

INDEX TO PUBLIC COMMENT

<u>Amdt.</u>	<u>Issue/Author</u>	<u>Pg. No.</u>
1	HIV EXPOSURE	
	(Stephanie Kane, Ph.D., Department of Criminal Justice, Indiana University)	37
	(Citizens for the Rehabilitation of Errants)	44
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	124
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	198
	(Curtis Decker, Executive Director, National Association of Protection and Advocacy Systems)	246
2	MINOR ASSAULT (§2A2.3)	
	(Citizens for the Rehabilitation of Errants)	44
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	126
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	198
3	INVOLUNTARY MANSLAUGHTER (§2A1.4)	
	(Citizens for the Rehabilitation of Errants)	44
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	127
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	198
4	KIDNAPPING, ABDUCTION, UNLAWFUL RESTRAINT (§2A4.1)	
	(Citizens for the Rehabilitation of Errants)	44
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	128
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	199
5	AGGRAVATED SEXUAL ABUSE; SEXUAL ABUSE (§§2A3.1, 2A3.2)	
	(Citizens for the Rehabilitation of Errants)	44
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	129

	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	199
6	DEATH OF THE VICTIM	
	(Citizens for the Rehabilitation of Errants)	44
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	130
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	199
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	221
7	ADEQUACY OF CRIMINAL HISTORY CATEGORY; ABUSIVE SEXUAL CONTACT (§§4A1.3, 2A3.4)	
	(Citizens for the Rehabilitation of Errants)	44
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	65
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	131
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	199
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	251
8	OFFENSES INVOLVING COUNTERFEIT BEARER OBLIGATIONS OF THE UNITED STATES; FRAUD AND DECEIT (§§2B5.1, 2F1.1)	
	(Citizens for the Rehabilitation of Errants)	44
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	132
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	199
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	222
9	UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE (§2D1.1)	
	(Citizens for the Rehabilitation of Errants)	45

	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	133
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	199
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	223
10	PROVIDING OR POSSESSING CONTRABAND IN PRISON (§2P1.2); DRUG OFFENSES OCCURRING NEAR PROTECTED LOCATIONS (§2D1.2)	
	(Citizens for the Rehabilitation of Errants)	45
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	134
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	199
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	251-52
11	DRUG OFFENSES OCCURRING NEAR PROTECTED LOCATIONS (§2D1.2)	
	(Citizens for the Rehabilitation of Errants)	45
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	66
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	136
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	224
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	252
	(Thomas W. Hillier, II, Federal Public and Community Defenders)	281
12	UNLAWFULLY DISTRIBUTING, IMPORTING, EXPORTING OR POSSESSING A LISTED CHEMICAL (§2D1.11)	
	(Robert L. Jones, III, Jones, Gilbreath, Jackson & Moll)	55
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	137

	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
13	UNLAWFUL POSSESSION, MANUFACTURE, DISTRIBUTION, OR IMPORTATION OF PROHIBITED FLASK OR EQUIPMENT (§2D1.12)	
	(Citizens for the Rehabilitation of Errants)	45
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	138
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	252
14	VULNERABLE VICTIM (§3A1.1); CIVIL RIGHTS (§§2H1.1, 2H1.3, 2H1.4, AND 2H1.5)	
	(Citizens for the Rehabilitation of Errants)	45
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	139
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
	(Alexa P. Freeman)	240
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	252
	(Norman E. Mogleston, Chief Probation/Pretrial Services Officer, and Mary Frances Barnes, Senior Probation Officer, District of Alaska)	298
15	UNLAWFUL RECEIPT, POSSESSION, OR TRANSPORTATION OF FIREARMS OR AMMUNITION (§2K2.1)	
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	117
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	140
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	225

16	FIREARMS (§2K2.1)	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	117, 118
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	141
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
17	FIREARMS (§2K2.1)	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	119
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	142
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	252
18	FIREARMS (§2K2.4)	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	120
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	143
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
19	FIREARMS (§2K2.1)	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	114
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	144
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200

	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	226
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	252
20	FIREARMS (§2K2.1); THEFT (§2B1.1)	
	(Citizens for the Rehabilitation of Errants)	46
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	120
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	145
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	201
21	FIREARMS (§2K2.1); EXPLOSIVES (§2K1.3)	
	(Citizens for the Rehabilitation of Errants)	46
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	121
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	146
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	201
22	IMMIGRATION, NATURALIZATION, AND PASSPORTS (§§2L1.1, 2L1.2)	
	(Citizens for the Rehabilitation of Errants)	46
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	66
	(Alan K. Simpson, Chairman, Subcommittee on Immigration, Committee on the Judiciary, United States Senate)	77
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	147
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	201
23	IMMIGRATION, NATURALIZATION, AND PASSPORTS (§§2L2.1, 2L2.2)	
	(Warren Christopher, Secretary of State)	36

	(Representatives Henry J. Hyde (R-IL), Benjamin A. Gilman (R-NY), and Charles Schumer (D-NY), Congress of the United States)	39
	(Gerald B. Rosen, United States District Judge, Eastern District of Michigan)	41
	(Harold W. Geisel, Acting Inspector General, United States Department of State)	42
	(Citizens for the Rehabilitation of Errants)	46
	(Alan K. Simpson, Chairman, Subcommittee on Immigration, Committee on the Judiciary, United States Senate)	77
	(Victor Oboyski, National President, Federal Law Enforcement Officers Association)	113
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	148
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	201
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	253
24	TERRORISM (§5K2.15); CAREER OFFENDER (§4B1.1)	
	(Citizens for the Rehabilitation of Errants)	46
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	149
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	201
25	JUVENILE INVOLVEMENT	
	(Citizens for the Rehabilitation of Errants)	46
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	150
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	202
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	227
26	CRIMINAL STREET GANGS	
	(Citizens for the Rehabilitation of Errants)	46
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	151
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	202

	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	228
27	ELDERLY VICTIMS	
	(Citizens for the Rehabilitation of Errants)	46
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	152
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	202
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	229
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	253
28	CAREER OFFENDER (§4B1.1)	
	(Citizens for the Rehabilitation of Errants)	46
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	153
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	202
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	230
29	"SAFETY VALVE" PROVISION (§5C1.2)	
	(Citizens for the Rehabilitation of Errants)	46
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	154
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	202
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	231
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	253
30	RESTITUTION, FINES, ASSESSMENTS, FORFEITURES (CHAPTER 5, PART E)	
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	155

	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	203
31	SUPERVISED RELEASE (§7B1.3, 7B1.4)	
	(Citizens for the Rehabilitation of Errants)	47
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	156
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	203
32	AMENDMENTS TO APPENDIX A AND GUIDELINE TITLES	
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	157
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	203
33	DRUG TRAFFICKING (§2D1.1)	
	(Citizens for the Rehabilitation of Errants)	47
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 160
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	203
	(Lee P. Brown, Director, Office of National Drug Control Policy)	218
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	233
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	253
34	DRUG TRAFFICKING (§2D1.1)	
	(Citizens for the Rehabilitation of Errants)	47
	(Robert L. Jones, III, Jones, Gilbreath, Jackson & Moll)	55
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	57
	(James E. McClinton)	104
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 161
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	203

	(Lee P. Brown, Director, Office of National Drug Control Policy)	218
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	234
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	254
	(Norman E. Mugleston, Chief Probation/Pretrial Services Officer, and Mary Frances Barnes, Senior Probation Officer, District of Alaska)	298
35	ROLE IN THE OFFENSE (CHAPTER THREE)	
	(Citizens for the Rehabilitation of Errants)	47
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	57
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 162
	(Richard Crane)	195
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	203
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	254
	(Norman E. Mugleston, Chief Probation/Pretrial Services Officer, and Mary Frances Barnes, Senior Probation Officer, District of Alaska)	298
36	DRUG TRAFFICKING (§2D1.1)	
	(Citizens for the Rehabilitation of Errants)	47
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 163
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	204
	(Lee P. Brown, Director, Office of National Drug Control Policy)	218
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	254
	(Norman E. Mugleston, Chief Probation/Pretrial Services Officer, and Mary Frances Barnes, Senior Probation Officer, District of Alaska)	298
37	DRUG TRAFFICKING (§2D1.1)	
	(Mikki Norris, Family Council on Drug Awareness)	1

