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This Issue in Brief

What Punishes? Inmates Rank the Severity of Prison vs. Intermediate Sanctions.—Are there intermediate sanctions that equate, in terms of punitiveness, with prison? Authors Joan Petersilia and Elizabeth Piper Deschenes report on a study designed to examine how inmates in Minnesota rank the severity of various criminal sanctions and which particular sanctions they judge equivalent in punitiveness. The authors also explore how inmates rank the difficulty of commonly imposed probation conditions and which offender background characteristics are associated with perceptions of sanction severity.

Using Day Reporting Centers as an Alternative to Jail.—An intermediate sanction gaining popularity is day reporting in which offenders live at home and report to the day reporting center regularly. Authors David W. Diggs and Stephen L. Pieper provide a brief history of day reporting centers and explain how such centers operate. They describe Orange County, Florida's day reporting center, which is designed to help control jail overcrowding and provide treatment and community reintegration for inmates.

Locating Absconders: Results From a Randomized Field Experiment.—Absconders are a problem for the criminal justice system, especially for probation agencies responsible for supervising offenders in the community. Authors Faye S. Taxman and James M. Byrne discuss how the Maricopa County (Arizona) Adult Probation Department addressed the problem by developing a warrants unit devoted to locating and apprehending absconders. They present the results of a randomized field experiment designed to test the effects of two different strategies for absconder location and apprehension.

Rehabilitating Community Service: Toward Restorative Service Sanctions in a Balanced Justice System.—While community service sanctions used to be regarded as potentially rehabilitative interventions for offenders, now they are often used as a punitive "add-on" requirement or not clearly linked to sentencing objectives. Authors Gordon Bazemore and Dennis Maloney argue that community service could be revitalized by developing principles and guidelines for quality and performance based on a clear sanctioning policy and intervention mission. They propose restorative justice as a philosophical framework for community service and present the "Balanced Ap-

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Looking at the Law

BY CATHARINE M. GOODWIN*
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LSD Sentence Modifications Raise Problems With § 1B1.10 Procedure

SECTION 2D1.1(c) of the Sentencing Guidelines was amended, effective November 1, 1993, to provide a different means of computing the weight of LSD.[1] The amendment will generate markedly lower sentences for LSD cases than were generated previously, using the actual weight of the LSD and carrier medium. Moreover, the Sentencing Commission made it retroactive by listing it (as #488) in U.S.S.G. § 1B1.10.

The Commission estimates that there have been approximately 400 defendants sentenced pursuant to guidelines for LSD offenses who will potentially be affected by this amendment. Because it is likely that more motions for modification of sentences will be filed based on this amendment than any other amendment made retroactive to date, it is important to consider some of the significant issues involved in the application of this amendment, as well as others, made retroactive pursuant to § 1B1.10. The probation officer will often be the first to face these issues and will need to frame them for the court.

This article discusses potential problems which may arise in LSD sentence modification proceedings, some of which are specific to that amendment and others which would be involved in any sentence modification pursuant to § 1B1.10. It also suggests that by making a significant change to § 1B1.10, many of these problems would be eliminated.

Initiation of LSD Proceedings

Neither the Department of Justice, the Bureau of Prisons, nor the courts have a computerized retrieval system which categorizes defendants by drug-type from the beginning of the guideline system. The Sentencing Commission was able to provide to the Bureau of Prisons approximately 270 names of defendants sentenced since the Commission began categorizing cases by drug-type in 1991. The Bureau sent a memorandum on November 1, 1993, to all institution staff, to be posted on all inmate bulletin boards and law libraries and to be included in case manager training, which provided notice of the amendment and a sample motion for inmates' use. The memo also stated that the Bureau will ensure that all the defendants identified by the Commission will be notified personally of the change to the LSD guideline.

