently had a client in this very position in a state capital murder case, and clearly relitigation of the acquitted offenses resulted in a grave misjudgment and immoral imposition of the death penalty.

Arnold was acquitted of a double murder in his mid-teens. The facts were simple. A former boyfriend of his mother entered their home three times after Arnold had gone to bed. Toxicology tests showed the boyfriend was legally intoxicated and heavy concentrations of cocaine were in his body. Arnold awoke when the boyfriend was robbing and beating up his mother. The unarmed 15-year-old stood up to this thug to protect his mother. The thug pulled a pistol on Arnold, who skidded across the room and grabbed a handgun from under the living room sofa. Both men exchanged shots. The intoxicated, coked-up thug failed in his aim. Arnold did not.

The family had no phone. They lived in a neighborhood where police were not trusted. The mother insisted that the body be removed. While Arnold went to dump the body on some railroad tracks, one of Arnold's homeboys drove up and killed the boyfriend's girlfriend, who was outside in a car. Arnold had no knowledge or involvement in the second shooting.

Arnold testified at trial. The jury quickly found him not guilty.

Several years later, the State charged Arnold on an accomplice theory in the capital murder of a drug dealer who had a long history of assaults. The State spent more time and argument on the prior case involving the acquittals than on the death of the drug dealer dirtbag. Arnold could not testify to raise the self-defense issue. The prior acquittals--totally justified--meant nothing. All jurors saw was that this kid killed three persons, and assessed the death penalty.

I am not at all impressed with the antiseptic reasoning and legal fictions of Dowling v. United States and United States v. Watts, in which the U.S. Supreme Court has approved use in court of matters where the accused was acquitted.

The use in sentencing of conduct where the defendant was acquitted is immoral. Such use detracts public respect for the law and for justice. It betrays the core values of our nation. It smacks of the quality of justice expected from Nazi Germany or a third world dictatorship, not in the pejorative sense, but in the actual ethical sense.

Reuse of conduct resulting in acquittals assumes that an accused will be on equal footing as the prosecution. Invariably, the accused will not. In my case and in others with which I have knowledge, witnesses for the defense are often dead, absent, in prison wanting a deal and thus hurting their credibility as a witness, or beset with memory problems over the years. You might suggest that there would be a record of trial from the acquittal to use. No so. Court reporters do not transcribe a record for a trial that resulted in an acquittal for obvious reasons. Court reporters do not save their notes after so many years (Texas: 3 years). Evidence is discarded.

On August 9, 1916, my grandfather as a county clerk in a rural Texas county tried vainly to stop a mob from lynching a Negro who killed the county sheriff. Without a trial, the accused was tarred and feathered, hung until death in the county square, and then his body was dragged behind a Model A Ford.

When I see proposals like yours to use acquittals for sentencing, it is clear that the lynch mob mentality of overpaid, bloated bureaucrats inside the Beltway still persists.

Sincerely,

John M. Economidy

JOHN M. ECONOMIDY

KIBBEY & BARLOW
ATTORNEYS AT LAW

February 25, 1997

U.S. Sentencing Commission
One Columbus Circle
Suite 2-500
Washington, DC 20002-8002

Dear Commission Members:

As a former prosecutor and now an attorney who regularly represents criminal defendants, I write to give you my input on guideline modifications for acquitted defendants.

It is without question that the current legal ability for a judge to consider ***and then*** add points for acquitted offenses is abhorrent to the entire notion that a man should be punished only for what he is convicted of. Such a practice runs afoul of the common perception of justice to the average American layman. It is this average American layman that we are all counting upon to trust the government and to support the important institutions of the judiciary. Public erosion and confidence of our judiciary can only lead to further erosion of the basic foundations that we all rely upon.

Simply put, a federal sentencing judge should ***not*** be allowed to consider acquitted offenses for enhancement of sentencing ranges. However, if the Commission is going to give a judge the discretion to consider such acquittals, I believe the standard should be a very tough one: a combination of requiring that the defendant's guilt be proven by "clear and convincing evidence," as well in so doing that such considerations "would not raise substantial concerns of fundamental unfairness ***to the average American***." It is important that these matters be viewed from the eyes and minds of the average citizen, because otherwise legal sophistry would enable prosecutors and judges to convince themselves that such consideration did not seem fundamentally unfair ***to them***.

RICHARD D. KIBBEY
416 CAMDEN AVENUE ▪ STUART, FL 34994
(561) 286-0023 ▪ FAX (561) 221-8888

RICHARD A. BARLOW
412 CAMDEN AVENUE ▪ STUART, FL 34994
(561) 286-1721 ▪ FAX (561) 286-1754

Thank you for considering this, and I urge you not to allow it, but if you are going to allow it, to give it the strongest possible limitations.