	(Chris Conrad, Global Operations Director, Business Alliance for Commerce in Hemp)	2
	(Citizens for the Rehabilitation of Errants)	47
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	67
	(Martha J. Hanna)	76
	(Paul A. Magnuson, Chief Judge, United States District Court, District of Minnesota)	111
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 165
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	204
	(Darcelle Johs)	212
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	235
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	255
38	DRUG TRAFFICKING (§2D1.1)	
	(Cloud H. Miller, III, Post-Conviction, Appellate and Sentencing Consultants, Miller, Shein and Associates)	15
	(Citizens for the Rehabilitation of Errants)	47
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	68
	(James E. McClinton)	99
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 166
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	204
	(Lisa Brown)	211
	(Lee P. Brown, Director, Office of National Drug Control Policy)	218
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	236
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	255
	(Clinton Lyons, Executive Director, and H. Scott Wallace, Special Counsel, National Legal Aid and Defender Association)	270

	(Nkechi Taifa, Legislative Counsel, American Civil Liberties Union)	271
	(Thomas W. Hillier, II, Federal Public and Community Defenders)	274
	(Gerald H. Goldstein, National Association of Criminal Defense Lawyers)	285
39	DRUG TRAFFICKING (§2D1.1)	
	(Cloud H. Miller, III, Post-Conviction, Appellate and Sentencing Consultants, Miller, Shein and Associates)	15
	(Citizens for the Rehabilitation of Errants)	47
	(James E. McClinton)	104
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 167
	(Richard Crane)	196
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	204
40	DRUG TRAFFICKING (§2D1.1)	
	(Sidney L. Moore, Jr.)	3
	(Cloud H. Miller, III, Post-Conviction, Appellate and Sentencing Consultants, Miller, Shein and Associates)	15
	(Citizens for the Rehabilitation of Errants)	47
	(Robert L. Jones, III, Jones, Gilbreath, Jackson & Moll)	55
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 167
	(Richard Crane)	196
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	204
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	237
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	255-56
	(Norman E. Muggleston, Chief Probation/Pretrial Services Officer, and Mary Frances Barnes, Senior Probation Officer, District of Alaska)	298
41	DRUG TRAFFICKING (§2D1.1)	
	(Cloud H. Miller, III, Post-Conviction, Appellate and Sentencing Consultants, Miller, Shein and Associates)	15
	(Citizens for the Rehabilitation of Errants)	47

	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	68
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 167
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	204
42	OFFENSES INVOLVING DRUGS (Chapter Two, Part D)	
	(Cloud H. Miller, III, Post-Conviction, Appellate and Sentencing Consultants, Miller, Shein and Associates)	15
	(Citizens for the Rehabilitation of Errants)	47
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	68
	(Martha J. Hanna)	76
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 167
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	204
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	256
43	DRUG TRAFFICKING (§2D1.1)	
	(Cloud H. Miller, III, Post-Conviction, Appellate and Sentencing Consultants, Miller, Shein and Associates)	15
	(Citizens for the Rehabilitation of Errants)	48
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	70
	(James E. McClinton)	104
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	158, 168
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	205
	(Lee P. Brown, Director, Office of National Drug Control Policy)	218
	(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	238
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	256

	(Norman E. Mugleston, Chief Probation/Pretrial Services Officer, and Mary Frances Barnes, Senior Probation Officer, District of Alaska)	298
44	MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING (Chapter Two, Part S)	
	(John D. Olive, Senior United States Probation Officer, District of Wyoming)	14
	(Citizens for the Rehabilitation of Errants)	48
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	70
	(Carol Carayannis, American Association for Constitutional Laws and Justice)	78
	(Emmanuel H. Dimitriou)	107
	(Bruce R. Bryan)	109
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	187
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	205
	(Theodora Garza)	206
	(Tim Holden, Representative, United States Congress)	217
45	SUPERVISED RELEASE (Chapter Five, Part D)	
	(Harry J. Jaffe, Deputy Chief United States Probation Officer, Western District of Tennessee)	11
	(Jerome Turner, Judge, Western District of Tennessee)	13
	(John D. Olive, Senior United States Probation Officer, District of Wyoming)	14
	(Citizens for the Rehabilitation of Errants)	48
	(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	60
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	191
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	205
46	IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT (Chapter Five, Part D)	
	(John D. Olive, Senior United States Probation Officer, District of Wyoming)	14
	(Citizens for the Rehabilitation of Errants)	48

(Honorable Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States)	63
(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	192
(Richard Crane)	196
(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	205
(Julian Abele Cook, Jr., Chief Judge, Eastern District of Michigan, on behalf of the Judges of the United States District Court for the Eastern District of Michigan)	239

Miscellaneous

THEFT GUIDELINES

(James J. Trimble, Jr., United States District Judge, Western District of Louisiana)	213, 215
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USE OF CERTAIN INFORMATION (§1B1.8)

(Michael Boudin, United States Circuit Judge, First Circuit Court of Appeals)	258
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GUIDELINE PROMULGATION AUTHORITY

(Thomas W. Hillier, II, Federal Public and Community Defenders)	283
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RETROACTIVITY

(Jana V. Jay, Omni Law Chartered)	284
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From: Mikki Norris

Date: January 20, 1995

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

Re: Marijuana Plant Weight Amendment

Dear Ms./Sir:

It has been brought to our attention that in March of this year you will have an opportunity to make a change that will benefit the lives of thousands of American families with an adjustment of your sentencing standards. By simply changing the supposed weight of a mature, healthy marijuana plant from 1000 grams to 100 grams per plant, you will not only provide a more realistic assessment of the situation, but will enable families to be reunited sooner with the earlier release of their imprisoned loved ones. Thus, we encourage you to make this change and make it retroactive.

Our organization, the Family Council on Drug Awareness, is a research group that has compiled vast amounts of information and studies regarding the marijuana plant. We would be happy to provide you with assistance in developing your policies regarding marijuana offences. In our research, we have found marijuana to be safer than most drugs including alcohol and tobacco, and we believe that the laws regarding marijuana should be based on this fact rather than on the fiction of "reefer madness." As former President Jimmy Carter stated in his message to Congress, "Penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself."

Although we recommend that marijuana be re-legalized, regulated and taxed for use by responsible adults with age limits and penalties for sales to minors, we feel that you can take an important first step toward a more sane policy by changing the weight of a marijuana plant down to 100 grams and reduce sentences accordingly. Taking it a step further, you should also consider that people do not smoke male flowers of the marijuana plant, and since an estimated fifty per cent of seedlings grow to be males, more weight should be dropped from the scales.

We hope that in light of the above, you will do the right thing and adjust the weight standards downward. This simple act will bring America closer to rectifying a situation that should not be happening in a free and just society.

Thank you for your consideration in this matter. Please contact us for any information that will be of assistance to the commission.

Sincerely,

Mikki Norris
Mikki Norris



002-95
BUSINESS ALLIANCE FOR COMMERCE IN HEMP

Director's voice mail: 213-969-1607

PO Box 71093, Los Angeles Cal. 90071-0093 USA

Hemp Hotline: 310-288-4152

From: Chris Conrad, Global Operations Director

Phone/fax: 510-215-8326

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

Re: Marijuana Plant Weight Amendment

Date: January 20, 1995

Dear Commissioners,

I will not mince words; the Draconian penalties against marijuana are an egregious injustice and an affront to God, nature and humanity. Remember that Speaker Newt Gingrich, Supreme Court Justice Clarence Thomas and President Bill Clinton all smoked marijuana.

This March you have an opportunity to do something right for America by throwing out the sentencing guidelines altogether, or at least reducing the weight calculations for cannabis plants. Our organization wishes to testify at the next hearings on sentencing guidelines.

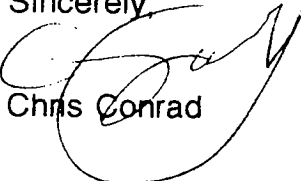
The current guideline that assumes a cannabis plant produces a kilogram of marijuana is an utter fraud that inflicts cruel injustice upon decent American citizens. Having studied legal growing operations in Holland, we know that a typical female plant only yields from 28 to 100 grams, and that half of all plants grown from seed are males which have no market value whatsoever. Since juries are told to judge the defendant based on fact, the actual weight of the flowering female product is the only honest way to gauge the amount of marijuana produced in any given garden. If any other standard should apply, it would be to discount half the plants as being male, and calculate the remainder at between 28 and 100 grams of product. Even this is an "optimistic" figure, but at least closer to actual fact.