The statute, 18 U.S.C. § 3582, provides that the actual motions for reduction of sentence can be made by the defendant, the Bureau of Prisons, or the court on its own motion (although the Government no doubt could make the motion and is doing so in some districts). Many inmate *pro se* motions will no doubt be styled as motions pursuant to 28 U.S.C. § 2255. While the courts have found § 2255 an inappropriate vehicle for motions to reduce a sentence pursuant to § 3582 (*United States* v. *Rios-Paz*, 808 F.Supp. 206 (E.D.N.Y. 1992)), the courts nonetheless generally construe such motions as having been brought pursuant to §3582. *Id.*; *United States* v. *Rodriguez-Alonso*, 807 F.Supp. 21 (E.D.N.Y. 1992).

Substance of LSD Amendment

The amendment basically provides a formula by which to compute the weight of LSD by "dose," in lieu of the actual weight of the LSD and its carrier medium. The commentary states that this amendment was needed because carrier mediums "vary widely and typically far exceed the weight of the controlled substance itself." § 2D1.1, comment. (backg'd.), *Guidelines Manual* (Nov. 1993). The commentary further states that the formulaic weight of .4 mg per LSD "dose" was chosen, even though it exceeds the DEA's estimation of the weight of the average actual LSD dose (0.05 mg), "in order to assign some weight to the carrier medium," in order to be "consistent both with the treatment of other controlled substances, and with *Chapman* v. *United States*, 111 S.Ct. 1919 (1991) (holding that the term 'mixture or substance' in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed)." *Id.*

Issues Raised Specifically by the LSD Amendment

Dose Computation

In the previous LSD sentencings, computations were made only according to weight, not doses. In applying this amendment, an intermediary computation must be made to convert the LSD involved into doses, in order to utilize the amendment's .4 mg weight

***Editor's Note: *Federal Probation* welcomes a new "Looking at the Law" columnist, Catharine M. Goodwin. Ms. Goodwin will alternate writing the column with David N. Adair, Jr. Ms. Goodwin was appointed assistant general counsel at the Administrative Office of the United States Courts in September 1993. Before that, she served as an assistant United States attorney in two judicial districts—first in the District of Colorado for 6 years and then in the Northern District of California for 4 years, where she was a member of the Organized Crime Drug Enforcement Task Force. She holds a law degree from the University of Florida.**

per dose. The procedure for this if the carrier medium is blotter paper is set out in part of the amendment at § 2D1.1, comment. (n.18), and a departure is suggested where liquid LSD is involved. Presumably, sugar cubes represent separate doses. However, there may be cases where the dose determination requires expert testimony, which might present a new issue of fact to be determined in the retroactive application of the amendment. It may be necessary to obtain additional information from the Government or to require an evidentiary hearing. Hopefully, such cases will be rare.

Mandatory Minimums

The principal legal issue raised by the LSD amendment itself, whether applied retroactively or as current law, is: Does the holding in *Chapman*, above, require that the *actual* weight of the LSD and its carrier medium be used to determine whether a *statutory* mandatory minimum penalty applies, thereby restricting use of the new formulaic weight only to guideline purposes, or does *Chapman* permit the use of the amendment's weight formula for all purposes? In other words, can the new weight result in a sentence below a mandatory minimum that would otherwise be applicable (if the actual weight were used)?

Ambiguity in the amendment itself has caused confusion and what is almost surely an inevitable legal split on this issue. *Chapman* held that the carrier medium must be included, and the amendment expressly provides that a portion of the new formulaic weight represents the carrier medium weight "to be consistent with" *Chapman*. On the other hand, even though the amendment does not clearly state that the actual weight should be used for statutory purposes, it does state, "Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (*see Chapman*; § 5G1.1(b))." Even though this provision appears to flag the issue rather than resolve it, the Commission staff maintains that *Chapman* mandates use of the actual carrier medium for determination of the mandatory minimum. This conservative view of the Commission's authority (generally shared by the Commission with the Department of Justice) maintains that the Commission's guidelines cannot direct courts' computation of *statutory* penalties.[2]

However, an argument could be made for application of the amendment for statutory as well as guideline purposes in an LSD case: The amendment complies with *Chapman* by providing that a significant portion[3] of the formulaic weight represents the carrier medium. Also, the amendment could be seen as a subsequent congressionally delegated and approved clarification of the statutory language not available for the *Chapman* court (which noted the absence of a definition of "mixture or substance" in the statute or guidelines), and which might result in a different decision now.