Sincerely,

RICHARD D. KIBBEY

RDK:ksw

U. S. Department of Justice

Tax Division

Assistant Attorney General

Washington, D.C. 20530

April 17, 1997

Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Conaboy:

On behalf of the Tax Division, I would like to express my sincere appreciation to you and the other members of the Sentencing Commission for the reception afforded Deputy Assistant Attorney General Mark E. Matthews at your April 14, 1997, Commission meeting to address proposals to increase the fraud and tax loss tables. I very much wanted to appear personally before the Commission to lend my support for the proposals, but, unfortunately, the press of other departmental business precluded that. However, Mr. Matthews has reported to me on the meeting, and I write to make clear my wholehearted endorsement for Mr. Matthews' comments in favor of enhancing sentences under the fraud and tax guidelines during this amendment cycle.

Since becoming Assistant Attorney General in 1994, I have been frustrated on numerous occasions by the Sentencing Guideline ramifications in our criminal tax cases. Particularly at this time of year, when the overwhelming majority of the American people diligently strive to render a complete and honest accounting of their income to the Government, we need to be ever-vigilant in promoting deterrence in the area of criminal tax enforcement. Action such as the Commission is contemplating would represent significant forward progress in tax enforcement and compliance. As Mr. Matthews made clear in his comments, unlike other statutory requirements, the provisions of the Internal Revenue Code touch virtually every individual and business in the country. Thus, to encourage compliance with the internal revenue laws by all taxpayers, criminal tax prosecutions must be directed at all occupations, businesses, income levels, and geographic locations. Nevertheless, because of limited resources, only a small number of tax violations can be prosecuted. Thus, as the Commission itself has recognized in the introductory commentary to Chapter 2, Part T, since the inception of the Guidelines, "deterring others from violating the tax laws is a primary consideration underlying these guidelines."

The critical notion of deterrence is further underscored by the ever-increasing "tax gap" among taxpayers who derive their income from legal sources. According to the Internal Revenue Service, estimates of the tax gap have increased from $65 billion in 1983 to approximately $127 billion annually today. To maximize the deterrent value of criminal tax prosecutions and to reverse or limit the increasing tax gap, we desperately need to enhance the probability of imprisonment in more tax cases. As the Commission's statistics verify, imprisonment is imposed only in slightly over one-third of prosecutions where tax is the lead charge.

I realize that the Commission faces many demands upon its time and resources, but I would strenuously urge you to consider an amendment in this year's cycle if at all possible. Working through Mary Harkenrider, the Department's ex officio member of the Commission, the Tax Division pledges to do all that it can to achieve that objective. Please do not hesitate to contact us for any assistance you might need.

Sincerely,

Loretta C. Argrett

Loretta C. Argrett
Assistant Attorney General

cc: All Commissioners

CLAIRE J. RAUSCHER
ATTORNEY-AT-LAW
435 East Morehead Street
Charlotte, North Carolina 28202-2609

Tel. 704-331-0863 Fax 704-331-0773

April 7, 1997

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Michael Courlander
Public Information Specialist

RE: 1997 Amendments-Proposed Amendment 13

Dear Members of the Sentencing Commission:

My comments address the proposed two-part amendment to Section 5A1.1-Sentencing Table (Proposed Amendment 13).

I support the incorporation of the sentencing table into the guidelines. However, more importantly, I **strongly** support the second part of this amendment which caps total offense level for non-death related offenses at level 42.

In 1995-1996, I represented a young defendant (age 22) who was charged in a drug conspiracy in the Western District of North Carolina (United States v. Cedric Lamont Dean, 3:95CR31-03-V). Mr. Dean and another co-defendant, Eric Sampson decided to exercise their constitutional rights and go to trial while the other co-defendants entered into plea agreements an cooperated with the government. Both defendants were convicted. Mr. Dean and Mr. Sampson were sentenced to life without parole because their total offense levels were 43. [N.B. There was absolutely no indication throughout the investigation of this matter that any homicides were involved.] For Mr. Dean, the level 43 was attained because the amount of cocaine base was found to be in excess of 1.5 kilograms (level 38), acts of the conspiracy occurred within 1000 feet of a school/playground (2 level enhancement), and an aggravating role enhancement was found under §3B1.1(b) (3 level enhancement).

The sentence is extraordinarily harsh in light of all the facts in this case. Cedric Dean was a very young and impulsive man at the time of the offense. The other more culpable defendants received significantly less time (approximately 10-14 years) even though it was clear from the testimony elicited at trial that the co-defendants were extremely violent

individuals as opposed to the defendant.

The cliff between offense level 42 and 43 must be removed for non-death related offenses. Not only does this cliff create extremely harsh and unintended results but it creates an area for governmental manipulation and abuse of the sentencing guidelines. I have heard agents and prosecutors affirmatively discuss using the enhancements in the guidelines to secure "life" sentences in drug conspiracies through the use of school/playground enhancements, gun enhancements, role enhancements, etc. This manipulation of the guidelines leads to results that were not intended by the Sentencing Commission in reserving level 43 for murder, treason and other like offenses.

