

Mr. James E. McClinton
11831 So. Orchard Ave
Los Angeles, CA 90044

February 24, 1995

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

Re: Written testimony for hearing (March 14, 1995) on Proposed Amendments to the Federal Sentencing Guidelines.

Dear Committee Members:

Numerous courts have come to acknowledge the flagrant injustices that have been and continue's to exist in America. Scores of blacks and minorities right's are trampled on each day as the courts impose the Guidelines established by the sentencing commission. " I simply do not see how Congress can be satisfied with the results of Mandatory Minimums for possession of crack cocaine " ¹. While the majority of these courts blatantly disagree with the guidelines and would much rather render a punishment, fitting of the crime and the respective circumstances that reflect the individuals culpability in his offense, and a sentence that would afford the interest of justice and yet still reflect the seriousness of the offense.

Our Government has for so long, claimed that the balance of justice is perceived as color blind. One could argue to the contrary and put up fact's to substantiate this statement, that so many perceive as allegations. One only has to look at the gross disparity in the numbers (statistics). The courts have expressed, no doubt that the burden of the penalty scheme, which equated one gram of cocaine base to 100 grams of powder cocaine, falls disproportionately upon blacks. As sure as there is day and night, these number's do not lie, but they do quite profusely indicate that something is definitely wrong here.

¹ Justice Anthony Kennedy, New York Times March 10, 1995.

Panic based on media reports which incited racial fears has been Historically in this country as the catalyst for generating racially biased legislation. Our lawmakers in a frenzy and over reaction to overflow of fear from sensationistic headlines, over zealous media, supposingly in the interest of justice broke there own rule's in implementing, formulating the infamous Crack Law, Abandoning hearings and the procedural steps that we now take in considering these proposed amendments. Time and time again the courts at the district and appellate level have concluded that no one has yet to prove that Congress enactment of the crack law was racially motivated. " District court judge Cahill, J. to cite one of many has substantated beyond a doubt that although Congress did not intentionally discriminate. That unconscious racism was at work here. " ²

It appears that lawmakers are more concerned with appeasing there constituents and tearing down the family unit by locking many, many non-violent, low level drug offenders up for unjustly lengthy sentences. Not to mention that the guidelines have again reintroduced racial disparities and variances, the very kind that the guidelines were disigned to reduce.

It has been almost 10 years since implementation of the infamous "crack law ". This has afforded the government time to gather data for and against the crack law. Senior Circuit Judge Bright writes, " note the racial injustice flowing from this policy." ³ Numerous studies by both sides continue to point out the fact that crack cocaine and powdered cocaine are in fact synonymous, one and the same. There has not been a Drug/Narcotic that at some point was not deemed detrimental to society, be it Heroin, Cocaine, P.C.P., LSD, Marijuana and Alcohol. " The Criminal justice system response to the emergence of crack was out of proportion to the actual problem. However the response has had a substantial impact on the imprisonment rate of inner city minorities. " ⁴

² District Court Judge Cahill, J. (Clary v. U.S., 846 F.Supp 768)

³ Senior Circuit Court Judge Bright (Williams v. U.S. 982 F2d. 1268)

⁴ Steven Belenko, Deputy Director of New York Criminal Justice Agency

But more important and noteworthy is the fact that the threat that these drugs posed was not acknowledged until they were being used frequently by blacks and other minorities. " District Court Judge Cahill, J. held that the 100 - 1 ratio of cocaine to cocaine base provided by penalty provisions of the crack statute and the sentencing guidelines deprive blacks of equal protection." ⁵ The much unwarranted 100 to 1 ratio between cocaine base (crack) and powdered cocaine for the purposes of the sentencing guidelines should be changed to reflect a ratio of 1 to 1 in that they cocaine base (crack) and powdered cocaine are one and the same. Members of the committee indulge with me briefly in a mere analogy. When we go out to eat, say for instance breakfast. We decide to have eggs as part of our breakfast dish. Our waitress inquires as to how we would like our eggs (i.e. scrambled, fried overeasy, sunny side up etc...), with this in mind when we are not charged more or less for our eggs just because we individually choose to ingest them in a different form. We are simply charged the price of the egg! Irregardless of the way prepared an egg is an egg, whether scrambled or fried, they are one and the same. Similarly, cocaine/cocaine base (crack) are one and the same. Individuals should be charged at a ratio of 1 to 1 for crack as they are for powder cocaine, just as eggs are eggs. My grandfather just as your's I'm quite sure had a saying " If it walks like a duck, quacks like a duck, looks like a duck, then it must be a duck. " I could cite numerous district and appellate court Judges, Lawmakers, and Authorities whom acknowledge that cocaine/cocaine base (crack) are one and the same. The [o]nly difference in the two are, the people who use it. Regardless of Congress wanting to put emphasis on cocaine base (crack) this ratio of 100 - 1 is the most gross, flagrant, injustice since separate water drinking fountains for blacks and whites. Lawmakers have subtly wiped out all the progress that was made during the civil rights movement at every opportunity. By the means of " Unconscious Racism ", that does exist and is very much alive, but never acknowledged openly simply because it is perceived as not fashionable even among similarly minded