Nonetheless, our office recommends that probation officers use the more conservative approach in making a recommendation to the court in LSD sentence modification proceedings. That view represents not only the more literal reading of *Chapman*, but also the Commission's purported intent. Further, the only published case applying the amendment has interpreted the statute to require the actual weight to determine the statutory penalty. *United States* v. *Woolston*, 1993 WL 544267 (December 21, 1993). The alternative view might be noted, in order to fully advise the court, if it is anticipated that the defendant will be making that argument. Ultimately, it will be up to the court to decide whether to read *Chapman* and the statute literally or more broadly. If the court takes the more literal view of *Chapman* or the statute, the new formulaic weight will only function to bring the sentence down to, but not below, any mandatory minimum penalty triggered by the actual weight.

Issues Raised by the Application of § 1B1.10

The Whole-Book Approach

The issue that most significantly impacts procedures for implementing a retroactive amendment pursuant to 18 U.S.C. § 3582 is the fact that the Sentencing Commission directed that the entire current set of guidelines, as amended, should be used in recalculating the sentence for "modification" (the "whole-book" or "one-book" approach), rather than only using the amended guideline which has been made retroactive inserted into the original set of guidelines used at the sentencing.

Application Note 1 to § 1B1.10 makes that directive clear:

> Although eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by *applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect).* (emphasis added)

Also, the Policy Statement itself states:

> In determining whether a reduction in sentence is warranted for a defendant . . . the court should consider the sentence that it would have originally imposed had the *guidelines*, as amended, been in effect at that time. Note 1, § 1B1.10(b) (emphasis added).

The Commission has statutory authority to make such a decision, and its directive should be followed, unless the courts were to hold otherwise. Title 28 U.S.C. § 994(u) provides: "If the Commission reduces the term of imprisonment recommended in the guide-

lines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." (By the same authority, the Commission could just as easily have decided otherwise and may reconsider whether to do so.) Additionally, after the Supreme Court's strong language in *United States* v. *Stinson*, 113 S.Ct. 1913 (1993), requiring adherence even to commentary, it is unclear how much discretion a court has to ignore a Policy Statement, such as § 1B1.10. It is clear, however, that if a court decides to apply such a Statement (e.g., to modify a defendant's sentence based on an amendment listed in § 1B1.10), the court *would* be expected to follow the commentary relating to the application of that Policy Statement (in this case, using the current entire set of guidelines), *unless* the commentary was found to be unconstitutional or contrary to statute or guidelines.

Complications and Disparate Applications

The use of the "guidelines currently in effect" would most probably be interpreted to mean those in effect at the sentence modification,[4] although some might claim it to be those in effect when the defendant's motion is filed or when the retroactive amendment became effective.

The decision to use the entire current set of guidelines has the most significant impact on the entire process. By providing that the entire amended set of guidelines be used in computing a potential modification of sentence pursuant to § 3582, the Commission has, in fact, made *every* guideline in the new guideline set retroactive, en masse, to the particular defendant receiving the sentence modification. This allows otherwise non-retroactive amendments to complicate the mere application of the particular amendment actually made retroactive.

The modified sentence calculation would involve all post-sentencing changes made to any guideline pertinent to calculating the length of imprisonment, including all amendments to Chapters One, Two, Three, and Four.[5] Also, using the entire current set would presumably include consideration of subsequent case law relevant to the application of the current set of guidelines at the sentence modification, possibly resulting in a different interpretation of even the guidelines used at the original sentencing.

In some cases, it is clear that numerous new issues could arise. For example, one amendment that the Commission did *not* make retroactive to other defendants is the eight-page "clarification" to relevant conduct (#439, effective November 1992), which substantially changed (and narrowed) the computation of relevant conduct in most districts. This may well, in the case of an LSD defendant involved in a conspiracy, result in wholesale reconsideration and recalculation of the drug activities of the LSD defendant (a recalculation which other contemporaneous drug defendants are denied).