In addition, by capping non-death related offenses at level 42, a trial court has great discretion in fashioning an appropriate remedy between 30 years up to life imprisonment in light of all the facts an circumstances of the case. In the Cedric Dean case, the trial judge sympathized with the harshness of the sentence but had no option but to impose life without parole. The result in that case was extraordinarily harsh and would have been prevented if the proposed amendment capping the offense level at 42 had been in effect.

I strongly urge the Commission support this proposed amendment. While it does not affect a substantial number of cases, it will have a significant ameliorative effect on those to whom it applies.

If the Commission desires any additional information about the Cedric Dean case or any other information, please feel free to contact me. Thank you for your attention to this matter.

Sincerely,

Claire J. Rauscher

Claire J. Rauscher

Law Offices
ALAN J. CHASET
908 King Street
Suite 200
Alexandria, Virginia 22314

(703) 683-3375
FAX (703) 548-3181

Alan J. Chaset

Also Admitted in
District of Columbia
Pennsylvania

Benson B. Weintraub
Of Counsel

Admitted in
District of Columbia
Florida

April 4, 1997

John Kramer
Staff Director
U.S. Sentencing Commission
Thurgood Marshall Federal Judiciary Building
Suite 2-500
One Columbus Circle, N.E.
Washington, DC 20002

Dear John:

Having received on Wednesday by messenger and by facsimile yesterday some additional and more current materials concerning the Commission's proposal to amend the fraud/theft/tax tables. I wanted to write briefly to first thank you for having these items forwarded in advance of next week's meeting. As someone who has expressed concern in the past over the defense bar's inability to provide meaningful comment without being provided adequate time to read and digest what is being considered by the Commission and as someone who has similarly complained about dramatic revision of proposals between formal publication and final action, I wanted you to understand that the gesture is much appreciated. The burden is now on me to review what is being contemplated and to be prepared with written or oral remarks when the opportunity to comment is provided.

I said that the burden was on me - and it clearly is in my representative capacity. As you know, this year I serve as co-chair of the ABA's Sentencing Guideline Committee as well as co-chair of the Post Conviction and Sentencing Committee of the National Association of Criminal Defense Lawyers [NACDL]. Additionally, I am one of the original members of the Commission's Practitioners' Advisory Group [PAG] and this week, during Fred Bennett's absence, I will be serving as Acting Chair of that entity. With all those hats and all that (more apparent than real) authority, I hope to have something to say - or someone to say it for me - about the proposed fraud/theft/tax amendments in amendment 18.

Permit me, however, to take off those hats and to address an issue related to both this year's amendment cycle in general and the recently forwarded materials in particular. And please

permit me to speak as an interested person and not necessarily as a representative of any of the above identified groups.

This clearly has been a most unusual year. We saw the publication of the long anticipated and much needed proposed set of rules of practice and procedure; we learned of the Commission's commitment to "simplification" of the guidelines and were provided with plans and proposals to consolidate various aspects of the manual; and we participated at a series of Commission meetings over several months where several hundred pages of proposed amendments and issues for comment were adopted for publication. However, near the end of the year, the picture about what might be accomplished became somewhat muddled.

First, the adoption of those rules and procedures was put off until after the proposed amendments were to be submitted to Congress. The simplification process - one that for me had not been very well defined to begin with - appeared to stall or at least to lose some momentum. And then the word began to filter out that very little of what was being proposed for change would be formally acted upon by the Commission.

That last matter merits some additional comment and explanation. Faced with what appeared to be an incredible amount of work just to understand what was being proposed and then to craft useful, insightful and/or hopefully relevant comments for each of the groups that I represent, I must admit to being somewhat relieved when I heard from a Commissioner at the February meeting that the agency probably would not address the fraud/loss issue this year and would probably only deal with the legislatively mandated proposals and certain of the circuit conflicts. While those remarks were clearly not an official or formal pronouncement, a subsequent story in the media about the comments of another Commissioner and staff along the same lines appeared to confirm that which I personally wanted to hear. I saw a huge burden being lifted and I shared my perceptions with others who has similar responsibilities to respond by the March deadlines. And it appeared, at first, that my perceptions matched those of others.

I must tell you, however, that the message coming from the Commission about what the Commission would and would not accomplish this year was not uniform. While confirming the basic message about the proposals that probably would be handled, my liaisons within the Commission cautioned that things were somewhat more ambiguous than I had thought (or wanted). Andy Purdy, for instance, encouraged the ABA committee members at our January 25th meeting to comment on more than just the legislative and conflict issues and he counseled the Practitioners' Advisory Group on at least two occasions in February and March that, while the definition of loss issue might not get addressed this year, there was some sentiment at the agency to deal with amendment 18 with its impact on the fraud/theft/tax guidelines. John Steer reiterated much the same in a number of conversations I had with him.

It was because of their encouragement and their comments that the PAG (through Barry Boss and James Felman) provided its responses to amendment 18. And it was because of their message that the other organizations (ABA, NACDL, Federal Defenders) added some reference