BACH is firmly committed to the concept that capitalism is a good thing and that free enterprise is the best solution to the problems that plague society. The war on marijuana is a colossal failure that adds over \$8 billion per year to our national debt. By relegalizing adult consumption of marijuana and regulating it like alcohol, we can add over \$10 billion back to our economy. Such a policy could be designed to conform with international law, as I would be more than happy to explain. Please set aside a time for me at your hearing.

This is your opportunity to do something good for everyone. We hope that you will show the integrity and good sense to reduce or eliminate the sentencing guidelines.

Thank you once again.

Sincerely,



Chris Conrad

[2]

Sidney L. Moore, Jr., Attorney at Law

Trinity-Peachtree Building - 175 Trinity Avenue, S.W. - Atlanta, Georgia 30303

*Sidney L. (Sid) Moore, Jr.
Attorney at Law*

(404) 522-2588
Fax (404) 523-2573

January 17, 1995

Mr. Michael Courlander
Public Information Specialist
1 Columbus Circle NE
Suite 2-500
Washington, D.C. 20002

Re: Revision of Sentencing Guidelines

Dear Mr. Courlander:

I understand that you are the person through whom one might suggest revisions of the sentencing guidelines, or that you might be able to direct me to the proper person.

I have recently had an opportunity to review the guidelines in connection with a case I was handling in the United States District Court for the Northern District of Georgia. The name of the client is irrelevant for the purpose of this letter, as this comment is for general application.

In my case (see Exhibit D-1) quantities of methamphetamine (55% concentration) and cocaine (88% concentration) were seized by the DEA and went into the calculation of the Offense Level for the client. Based on the guidelines, the total "marijuana equivalent" of the substances seized from the Defendant was 139.69 kilograms, which with certain subtractions and additions (see exhibit) yielded an offense level of 25. This provided a sentencing range of 57 to 71 months, and the client in fact received a 60 month sentence.

Out of pure curiosity, I redid the calculation using 100% pure cocaine in the same quantities that were seized, and I was amazed to find that the calculation (see Exhibit D-2) yielded a marijuana equivalency of only 45.53 grams, with a resulting offense level (with the same additions and subtractions) of only 19. This offense level produced a guideline range of 30 to 37 months incarceration.

In other words, under the guidelines the sentence for a quantity of 55% methamphetamine is double that for 100% cocaine in the same quantity. This simply doesn't make sense. Cocaine, according to my clients and others I have discussed it with, is far more dangerous to take, and its distribution presents more violences and other societal risks than are involved in the distribution of methamphetamine. Additionally, cocaine trafficking far more often involves international smuggling, official corruption, and even violence against the judicial system itself.

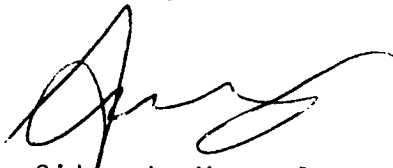
This apparent anomaly should be corrected. I have no idea what the origin was, but it has been suggested to me that perhaps methamphetamine cases are rare in the federal system compared to cases involving cocaine and marijuana, and thus the sentencing results studied were not of sufficient number to be a valid sample. Or, perhaps the majority of the smaller methamphetamine cases are in State Court and this skews the sample. In any event, the resultant comparison between the sentence guideline ranges of 55% (or even 1%) methamphetamine and 100% pure cocaine is not justified by any known facts.

Please let me know your response to this problem. Surely it might be remedied by increasing the recommendation on cocaine, as by decreasing the recommendation on methamphetamine, but I would imagine that the cocaine cases, being far greater numbers, would be the firmer and truer reflection of actual court activity than the methamphetamine cases, and the correct way to solve the problem would be to adjust the methamphetamine guidelines downward.

If, on the other hand, you believe that 1% methamphetamine should be considered five times as bad as 100% cocaine of equal weight, I would appreciate knowing why.

Thank you for your attention to these comments, and I look forward to your reply.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sidney L. Moore Jr.', with a stylized, cursive script.

Sidney L. Moore Jr.

EXHIBIT D 1CALCULATION OF OFFENSE LEVEL

			Marijuana Equivalent
Exhibit A	Methamphetamine (sold)	27.7 grams	27.7 kilograms
Exhibit B	Methamphetamine (sold)	83.6 grams	83.6 kilograms
Exhibit C	Methamphetamine (possessed)	3.8 grams	3.8 kilograms
Exhibit C	Methamphetamine (possessed)	2.6 grams	2.6 kilograms
Exhibit C	Cocaine (Possessed)	109.9 grams	21.98 kilograms
Exhibit D	Marijuana (possessed)	6.5 grams	<u>.01 kilograms</u>
	TOTAL		139.69 kilograms

139.69 kilograms of marijuana = LEVEL 26

ACCEPTANCE -3

FIREARM +2

TOTAL LEVEL 25

LEVEL 25 = 57 to 71 months

file
Merlino

EXHIBIT D-2

CALCULATION TREATING ALL
METHAMPHETAMINE AND COCAINE
AS IF IT WERE PURE COCAINE

			MARIJUANA EQUIVALENT
EXHIBIT A	Cocaine (100%)	27.7 grams	5.54 kilograms
EXHIBIT B	Cocaine (100%)	83.6 grams	16.72 kilograms
EXHIBIT C	Cocaine (100%)	3.8 grams	.76 kilograms
EXHIBIT C	COCAINE (100%)	2.6 grams	.52 kilograms
EXHIBIT C	COCAINE (100%)	109.9 grams	21.98 kilograms
EXHIBIT D	MARIJUANA	6.5 grams	<u>.01 kilograms</u>
		TOTAL	45.53 kilograms

45.53 kilograms of marijuana = LEVEL 20

ACCEPTANCE	- 3
FIREARM	<u>+ 2</u>

TOTAL LEVEL 19

LEVEL 19 = 30 to 37 months

A

DEP IDENTIFIER

-S2

6. CUSTOMS REFERRAL

Decatur, Ga.

☐ Case No. OR ☐ Seizure No.
No.

OFFICE SUBUNIT

LATENT FINGERPRINTS REQUESTED

15. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG ☒ NO (Included above) ☐ YES (If Yes, enter exhibit no. and describe original container fully)

REMARKS: On 7-14-93 SG3-93-X039 purchased 1 ounce of methamphetamine from Thomas Bernard Merlino at Tommys Bar and Grill 1713 Griffin St. Decatur, Ga. at approximately 8:20pm for \$1500.00 OGF. Exhibit 1 was turned over to the custody and control of TF/A M. Bailey. TF/A Bailey stored Ex. 1 in the DeKalb County Police Dept. evidence overnight storage. TF/A Bailey picked up and maintained the control and custody of Ex. 1 until mailed to DEA SEL Miami registered mail, return receipt requested.

RUSH RUSH RUSH

TF/A Michael Bailey

G/S Leo A. DeFranco

16. SUBMITTED BY SPECIAL AGENT (Signature)

17. APPROVED BY (Signature & Title)

LABORATORY EVIDENCE RECEIPT REPORT

18. No. PACKAGES 1	19. RECEIVED FROM (Signature & Date) RM 622 095 856	20. TITLE
21. SEAL ☐ Broken ☒ Unbroken	22. RECEIVED BY (Signature & Date) K. Krut 7/19/95	23. TITLE F/C

LABORATORY ANALYSIS / COMPARISON REPORT

3/10/93

24. ANALYSIS SUMMARY AND REMARKS

Exhibit 1

Gross: 56.5 g

Net: 27.7 g

Note: Original containers submitted for fingerprint examination.

25. Exhibit No.	26. Lab. No.	27. ACTIVE DRUG INGREDIENT (Established or Common Name)	WEIGHT PER UNIT ANALYZED			31.	32.
			28. Strength	29. Measure	30. Unit	TOTAL NET	RESER
1	76964	d-methamphetamine Hydrochloride	55	Z		15.2 g	23.9
3. ANALYST (Signature) <i>Ivette M. Vallejo</i>			34. TITLE Forensic Chemist Ivette M. Vallejo			35. DATE COMPLETED 08/06/93	
36. APPROVED BY <i>Ivette M. Vallejo</i>			37. TITLE Laboratory Director			38. LAB LOCATION Miami, Flor	

1. HOW OBTAINED (Check) ☒ Purchase ☐ Seizure ☐ Free Sample ☐ Lab. Seizure ☐ Money Flashed ☐ Compliance Sample (Non-Criminal) ☐ Other (Specify)		2a. FILE NO.	2b. PROGRAM CODE	3. G-DEP ID IG3-S2
4a. WHERE OBTAINED (City, State/Country) Decatur, Georgia		4b. DATE OBTAINED 7/28/93		
5a. REFERRING AGENCY (Name)		5b. REFERRAL ☐ Case No. OR ☐ Seizure No. No.		