In other cases, otherwise non-retroactive amendments may actually undercut the effect of the retroactive amendment. For example, an LSD defendant might receive a smaller reduction of sentence than otherwise, due to the increase in another (e.g., firearm) amendment.[6]

The issue most often encountered to date is that of the third level for acceptance of responsibility (#459), effective November 1992. As a windfall, LSD defendants will receive consideration for this amended adjustment, consideration routinely and repeatedly denied to non-LSD drug defendants sentenced before the amendment who have asked for and been denied retroactive consideration for this same amended adjustment in numerous post-conviction motions. This sort of disparate application of the guidelines is disquieting and difficult to defend.

New Factual Issues and Procedural Consequences

The use of the current set of guidelines, rather than simply using the retroactive guideline in the context of the set used at sentencing, allows new factual issues to complicate the sentence modification, which in turn generates several procedural concerns.

New determinations of fact, necessary to determine guidelines which either did not exist or were different at the sentencing, will often require evidentiary hearings which would otherwise not be necessary. For example, the criteria for the extra acceptance adjustment was not at issue in sentences prior to November 1992; the scope of the role determination has changed substantially in recent years; and the sweeping changes to relevant conduct have had immense impact on the calculations of drug amounts for defendants in drug conspiracies.

New factual issues lead to the problem of whether there should be an evidentiary hearing and whether the defendant should be present for the sentence modification. Rule 43(a), Federal Rules of Criminal Procedure, provides that the defendant "shall be present at . . . the imposition of sentence, except as otherwise provided by this rule." However, the defendant's presence is excused "[a]t a reduction of sentence under Rule 35." (Rule 43(c)(4)). To the extent that a complete new set of guidelines raises new factual determinations, the modification proceeding becomes more like a sentencing and less like a Rule 35 reduction of sentence, and thus more likely to require the defendant's presence.[7]

A court might be able to successfully (and carefully) accept a defendant's knowing and express waiver of his or her presence at a § 3583 modification of sentence, even using the one-book procedure. However, a defendant might later challenge the procedure in a § 2255 motion, particularly if new factual issues are determined to the defendant's detriment in the defendant's absence. It may be reversible error not to afford a defendant adequate notice of the issues to be determined or the opportunity to attend the hearing in order to respond to those issues.

Anecdotal information from the field indicates that the courts conducting sentence modifications to date have not had hearings and have not applied the current set of guidelines, nor have these issues been raised. *See, e.g., Woolston, supra.* Therefore, many of the problems discussed herein have not arisen yet. This may be partly due to the nature of the LSD amendment. The mandatory minimum issue impacts the sentence so strongly that it makes all other issues immaterial (i.e., where there was no mandatory, the new calculations are so low that the defendants are released for time served; where the actual weight triggered a mandatory, it is so much higher than any guideline computations that the defendant's only remedy is to appeal the mandatory minimum issue). Future retroactive amendments may actually present the full range of difficulties with § 1B1.10 procedures more than the LSD procedures do, if the procedures do not change.

Role of the Probation Officer

Given the lack of any nationwide system for invoking the sentence modifications for the LSD amendment, some courts may ask the probation office to assist in identifying the affected cases. In any case where the amendment potentially applies retroactively, the probation officer will need to make a supplemental report, probably incorporating, and perhaps attached to, the original report. Of primary importance will be the probation officer's role in identifying any new facts which need to be determined under the amended set of guidelines which were not determined at the original sentencing. The officer is sometimes also involved in assisting the court on the issue of whether a hearing should be held and whether the defendant should be present.[8]

After recomputing the guidelines and addressing the mandatory minimum issue, the officer will also ultimately need to make a recommendation to the court as to *whether* the sentence should be modified and, if so, to *what extent.* In this regard, it should be understood that a sentence reduction is discretionary, not mandatory. Both the statute and the guideline make this fact clear.[9] The courts have held that modification is discretionary with the court. *See United States* v. *Coohey*, 1993 WL 495577 (8th Cir., Dec. 3, 1993) (application of the LSD amendment is discretionary).[10] Retroactivity is generally construed narrowly,[11] and as noted, § 1B1.10 itself is a Policy Statement, which allows some discretion,[12] although this particular Policy Statement carries extra authority by specific reference in the statute.[13]