⁵ District Court Judge Cahill, J. (Clary v. U.S. 846 F.Supp 769)

constitutents. In Arlington, the Supreme Court listed circumstantial evidentiary sources for judicial review of legislative or executive motivation to determine whether a racially discriminatory purpose exist. Arlington decided that departures from normal procedures are relevant in determining the existence of invidious influences. Evidence presented that this was significant departures from prior substantive and procedural sequences, which point toward invidious discriminatory purpose.

Although moderate strides have been taken, we cannot fool ourselves into believing that our decisions are free from the influences of this country's legacy of racial subordination and discrimination. If we deny the influences of the vestiges of racism we will remain imprisoned by the past. Thus the root of racism has been implanted in our collective unconscious and has biased the ideas that Americans accept about the significance of race. The root of unconscious racism can be found in the latent psyches of white Americans that were inundated for centuries with myths and fallacies of the superiority over the black race. So deeply embedded are these ideas that their acceptance and socialization from generation to generation have become mere routine. The illustration of unconscious racism is patently evident in the crack cocaine statutes. Had the same type of law been applied to powder cocaine it would have sentenced droves of young whites to prison for extended terms. Before enactment of such a law it would have been much more carefully and deliberately considered and scrutinized.

With regard to §2D1.1 (c) (1), cocaine does not increase in purity as quantity increases. In the case of cocaine base (crack) purity is [s]ubstantially lower. Thusly, It should be reflected in a significantly lower offense level. By utilizing a rebuttable presumption that the actual weight of the controlled substance was 50% of the weight of the mixture containing the controlled substance. This would best reflect what is actually taking place and is consistent with the majority of cocaine base (crack) mixture being sold in our streets. To apply a set of rebuttable presumptions, with too many other interpretations would allow for the law to be manipulated as to give the same effect as never being amended. The only stipulation that should be allowable to the

rebuttable presumption of 50% purity is, if a defendant or government can establish a purity by chemical analysis (DEA form 7). Then this established figure should be used in determination of purity, regardless whether it is higher or lower than the presumption of 50% purity. In short a person should be charged only for the amount of cocaine in the mixture. For example, Our laws do not take into consideration that 5 kilo's (5,000 grams) of cocaine base is not 5 kilo's of cocaine base (crack). To have 5 kilo's of " pure " cocaine base (crack) is unheard of. On top of the fact that most of the cocaine we get in the United States is not 100% pure. This adds considerably to the quality of the cocaine base (crack). No consideration is given to the fact that legal over the counter products are used to obtain cocaine (crack), (i.e. Baking Soda, Vitamin B Blend, Procaine-Synthetic cocaine etc...). Case in point the average drug dealer wants to maximize his profits and cut cost. What better way to achieve this than by stretching your product. In lay mans terms watering it down. For example if a individual wanted to sell 5 kilo's (5,000 grams) of cocaine base (crack) to someone all he or she does is purchase 2.5 kilo's (2,500 grams) of powdered cocaine. They could then buy 3 to 4 lbs of baking soda, 2 to 3 lbs of Procaine, then mix the 2.5 kilo's of powdered cocaine with 1,500 grams of Procaine and 1,200 grams of baking soda. A individual now has 5 kilo's (approx. 5,000 - 5,200 grams) of cocaine base (crack), with a purity of between 30% to 50%. The end result is how can lawmakers justify punishing a individual with a law that say's cocaine base (crack) is XX% purity or stronger? When in fact it has the same effect or less than it does in powdered form. How can you charge a person for weight that is not consistent with the drug itself, not to mention that it is quite legal (the additives) and purchased legally and openly?