9. Exhibit No.	10. FDIN (8 characters)	11. ALLEGED DRUGS	12. MARKS OR LABELS (Describe fully)	QUANTITY		15. Purchase Cost
2		Methamphetamine	3 ziplocks bags containing white powder within (1) bag. (Latent fingerprints requested)	13. Seized	14. Submitted	

16. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? ☐ NO (Included above) ☒ YES (If Yes, enter exhibit no. and describe original container fully)

REMARKS:
On 7/28/93 SG3-93-X03 purchased 3 ounces of methamphetamine from Thomas Bernard MERLINO at Tommy's Bar & Grill, 1713 Church Street, Decatur, Georgia at approximately 6:50 p.m. for \$4350.00. Exhibit #2 was turned over to the custody and control of TF/A M. Bailey. TF/A Bailey stored Exhibit #2 in the Dekalb County P.D. Evidence overnight storage. TF/A Bailey picked up and maintained the control and custody of Exhibit #2 until mailed to DEA SEL Miami, FL registered mail return receipt requested.

17. SUBMITTED BY SPECIAL AGENT (Signature) TF/A Michael Bailey / Michael Bailey	18. APPROVED BY (Signature & Title) G/S Leo DeFranco
--	---

LABORATORY EVIDENCE RECEIPT REPORT

19. No. PACKAGE 145EE	20. RECEIVED FROM (Signature & Date) RM 623 p75 7/29	21. TITLE
22. SEAL ☐ Broken ☒ Unbroken	23. RECEIVED BY (Signature & Date) 7.2.93	24. TITLE ACT. EV. TECH

LABORATORY ANALYSIS/COMPARISON REPORT

25. ANALYSIS SUMMARY AND REMARKS

Exhibit 2
Gross: 115.8 g
Net: 83.6 g

Note: Original containers submitted for fingerprint examination.

26. Exhibit No.	27. Lab. No.	28. ACTIVE DRUG INGREDIENT (Established or Common Name)	WEIGHT PER UNIT ANALYZED			32. TOTAL NET	33. RESERVE
			29. Strength	30. Measure	31. Unit		
2	77104	d-methamphetamine Hydrochloride	55	2		46 g	81.2 g
ANALYST (Signature) Ivette M. Vallojo			35. TITLE Forensic Chemist			36. DATE COMPLETED 08/12/93	
37. APPROVED BY			38. TITLE Laboratory Director			39. LAB LOCATION Miami, Florida	

1. HOW OBTAINED (Check) ☐ Purchase ☒ Seizure ☐ Free Sample
☐ Lab. Seizure ☐ Money Flashed ☐ Compliance Sample (Non-Criminal)
☐ Other (Specify) _____

2a. FILE NO. _____ 2b. PROGRAM CODE _____ 3. G-DEP ID _____ IGA 77

WHERE OBTAINED (City, State/Country) Decatur, GA 4b. DATE OBTAINED 04-28-94

5a. REFERRING AGENCY (Name) DEA Atlanta 6b. REFERRAL ☐ Case No. OR ☐ Seizure No. _____
 No. _____

9. Exhibit No.	10. FOIN (8 characters)	11. ALLEGED DRUGS	12. MARKS OR LABEL	13. Seized	14. Submitted	15. Purc Co
5		Methamphetamine	Four plastic bags containing white powder, one yellow envelope containing brown powder in a plastic bag and one yellow envelope containing a white chunky substance in a plastic bag corner. Items are marked "1B"	187.7gms	167.7gms	N/A

16. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? ☒ NO (Included above) ☐ YES (If Yes, enter exhibit no. and describe original container fully)

REMARKS:

Exhibit 5 was seized during the service of a search warrant on Tommy's Bar and Grill in Decatur GA. Exhibit 5 remained in the custody of IFA Bailey until processed as evidence and sent by registered mail to SEL.

17. SUBMITTED BY SPECIAL AGENT (Signature) Michael Bailey 18. APPROVED BY (Signature & Title) [Signature] ASST

LABORATORY EVIDENCE RECEIPT REPORT

19. No. PACKAGES 1 KEE 20. RECEIVED FROM (Signature & Date) RM 429613673 21. TITLE _____
 22. SEAL ☐ Broken ☒ Unbroken 23. RECEIVED BY (Signature & Date) [Signature] 1PS 5/2/94 24. TITLE F/C

LABORATORY ANALYSIS/COMPARISON REPORT

25. ANALYSIS SUMMARY AND REMARKS

Exhibit 5
 Gross: 168.5 g
 Net: Exhibit 5.01: 3.8 g
 Exhibit 5.02: 2.6 g
 Exhibit 5.03: 109.9 g

8066

CCV

26. Exhibit No.	27. Lab. No.	28. ACTIVE DRUG INGREDIENT (Established or Common Name)	WEIGHT PER UNIT ANALYZED			32. TOTAL NET	33. RESE
			29. Strength	30. Measure	31. Unit		
5.01	80603	d-Methamphetamine Hydrochloride	92	%		3.5 g	3.1 g
5.02	80606	d-Methamphetamine Hydrochloride	35	%		0.91 g	1.7 g
5.03	80603	Cocaine Hydrochloride	38	%		96.7 g	107.3 g

34. ANALYST (Signature) Juene M. Vallette by RSB 35. TITLE Forensic Chemist 36. DATE COMPLETED 5/23/94
 37. APPROVED BY [Signature] 38. TITLE Laboratory Director 39. LAB LOCATION Miami, Fla.

1. HOW OBTAINED (Check) ☐ Purchase ☒ Seizure ☐ Free Sample ☐ Lab. Seizure ☐ Money Flashed ☐ Compliance Sample (Non-Criminal) ☐ Other (Specify)			2a. FILE NO.		2b. PROGRAM CODE		3. G-DEP IGA22	
3. WHERE OBTAINED (City, State/Country) Decatur, GA			4b. DATE OBTAINED 04-26-94		D ward			
6a. REFERRING AGENCY (Name) DEA Atlanta			6b. REFERRAL ☐ Case No. OR ☐ Seizure No. No.					
9. Exhibit No.	10. FOIN (8 characters)	11. ALLEGED DRUGS	12. MARKS OR LABELS (Describe fully)		13. Seized	14. Submitted		15. Pur
6		Marijuana	One plastic bag containing a green leafy substance and one plastic bag containing a hand-rolled cigarette. Items are marked "B".		39.5gms	39.5gms		
16. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? ☒ NO (Included above) ☐ YES (If Yes, enter exhibit no. and describe original container fully)								
REMARKS: Exhibit 6 was seized during the service of a search warrant on Tommy's Bar and Grill in Decatur GA. Exhibit 6 remained in the custody of TF/A Bailey until processed as evidence and sent by registered mail to SEEL.								
7. SUBMITTED BY SPECIAL AGENT (Signature) TF/A Michael Bailey					18. APPROVED BY (Signature & Title) G./S. Leo DeFranco			
LABORATORY EVIDENCE RECEIPT REPORT								
19. No. PACKAGES 1 HSEE		20. RECEIVED FROM (Signature & Date) RM 429 613 673			21. TITLE			
22. SEAL ☐ Broken ☒ Unbroken		23. RECEIVED BY (Signature & Date) V. K. H. 5/2/94			24. TITLE FIC 5/24/94			
LABORATORY ANALYSIS/COMPARISON REPORT								
25. ANALYSIS SUMMARY AND REMARKS Exhibit: u Gross: 40.4 g Net: 7.0 g 806								
CCV								
26. Exhibit No.	27. Lab. No.	28. ACTIVE DRUG INGREDIENT (Established or Common Name)	WEIGHT PER UNIT ANALYZED			32. TOTAL NET	33. RES	
			29. Strength	30. Measure	31. Unit			
6	80609	Marijuana (Cannabis)					6.5	
34. ANALYST (Signature) Ivette M. Vallejo by RSB			35. TITLE Forensic Chemist Ivette M. Vallejo			36. DATE COMPLETE 5/23/94		
37. APPROVED BY [Signature]			38. TITLE Laboratory Director			39. LAB LOCATION Miami, FL		

004-95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
PROBATION OFFICE

JIM MCKINLEY
CHIEF PROBATION OFFICER

ROOM 234
FEDERAL BUILDING
167 N. MID-AMERICA MALL
MEMPHIS, TN 38103
901-544-3256

January 31, 1995

U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-5000, South Lobby
Washington, DC 20002-8002

ATTENTION: Public Information Office

Re: Proposed Amendments

Dear Commissioners:

I am writing in regard to proposed Amendment 5 of Chapter 5, Part D (supervised release).