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

It is undisputed that the "one-book" rule (use of an entire set of guidelines), as set out in § 1B1.11(c), applies to the sentencing process in order to "preserve a cohesive and integrated whole." *United States* v. *Stephenson*, 921 F.2d 438 (2d Cir. 1990). The Commission has recently determined that the same approach should be used for sentencing multiple-count cases as well.[14]

Perhaps the Commission directed that the current set of guidelines be used in order to be consistent with *sentencing* procedure. However, the reasons for such a rule do not necessarily apply to the sentence *modification* process, where the purpose is not to generate a whole, new integrated sentence, but to apply a single change to a previously imposed sentence.[15] The sentence modification process, even using a new complete set of guidelines, is still not an actual "resentencing." For one thing, it involves only the imprisonment component, ignoring, for example, any changes to fines or restitution criteria. Only the imprisonment component is changed, and all other aspects of the original sentencing are retained. An amended Judgment and Commitment is issued. Probably Rule 32 is not fully implicated (see discussion above, regarding presence of defendant). Also, it uses the defendant's criminal history as of the original sentencing, ignoring any criminal history accrued since the sentencing. It is only a portion of a sentencing, at most, even using a full new set of guidelines.

In fact, the one-book rule for sentencing is best *supported* by the *preservation of the original full set of guidelines used at sentencing*, with only the retroactive amended guideline inserted therein, effecting a more specific, "laser-beam" kind of *modification* of the original, otherwise coherent, sentence.

Utilizing only the retroactive amendment would be consistent with the statutory authority, which refers to *reducing* (28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)), or *modifying* (18 U.S.C. § 3582(c)) a *term of imprisonment.* "Modification" and "reduction" imply a specific change to an otherwise unchanged whole, rather than the creation of a new whole.

The fact that courts have generally *not* used the current set of guidelines to modify sentences may

indicate that the procedure is ambiguous. This may be due partly to the Bureau of Prisons memorandum which refers to using the (LSD) amendment to modify a sentence. Inapplication of the new manual may also be due to resistance because of the complications it entails. *See, United States* v. *Woolston*, 1993 WL 544267 (D.Me., Dec. 21, 1993) (applying the LSD guideline); *United States* v. *Crosby*, 762 F.Supp. 658 (E.D.Pa. 1991); *United States* v. *Kahn*, 789 F.Supp. 373 (M.D.Ala. 1992).

The "laser-beam" application of retroactive amendments would not only greatly simplify the proceedings, but the Commission might be more willing to make amendments retroactive if they could be applied without complications of these kinds.

This issue is one on which the Commission has agreed to solicit comment during this amendment cycle, at the request of the Criminal Law Committee of the Judicial Conference. *Federal Register* (Vol. 58, No. 243, Part V, December 21, 1993, Issue for Comment, #31).

Conclusion

For all these reasons, the one-book procedure for § 1B1.10 sentence modifications merits the Commission's careful reconsideration. While it is clear that, for sentencing, the guidelines should be used as a complete, integrated set, it is nonetheless difficult to escape the conclusion that the better course would be for the Commission to allow, for purposes of retroactive sentence modification, the use of only the retroactive amendment.

However, even if such a change is ultimately made, unless or until the courts determine that use of the one-book approach is contrary to either the Constitution, statute, or guidelines, the probation officer will be the first person who must decide the numerous issues inherent in the application of retroactive guidelines in the immediate future, when most of the LSD sentence modifications will take place. These proceedings will be complicated by the *en masse* retroactive application of otherwise non-retroactive amendments, disparate application of otherwise non-retroactive amendments, new factual issues, and greater need for the presence of the defendant.

NOTES

[1]The amendment, #488, added this paragraph following the drug quantity table in 2D1.1(c): "In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table" (p. 86, *Guidelines Manual* (Nov.1993)(hereinafter *Manual*). It also added two lengthy paragraphs of explanation at the end of the *Background Commentary* following §2D1.1 (p. 96, *Manual*), eliminated LSD from the table in note 11 (p. 89, *Manual*), and added Application Note 18 to §2D1.1 (p. 95, *Manual*), pertaining to dose computation and liquid LSD.