In conclusion there should be some law to the extent, where a individual will be charged for the cocaine only and not for the medium added to it. Section §2D1.1 (c) (1) falls short of reality. Cocaine that is in the form of base (crack) is rebricked before sale as a kilo. Therefore that means that half of that kilo is mixture already. For this reason 50% as in (A) (2) is more in line with reality. As

pertaining to section two of the Domestic Chemical Diversion Act of 1993 the amendment under §2D1.11 points out that in order to avoid any unwarranted disparity in determining the level of offense, those substances which are additives to the drug that is at issue as being illegal in some manner are not be considered in establishing the offense level. Only the weight of the drug in its pure state and not the mixture is to be used in determining the offense level for the violation. Surely all will agree that the intent and spirit of this statement should cover all drugs.

With regard to proposed amendment #43 AND 38, OPTION 2: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including possession with Intent to Commit these offenses); Attempt or Conspiracy applying also the drug quantity table for offenses involving cocaine base (crack). The equivalent for this should without dispute be 1 to 1 to reflect accurately that powder cocaine and cocaine base (crack) are one and the same.

The proposed Amendment #34 to Section §2D1.1 (a) (3) makes a lot of sense in that it takes into consideration, that a person whom qualifies for a adjustment under §3B1.2 (Mitigating Role). In short it takes the brunt of responsibility off of the low level defendant. The drug quantity should not play [as] much in the determination of offense level, with this in mind it only makes sense that those less accountable, offense level should reflect such. I assume the commission in considering this proposal have arrived at level 28 by assuming that a individual will recieve a deduction in offense level for acceptance of responsibility, mitigation role, there by placing a low level defendant at a 5 year sentence (level 24 - 26). Some consideration should possibly be given to making this even lower, with respect to surrounding circumstances (i.e. first time offender).

Futhermore, the proposed amendment to Section §2D1.1(c), by basing the scale of the offense upon the quantity of the control substance which the defendant was involved in a given time period, would in my opinion result in a more accurate assumption as to the quantity involved. It is without a doubt that [Option 2:(A) if the offense involved a num-

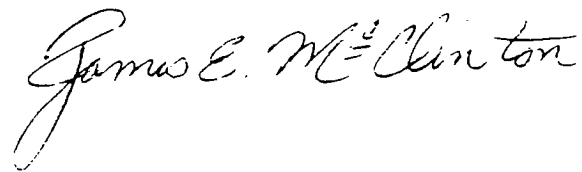
ber of transactions over a period of time, the offense level from the drug quantity table should be determined by the quantity of controlled substance with which the defendant was involved on any one occasion using the quantity that results in the greatest offense level].

In conclusion [a]ny law that is subsequently changed should benefit all. In the interest of Justice and Fairness. To amend a law implies that there was something incorrect about it. When a law that is unjust is applied to a individual, when that law is later corrected it should be applied to that individual whom it was applied in its incorrect form to correct that wrong. For example, when the method of weighing LSD a drug used predominately by whites was amended to reflect proper weight it was applied " Retroactively ". With this in the mind of [a]ll Americans to not make the amendments to powder cocaine/cocaine base (crack) ratio, purity and weight, retroactive would signal to all around the world that the United States is everything but one Nation with justice for [a]ll. For lawmakers not to make the lowering of crack retroactive would be the most gross, blatant act of conscious or unconscious racism since, implementation of the 100 to 1 powder cocaine/cocaine base (crack) ratio. When will lawmakers realize that by taking the bread winner out of the home and locking them up for lengthy periods only burdens the entire system. For instance the cost of housing inmates is continually rising, over burdening taxpayers. Lawmakers are always talking about finding ways to decrease the welfare rolls. How? When they continue to take away the bread winners, leaving there spouse and kids with no other option other than welfare. I myself would like to see our government take a different approach. For instance, First offense, non-violent, low level drug offenders could better serve society by serving periods of house arrest instead of incarceration. By working and being made to pay a percentage of there income (after tax deduction) to the government for a determined period in conjunction with counseling, Educational classes, Drug treatment at there expense or face a term of incarceration.

With regard to the committee hearing testimony on all the proposed amendments in the law I appeal to the moral and common sense of

our policy makers. I seek something vital to not only myself but to the future of my children, My grand children, their children and yours. Vital to the future of every American be they black or white. The hope and possibility of " Equal Protection, Equal Justice " under the law. The idea of that one day racism on a whole conscious or unconscious, openly or hidden will not be the ruling factor in deciding how successful or how far we may accel in life. Until our society begins to address the problem, Instead of locking it up for extended periods of time, Until our society begins to provide effective drug treatment, Educational programs and equal opportunity for a decent education and jobs, A bad situation will only worsen. All of us including our Children will suffer.

Sincerely,

A handwritten signature in cursive script that reads "James E. McClinton". The signature is fluid and elegant, with a large initial 'J' and a distinct 'M'.

James E. McClinton