I support the Judicial Conference's position for the abolition of supervised release. I find no evidence to support the belief that tacking on a period of supervised release to a term of imprisonment has any positive effect on the crime rate or, for that matter, the rehabilitation of the supervised releasee. Furthermore, the number of supervised release violations has increased so dramatically that the district courts will soon be spending as much time holding violation hearings as they are now holding sentencing hearings.

I find it unusual that the Congress abolished the federal parole system, only to re-establish it as "supervised release" within the federal judiciary.

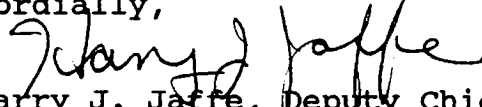
In short, I believe that the maintenance of supervised release has absolutely no effect on the incidence of criminal behavior by those people on supervised release nor does it impact positively on their rehabilitation. Supervised release violations are devouring the precious time of the federal courts, particularly technical violations such as use of narcotics or failure to report for supervision. I would encourage the

[]

U.S. Sentencing Commission
January 30, 1995
Page Two

Sentencing Commission to give the district judges the authority to decide whether any term of supervised release should be imposed.

Cordially,


Harry J. Jaffe, Deputy Chief
U.S. Probation Officer

HJJ/dlc

UNITED STATES DISTRICT COURT

Western District of Tennessee

SUITE 1107

FEDERAL BUILDING

MEMPHIS, TENNESSEE 38103

Jerome Turner
Judge

February 8, 1995

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-5000
South Lobby
Washington, D.C. 20002-8002

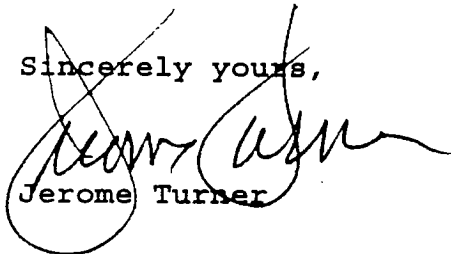
Attn: Public Information

Gentlemen:

I understand that the commission has invited comment on whether the supervised release guidelines should be amended. It has been my experience that an ever-increasing amount of judicial resources are being devoted to supervised release violations. The violation hearings are expanding rapidly both in time and number. The court has become somewhat of an unglorified parole board for a period of three to five years after incarceration. I do not believe in this time of increasing civil and criminal federal laws that the federal courts have the capacity to handle the required hearings (mini-trials) on supervised release violations.

Given that parole is no longer utilized in the federal system, I am somewhat doubtful that supervised release is necessary in any but those cases where the actual sentence of incarceration is short or has been reduced below the applicable guideline range by virtue of departure. Moreover, where a defendant on supervised release has been charged with felony violations of state law, I see no need for the federal courts to interpose themselves with a supervised release hearing long before the criminal trial will have been disposed of in state court. In those instances where state indictments are pending, mandatory supervised release hearings should not be required.

Sincerely yours,


Jerome Turner

JT:jmf

006-95

UNITED STATES DISTRICT COURT
PROBATION OFFICE
DISTRICT OF WYOMING

DANIEL J. FISHER
CHIEF U.S. PROBATION OFFICER
2120 CAPITOL AVE., ROOM 2141
P.O. BOX 847
CHEYENNE, WYOMING 82003
TELEPHONE #(307) 772-2318

111 SOUTH WOLCOTT, ROOM 138
CASPER, WYOMING 82601
TELEPHONE #(307) 261-5751

177 NORTH THIRD ST. 1ST FLOOR
P.O. BOX 369
LANDER, WY 82520
TELEPHONE #(307) 332-4891

REPLY TO: CHEYENNE

February 8, 1995

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

RE: Proposed 1995 Guideline Amendments

Dear U.S. Sentencing Commission:

The U.S. Probation Office in the District of Wyoming would like to comment upon some of the proposed 1995 Guideline Amendments. You will receive feedback from our District regarding the proposed drug guideline amendments via our survey which was sent to Caryl A. Ricca, our 10th Circuit representative on the Probation Officers Advisory Group.

Regarding other proposed amendments, our District heartily approves amendment 44 dealing with money laundering. We would like to see this amendment made retroactive if possible, due to the sizable number of persons sentenced by this District in recent years for money laundering that were not involved in drug activity. The underlying offenses are almost always Wire Fraud or Mail Fraud, and the sentences that have resulted overrepresent actual offense conduct in many cases. We agree the proposed money laundering table should be used instead of the table in 2F1.1 if the case does not involve an underlying fraud.

Regarding paragraph 45, the only time the mandatory imposition of a term of supervised release becomes a problem is in dealing with deportable aliens. Few Districts are going to extradite an offender for illegal re-entry if the offender is arrested in another District. Otherwise, mandatory supervised release periods are beneficial to offenders and to the public. In rare cases, the Court can always depart and not impose TSR if for some reason TSR is not advisable.

Also, our District agrees with the proposed amendments to 5G1.3 listed in paragraph 46...

Thank you for allowing the opportunity to comment on these proposed guideline amendments.

Sincerely,



John D. Olive
Senior U.S. Probation Officer

jdo

[14]

Post-Conviction, Appellate & Sentencing Consultants

Miller, Shein and Associates

Reply to Post Office Box 677954, Orlando, Florida 32867-7954

Cloud H. Miller, III, * Ph.D., J.D., Criminologist
Post-Conviction, Sentencing & Appellate Consultant

National Paging 1-800-759-8888 Enter 567-2988

National Watts 1-800-992-0832

Marcia G. Shein, M.S., J.D. Therapist
Sentencing, Appellate & Post Conviction Consultant

Atlanta Office (404) 874-9553

Miami Office (305) 756-0403

Orlando Office (407) 366-2545

Habla Espanol (407) 366-2545

Fax (407) 359-7445

Joan Jackson
Administrator

Monica Tacon*
Paralegal

February 8, 1995

*Admitted to Georgia Bar Only

United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8001

Dear Ms. Newton,

RE: Public Comment

I have reviewed the proposed guideline amendments, published January, 1995, CFR Vol.60 No.5, Part Two and share the following observations with you.

Amendments 39 - 43 are a significant contribution to the original goals of the Sentencing Reform Act of 1984, effective November, 1987. The various options/alternatives proposed bring thoughtful consideration for the development of a system of "criminal cohort justice". The amendments provide significant guidance for the application of fair and equitable judicial decision-making and thoughtfully "levels the playing field" with respect to relevant conduct from a defense and defendant's perspective. Of course, the actual application of these proposed amendments if adopted, may result in something other than that anticipated or desired, but they certainly are a vast improvement over the existing policies, procedures and guidelines.

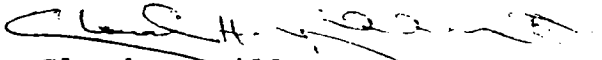
With respect to Amendment 38, which addresses "powder" cocaine hydrochloride versus "crack" cocaine base ratio issue, I would strongly encourage your conscious consideration of equalizing the penalty provisions in terms of guideline accountability, particularly since significant research data suggest that the guideline differential between "crack" and cocaine hydrochloride

significantly over represents the prosecution and draconian sentences for racial minorities.

With respect to your amendments regarding the development of a policy to assess guideline accountability proportionate to the percentage of drug purity, please note the attached constructive criticism articulated by the Eleventh Circuit Court of Appeals (Atlanta) in United States v. Carroll, et.al 6 F.3d 735 (11th Cir. 1993).

Thank you in advance for your consideration in this matter.

Very truly yours,


Cloud H. Miller, III

Station
F.3d 735

FOUND DOCUMENT

Database
CTA

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Page

NOTE AS: 6 F.3D 735)

UNITED STATES of America, Plaintiff-Appellant,
v.

Larry Joe CARROLL, Defendant-Appellee;

UNITED STATES of America, Plaintiff-Appellant, Cross-Appellee,
v.

Thomas SPIKER, Dorlis Spiker, Larry Joe Carroll, Michael Spiker, Defendants-Appellees, Cross-Appellants,

Larry Jessee, Defendant-Appellant.

Nos. 91-3079, 91-3188.

United States Court of Appeals,
Eleventh Circuit.

Nov. 9, 1993.