[2]This view results in a dichotomized procedure, whereby the court remains undirected in the computation of statutory penalties but is Commission-directed in the computation of all other sentencing penalties. Recently, however, the courts have begun to integrate the computation of statutory and guideline penalties in the drug conspiracy context by deciding that relevant conduct principles apply not only to the guideline sentence, but also to the computation of statutory penalties. *See, e.g., United States* v. *Jones*, 965 F.2d 1509 (8th Cir. 1992), and *United States* v. *Martinez*, 987 F.2d 920 (2d Cir. 1993).

[3]The difference between 0.05 and .4, a considerable amount, allows for the carrier medium according to the Commission. § 2D1.1, comment. (backg'd.), *Manual*.

[4]Might this give defendants sentenced to long sentences an incentive to wait to file a motion, in order to realize the benefits of later amendments as well (especially when sweeping changes/reductions to the drug calculations are suggested, as they are now)? While most defendants would not play this sort of amendment-lottery (and courts could preclude the issue by filing the motions themselves), any such confusion would be avoided by using only the amended guideline in the context of the original set of guidelines used at sentencing.

[5]The current criminal history guidelines would be applied, however, to the defendant's criminal history as it was at the time of the original sentencing (ignoring any subsequently incurred criminal history) because "the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect *at that time* [of the original sentencing]." § 1B1.10 (emphasis added).

[6]We believe that there would be no credible *ex post facto* challenge, however, simply because some increased guidelines are made retroactive by their inclusion in a new, amended set of guidelines. The overall result of any application of § 3582 would, by definition, be to *reduce*, not *increase*, a sentence.

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

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

This rationale may apply as well to sentence modifications pursuant to § 3582 because the defendant is similarly incarcerated at a distant point. However, Rule 35 reductions are made generally on a single ground, which is typically not contested, and no new factual issues are generally raised other than the extent of reduction (e.g., extent and value of substantial assistance, under the new Rule 35). This exception to the defendant's presence would more likely protect the court in the defendant's absence at the § 1B1.10 procedure if only the retroactive amendment were used.

[8]It may be instructive to note that one of the few § 3582 cases to mention procedure is *United States* v. *Kahn*, 789 F.Supp. 373 (M.D.Ala. 1992), where the court, after reviewing the probation officer's report, evidently offered to hold an evidentiary hearing, but the parties declined, leaving the court concerned about the sparse record. *Id.* at 378.

[9]" . . . the court . . . *may* reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that

they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2) (emphasis added). The guideline is similar: [Where the guideline range has subsequently been lowered due to a guideline amendment], "a reduction in the defendant's term of imprisonment *may be considered* under 18 U.S.C. § 3582(c)(2)." § 1B1.10(a) (emphasis added).

[10]See also, *United States* v. *Connell*, 960 F.2d 191, 197 (1st Cir. 1992) (a defendant is not entitled to reduction of sentence as a right under 18 U.S.C. § 3582); *United States* v. *Wales*, 977 F.2d 1323, 1327-8 (9th Cir. 1992).

[11]*See United States* v. *Havener*, 905 F.2d 3 (1st Cir. 1990), for a thorough discussion of retroactivity by Chief Judge Stephen Breyer, one of the original Sentencing Commissioners.

[12]*United States* v. *Park*, 951 F.2d 634, 636 (5th Cir. 1992).

[13]"(2) . . . the court may reduce the term of imprisonment . . . if such a reduction is consistent with *applicable policy statements* issued by the Sentencing Commission." 18 U.S.C. §3582(c)(2)(emphasis added). This provision is universally considered a reference to Policy Statement §1B1.10 U.S.S.G.

[14]Amendment #474, effective November 1, 1993, added §1B1.11(b)(3): "If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." *But see* critical discussion of this approach in "Looking at the Law," *Federal Probation*, June 1991, p. 72.

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