Defendants were convicted in the United States District Court for the Middle District of Florida, No. 90-00158-Cr-T-15, James L. Watson, J., sitting by designation, of conspiracy to manufacture and possess with intent to distribute methamphetamine. On government's appeal of sentencing issues, the Court of Appeals, Carnes, Circuit Judge, held that: (1) defendants were not entitled to offense-level reduction for acceptance of responsibility; (2) drug quantity involved was properly calculated; and (3) "pure methamphetamine," as used in drug quantity table of Sentencing Guidelines for establishing offense levels for drug trafficking offenses, does not refer only to particular form of methamphetamine, but rather to relative purity of any methamphetamine compound. Convictions affirmed; sentences reversed and remanded.

Bright, Senior Circuit Judge, sitting by designation, concurred in part, dissented in part and filed opinion.

CRIMINAL LAW k1158(1)

110k1158(1)

District court's reduction of sentencing offense levels for acceptance of responsibility is reviewed for clear error. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[2] CRIMINAL LAW k1252

110k1252

Finding that drug defendants had accepted responsibility for their crimes, and thus were entitled to offense level reductions, was clearly erroneous; defendants never admitted guilt or expressed any remorse for their offenses, and refusal to grant sentence reduction would not have penalized defendants for exercising their rights not to testify. U.S.C.A. Const.Amend. 5; U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[3] CRIMINAL LAW k1252

110k1252

Offense level reduction for acceptance of responsibility applies only to those defendants who affirmatively acknowledge their crime and express genuine remorse for harm caused by their actions; mere failure to disrupt court proceedings is insufficient. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[4] CRIMINAL LAW k1252

Copr. (C) West 1995 No claim to orig. U.S. govt. works

[17]

(CITE AS: 6 F.3D 735)

110k1252

Sentencing Guidelines provision allowing two-level reduction for acceptance of possibility does not allow for one-level reduction based on defendant's partial acceptance of responsibility. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[5] CRIMINAL LAW k1252

110k1252

Defendant's confession that she had been in possession of methamphetamine and that she had drug use problem was insufficient to warrant offense-level reduction for acceptance of responsibility, in prosecution for conspiring to manufacture and possess with intent to distribute 100 grams or more of methamphetamine and possession with intent to distribute ten grams or more methamphetamine; despite defendant's acknowledgement of lesser included offense of mere possession, she did not accept responsibility for more serious crimes of which she was charged and convicted. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[6] CRIMINAL LAW k1252

110k1252

Defendant who elects to go to trial does not, thereby, necessarily forfeit entitlement to offense-level reduction for acceptance of responsibility. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[7] CRIMINAL LAW k1158(1)

110k1158(1)

Trial court's determination of quantity of drugs involved, used to establish base offense level for sentencing purposes, is reviewed under clearly erroneous standard.

[8] CONSPIRACY k51

91k51

Where only small amount of methamphetamine was actually seized, court could properly consider evidence offered at sentencing to establish amount of methamphetamine that could have been produced by defendants' conspiracy. U.S.S.G. s 2D1.4, comment. (n.2) (1992).

[9] CRIMINAL LAW k1139

110k1139

District court's reading of Sentencing Guidelines is subject to de novo review on appeal. U.S.S.G. s 1B1.1 et seq., 18 U.S.C.A.App.

[10] DRUGS AND NARCOTICS k133

138k133

"Pure methamphetamine," as used in drug quantity table of Sentencing Guidelines for establishing offense levels for drug trafficking offenses, does not refer only to particular form of methamphetamine, but rather to relative purity of any methamphetamine compound. U.S.S.G. s 2D1.1(c), 18 U.S.C.A.App. See publication Words and Phrases for other judicial constructions and definitions.

*737 John H. Bothwell, III, Tampa, FL, for Dorlis Spiker.

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CITE AS: 6 F.3D 735, *737)

Jack T. Edmund, Ft. Meade, FL, for Thomas Spiker.

Nestor Castillo, Jr., Tampa, FL, for Larry Joe Carroll.

Philip E. Kuhn, Lakeland, FL, for Michael Spiker.

Shawn A. Burklin, Clearwater, FL, for Larry Jesse.

Tamra Phipps, Edmund W. Searby, James C. Preston, Asst. U.S. Attys., Tampa, FL, for U.S.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT [FN*], Senior Circuit Judge.

FN* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

CARNES, Circuit Judge:

This case involves convictions arising out of a conspiracy to manufacture and possess with intent to distribute methamphetamine. A jury convicted the defendants on various counts of a multicount indictment. The Government has appealed from the district court's entry of a judgment of acquittal on the conspiracy conviction of one defendant and the court's imposition of sentence for all the defendants, and the defendants have cross-appealed their convictions and sentences. [FN1] Of the many issues raised in the appeal and cross-appeals, we find that only three, all sentencing issues, warrant discussion. For reasons we will explain, we reverse the district court's decision to credit Dorlis Spiker, Michael Spiker, and Thomas Spiker with reductions for acceptance of responsibility; we affirm the court's determination of the drug quantity involved in this conspiracy for purposes of sentencing; and we reverse the court's determination that "Pure Methamphetamine" as used in the Sentencing Guidelines refers only to D-methamphetamine. In all other respects, the convictions and sentences are due to be affirmed.

FN1. In addition to the Government's sentencing challenges addressed in our opinion, the Government appeals from the district court's entry of a judgment of acquittal on the conspiracy conviction of Larry Joe Carroll for insufficient evidence. We find this challenge to be without merit. The defendants also raise the following issues that we find to be meritless: sufficiency of the evidence to convict the defendants of knowing participation in the charged conspiracy and of possession with intent to distribute; the sentencing of Thomas Spiker as an organizer or leader; alleged errors in the district court's instructions to the jury; the constitutionality of the sentences imposed under the Sentencing Guidelines; alleged perjury by the Government's expert witness; alleged discovery violations by the Government; the Government's alleged use of perjured testimony; allegedly prejudicial comments by the prosecutor; the district court's reservation of its rulings on motions for judgments of acquittal; the district court's refusal to sever the distribution charge in Count Two; and the district court's allowance of two opening statements by the Government following inadvertently erroneous statements by the

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I. BACKGROUND

In November 1989, representatives of the Eastman Kodak Company ("Kodak") notified the Drug Enforcement Agency ("DEA") that Kodak had received a suspicious order for chemicals from a company called "All American Labs" in Winter Haven, Florida. An investigation revealed that there was no such company at the address listed on the purchase order presented to Kodak; rather, at that location was a store called "Spiker's All American 4x4," which sold automotive parts and accessories. Michael Spiker, Larry Jessee, and Larry Joe Carroll all worked at the store, Spiker as manager.

The DEA began an investigation of "Spiker's All American 4x4," which included surveillance of the store and of three different *738 deliveries of chemicals by Kodak to "All American Labs" at the address of "Spiker's All American 4x4" from November 1989 to May 1990. These orders were placed under a false name, using purchase order forms from "Spiker's All American 4x4" that had been altered to read "All American Labs." The chemicals ordered by the bogus "All American Labs" included phenylacetic acid, acetic anhydride, and sodium acetate, which when properly combined create phenylacetone, or "P-2-P," a Schedule II controlled substance and an immediate precursor to methamphetamine. See 21 C.F.R. s 1308.12(g)(1)(i). The DEA's investigation and surveillance of the defendants included court-ordered electronic tracking devices placed in the drums of chemicals delivered by Kodak, and both still and video photography. At trial, the Government introduced photographic evidence of Michael Spiker, Larry Joe Carroll, and Larry Jessee unloading and loading the chemicals. The altered purchase orders instructed that deliveries were to be made to the attention of "Michael/Larry." The Government introduced evidence to show that these chemicals were not part of the retail business

conducted by "Spiker's All American 4x4," were not typical of the deliveries received at the store, and once received were placed in a storage shed at the rear of the store which was not used for store inventory. In addition, the Government's evidence showed that Thomas Spiker, who was not an employee of the store at the time, was allowed to remove the chemicals from the store soon after their delivery. Furthermore, the evidence established that Thomas Spiker and Dorlis Spiker recruited John Booth to be their "cook," or "chemist," and to help them in the manufacture of methamphetamine with the chemicals that had been ordered and delivered. [FN2] Booth helped Thomas Spiker determine which chemicals to order and in what quantities to order them. Booth set up a clandestine laboratory in a trailer in a remote area and, using the chemicals provided by Thomas Spiker, produced approximately 31 grams of DL-methamphetamine.

FN2. Booth was originally indicted as a co-conspirator in this case, but subsequently entered a plea of guilty and agreed to cooperate as a Government witness during the defendants' trial.

On May 24, 1990, Thomas and Dorlis Spiker were followed by DEA agents to Booth's home, where Booth delivered to them approximately 28 grams of the methamphetamine he had produced. Thomas and Dorlis Spiker were arrested upon leaving Booth's home, and the methamphetamine was found in Dorlis's purse.

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CITE AS: 6 F.3D 735, *738)

Booth was arrested in his home later that evening, and a search of his home, pursuant to a warrant, led to the seizure of several drums of chemicals, including one in which the DEA had placed a tracking device prior to its delivery by Kodak. The following day, the DEA searched a mobile home where Thomas Spiker had previously stored the chemicals and recovered business cards printed with "All American Labs" and the "Spiker's All American 4x4" address; copies of purchase order forms sent to Kodak; a laboratory products catalog with Thomas Spiker's handwriting on the front; and a list of chemicals needed for the manufacture of methamphetamine written by John Booth.

The DEA's investigation led to a seven-count indictment charging the defendants and others who are not parties to this appeal with conspiring to manufacture and possess with intent to distribute 100 grams or more of methamphetamine in violation of 21 U.S.C. ss 841(a)(1) and 846, and other crimes. [FN3]

FN3. Count One of the indictment in this case charged each defendant with conspiring to manufacture and to possess with intent to distribute 100 grams or more of methamphetamine; Count Two charged only Larry Joe Carroll with distribution and possession with intent to distribute 10 grams or more of methamphetamine; Count Three charged each defendant with possession with intent to distribute 10 grams or more of methamphetamine; Counts Four and Five charged simple possession of methamphetamine and marijuana by a defendant who is not a party to this appeal; Count Six charged Michael Spiker and Larry Joe Carroll with possession of cocaine; Count Seven charged only Michael Spiker with possession of marijuana.

II. DISCUSSION

Reduction for Acceptance of Responsibility

The Government has appealed the district court's action at sentencing in crediting *739 Thomas Spiker, Michael Spiker, and Dorlis Spiker each with a reduction of their offense levels for acceptance of responsibility under U.S.S.G. s 3E1.1(a). That Guidelines section provides that a defendant who "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct" may receive a two-level decrease in his offense level. U.S.S.G. s 3E1.1(a) (November 1, 1990). [FN4] We review the district court's determination under s 3E1.1(a) for clear error. *United States v. Query*, 928 F.2d 383, 386 (11th Cir.1991). We have stated numerous times that "[t]he district court is in a unique position to evaluate whether a defendant has accepted responsibility for his acts, and this determination is entitled to great deference on review." *United States v. Pritchett*, 908 F.2d 816, 824 (11th Cir.1990). Nonetheless, in this case we conclude that the district court's determination that these defendants had clearly demonstrated acceptance of responsibility for their crimes is without foundation and, therefore, must be reversed. See *United States v. Marin*, 916 F.2d 1536, 1538 (11th Cir.1990) (district court's s 3E1.1 determination not disturbed unless without foundation).

FN4. Section 3E1.1 was amended following sentencing in this case to allow an additional one-level reduction in circumstances that are not relevant here. U.S.S.G. App. C, amend. 459 (November 1, 1992).

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1. The Reductions for Thomas and Michael Spiker

] At sentencing, the district court explained its two-point acceptance of responsibility reductions for both Thomas Spiker and Michael Spiker in the same way, stating:

[A]lthough defendant has exercised his Fifth Amendment rights to not incriminate himself, he has otherwise co-operated fully at all phases of the trial and sentencing process, including meeting all conditions of pre-trial release and voluntarily surrendering to the U.S. Marshal as ordered. Defendant has never denied his participation in this offense other than through his entry of the Not Guilty plea and this Court is of the opinion that to penalize him for failure to waive his Fifth Amendment rights would result in a denial of fundamental constitutional rights.

The Government objected to the reductions for Thomas and Michael Spiker in the district court and argues on appeal that the court's action was "tantamount to rewarding them for not disrupting court proceedings." We agree. The relevant Sentencing Guidelines commentary provides that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. s 3E1.1, comment. (n. 2). In this case, Thomas and Michael Spiker never admitted guilt nor expressed any remorse for their offenses, and the district court's reliance on concerns for their Fifth Amendment rights for its award of s 3E1.1 reductions was clear error.

In *United States v. Henry*, 883 F.2d 1010, 1011 (11th Cir.1989), this Court held that conditioning sentence reductions on a defendant's acceptance of responsibility does not violate the Fifth Amendment merely because such reductions likely will be unavailable to defendants who choose to exercise

their Fifth Amendment rights. Henry appealed his sentence contending that because he had chosen to testify to his innocence at trial, in order to receive a lower sentence, he was faced with the necessity of having to build a perjury case against himself by confessing at the sentencing hearing to that which he had denied under oath at trial. Henry argued that "because a defendant, believing in his innocence but fearing conviction, might reasonably forego taking the stand to take advantage of the acceptance of responsibility provision without subjecting himself to a perjury charge[,] ... [s 3E1.1] chills the right of a defendant to defend himself." Henry, 883 F.2d at 1011. This Court rejected Henry's argument:

Section 3E1.1 may well affect how criminal defendants choose to exercise their constitutional rights. But "not every burden on the exercise of a constitutional right and not every encouragement to waive such a right is invalid." *Corbitt v. New Jersey*, *740 439 U.S. 212, 219, 99 S.Ct. 492, 493-497, 58 L.Ed.2d 466 (1978). Persons involved in the criminal law process are faced with a variety of choices. Some of the alternatives may lead to unpleasant consequences. For example, to choose to go to trial may result in greater punishment.... Section 3E1.1 may add to the dilemmas facing criminal defendants, but no good reason exists to believe that 3E1.1 was intended to punish anyone for exercising rights. We are unprepared to equate the possibility of leniency with impermissible punishment.

Id. (footnotes omitted). But see *United States v. Frierson*, 945

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CITE AS: 6 F.3D 735, *740)

F.2d 650, 659-60 (3d Cir.1991) (holding that denial of reduction for acceptance of responsibility was a "penalty" which could not be imposed for defendant's assertion of Fifth Amendment privilege), cert. denied, --- U.S. ----, 112 S.Ct. 1515, 117 L.Ed.2d 651 (1992).

As with the defendant's decision to testify in Henry, Thomas and Michael Spiker's decisions to exercise their Fifth Amendment rights and not testify would not be unconstitutionally burdened by a refusal to award them leniency at sentencing for acceptance of responsibility. Section 3E1.1(a) is not a punishment; rather, the reduction for acceptance of responsibility is a reward for those defendants who express genuine remorse for their criminal conduct. E.g., Henry, 883 F.2d at 1011-12 & n. 6. It was clear error for the district court in this case to grant the s 3E1.1 reduction based on the conclusion that to refuse would be to "penalize" the defendants for exercising their rights not to testify.

[3] The other factors enumerated by the district court as support for its action also fail to demonstrate these two defendants' acceptance of responsibility. A defendant must do more than sit quietly and take his medicine. Section 3E1.1 is intended to reward those defendants who affirmatively acknowledge their crimes and express genuine remorse for the harm caused by their actions. United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir.1989), cert. denied, 494 U.S. 1083, 110 S.Ct. 1816, 108 L.Ed.2d 946 (1990). The district court cited no evidence that Thomas and Michael Spiker did, in fact, accept responsibility for their crimes. When given the opportunity at oral argument, counsel for the defendants could point this Court to no such evidence. Under these circumstances, it was clear error for the district court to grant Thomas and Michael Spiker two-point reductions for acceptance of responsibility under s 3E1.1(a).

2. The Reduction for Dorlis Spiker

Dorlis Spiker was convicted on Count One of conspiring to manufacture and possess with intent to distribute 100 grams or more of methamphetamine and on Count Three of possession with intent to distribute 100 grams or more of methamphetamine. At sentencing, the district court awarded Dorlis Spiker a one-level reduction of her offense level for acceptance of responsibility, explaining, "The Court finds this defendant clearly demonstrated a recognition and affirmative acceptance of personal responsibility as to the criminal conduct charged in Count 3 and therefore is entitled to a 1 point reduction." In a Solomonian attempt to split the baby, the court apparently gave Dorlis Spiker "half credit" under s 3E1.1(a), because through counsel she admitted to one of the elements of one of the two crimes with which she was charged, i.e., she admitted to a lesser included offense to one of the charges.

In closing argument, Dorlis Spiker's counsel conceded that she had been in possession of methamphetamine and that she had a drug use problem, arguing that she was a truck driver and that everyone knows truck drivers frequently use methamphetamine. However, neither Dorlis Spiker nor her counsel ever conceded the other elements of the higher charges she faced, which were conspiracy to manufacture and intent to distribute methamphetamine. Because there is no provision in the Guidelines for such a one-point reduction for acceptance of responsibility, and because the facts in this case did not support any adjustment for acceptance of responsibility, we reverse.

[4] This Circuit has never decided whether s 3E1.1 authorizes less than a

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CITE AS: 6 F.3D 735, *740)

two-level reduction for a "partial" acceptance of responsibility. *741 Because this is an issue of Guidelines interpretation, we review de novo the district court's decision to grant a one-level reduction for Dorlis Spiker's partial acceptance of responsibility. United States v. Worthy, 915 F.2d 1514, 1516 (11th Cir.1990). We are persuaded by the plain language of s 3E1.1 to follow the Fifth Circuit's decision in United States v. Valencia, 957 F.2d 153 (5th Cir.1992), and hold that s 3E1.1 does not provide for such a reduction. In Valencia, the district court expressly found that the defendant had partially accepted responsibility and, therefore, was entitled to a one-point reduction, rather than the two-point reduction provided for in s 3E1.1(a). The Fifth Circuit reversed, holding that "U.S.S.G. s 3E1.1 does not contemplate either a defendant's mere partial acceptance of responsibility or a district court's being halfway convinced that a defendant accepted responsibility." Id. at 156; see also United States v. Farrier, 948 F.2d 1125, 1127 (9th Cir.1991) (holding that the Guidelines do not provide for an acceptance of responsibility reduction other than by two levels, therefore, reversing four-level reduction). We agree with the Fifth Circuit's reasoning and, therefore, hold that the district court's decision to grant Dorlis Spiker a one-level reduction for acceptance of responsibility was based on an erroneous interpretation of the Guidelines. Dorlis Spiker was entitled to either a two-level reduction or none, and the burden was on her clearly to demonstrate an acceptance of responsibility for her criminal conduct in order to justify a two-level reduction. See United States v. Paslay, 971 F.2d 667, 675 (11th Cir.1992) (burden of proof under s 3E1.1 on defendant). If the facts of this case were such that the district court could properly award Dorlis Spiker a two-level reduction for acceptance of responsibility, we would remand to allow the court to decide whether to do so. Because we decide that it would be error to grant such a reduction, however, we decline to remand the matter for further consideration.

[5][6] In United States v. Jones, 899 F.2d 1097, 1101 (11th Cir.), cert. denied, 498 U.S. 906, 111 S.Ct. 275, 112 L.Ed.2d 230 (1990), and overruled on other grounds, United States v. Morrill, 984 F.2d 1136 (11th Cir.1993), this Court upheld as not clearly erroneous a district court's conclusion that the defendant's acknowledgment of a lesser-included offense was a "trial tactic" and did not amount to acceptance of responsibility under s 3E1.1. In this case, the issue is whether a tactical admission of guilt to a lesser-included offense could ever be sufficient, standing alone, to warrant a two-level reduction for acceptance of responsibility. We begin our analysis of this question by acknowledging that a defendant who elects to go to trial does not, thereby, necessarily forfeit entitlement to a s 3E1.1 reduction. As the Guidelines commentary says, "Conviction by trial ... does not automatically preclude a defendant from consideration for such a reduction." U.S.S.G. s 3E1.1, comment. (n. 2). The commentary goes on to point out, however, the infrequent nature of circumstances where the reduction might still be available after a defendant has elected to put the government to its proof:

In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a

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(CITE AS: 6 F.3D 735, *741)

challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility must be based primarily upon pre-trial statements and conduct.

No such rare circumstances were present in this case. While counsel for Dorlis Spiker acknowledged Dorlis's guilt for the lesser-included offense of simple possession of methamphetamine, Dorlis did not accept responsibility for the more serious crimes of which she was charged and convicted: conspiracy to manufacture and possess with intent to distribute, and possession with intent to distribute.

We find persuasive the reasoning of the Fourth Circuit in *United States v. Gordon*, 895 F.2d 932 (4th Cir.), cert. denied, 498 U.S. 846, 111 S.Ct. 131, 112 L.Ed.2d 98 (1990), which involved facts somewhat similar to this *742 case. Gordon was convicted after a jury trial of possession with intent to distribute cocaine. At sentencing, Gordon admitted that he was guilty of simple possession and requested a reduction for acceptance of responsibility under s 3E1.1. The district court denied Gordon's request and he appealed, arguing that forcing him to admit an intent to distribute in order to receive the reduction required him to sacrifice his right to preserve his appeal in exchange for a reduction in sentence. Noting the district court's finding that Gordon had done nothing else to indicate his acceptance of responsibility, the Fourth Circuit stated, "Indeed, Gordon's claim that he was entitled to this mitigating factor while at the same time denying the criminal conduct for which he was convicted by a jury borders on the frivolous." *Gordon*, 895 F.2d at 937. Dorlis Spiker's claim is not frivolous, but it is without merit. Absent some other factual foundation to support the finding that Dorlis Spiker demonstrated acceptance of responsibility for her crimes of conviction, the district court's reliance for its s 3E1.1(a) reduction on a t tical confession of guilt to a lesser-included offense was clear error.

The Sentencing Court's Finding with Respect to Drug Quantity and Purity

1. The Drug Quantity for Sentencing

[7] The defendants challenge the district court's determination of the drug quantity for purposes of sentencing, alleging that the court failed to set out sufficiently the factual findings on which its determination was based. "This court reviews the trial court's determination of the quantity of drugs used to establish a base offense level for sentencing purposes under the clearly erroneous standard." *United States v. Robinson*, 935 F.2d 201, 205 (11th Cir.1991), cert. denied, --- U.S. ---, 112 S.Ct. 885, 116 L.Ed.2d 789 (1992). We conclude that the district court did not clearly err in its drug quantity calculation, and that its finding should be affirmed.

[8] Because only a small amount of methamphetamine was actually seized in this case, the district court considered, consistent with the Guidelines, evidence offered at sentencing to establish the amount of methamphetamine that could have been produced by the defendants' conspiracy. The relevant Guidelines commentary provides:

Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory

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CITE AS: 6 F.3D 735, *742)
involved.

U.S.S.G. s 2D1.4, comment. (n. 2) (November 1, 1990) (emphasis added). [FN5]

FN5. Effective November 1, 1992, Guidelines s 2D1.4, dealing with attempts and conspiracies for drug crimes, was deleted and consolidated with the substantive offense section at s 2D1.1. Application Note 2 was added to the commentary of the substantive offense guideline in s 2D1.1 as Note 12. U.S.S.G. App. C, amend. 447 (November 1, 1992). Those amendments were enacted for purposes of simplification and resulted in no substantive change.

The district court heard testimony from two expert witnesses, Dr. Terrence Owen for the defense and DEA chemist Harold Hanel for the Government. Owen testified that based on an estimated yield of 60%, 1.5 kilograms of methamphetamine could have been produced from the chemicals seized in this case, but that the process used by the conspirator's chemist, John Booth, would likely have produced only 150 grams. Hanel testified that 150 grams was a yield of only 1.5%-2% and that based on a 100% theoretical (and admittedly unattainable) yield, 6.1 kilograms could have been produced from the least abundant chemical precursor in Booth's clandestine lab, and 19.1 kilograms from the most abundant chemical. Based on all of the chemicals actually ordered, Hanel testified that a minimum of 18 kilograms and a maximum of 72.5 kilograms could be produced. Hanel also testified, however, that 50%-75% was a more realistic yield, which would reduce his estimates by as much as one-half. In light of this evidence, the district court concluded as follows:

The Court finds as a result of hearing the testimony of the expert chemical witnesses *743 the quantity of methamphetamine which could have been produced in the lab using all chemicals known to have been received during the course of this conspiracy is 1.8 kilograms.

Thus, the district court was presented with a range of estimates based on the chemicals received during the course of the conspiracy. At the low end were Dr. Owen's estimates of 150 grams producible using John Booth's methods or 1.5 kilograms using a more productive method, and at the high end were DEA chemist Hanel's estimates of 19.1 kilograms at 100% yield and 9.55 kilograms at 50% yield. The court placed the amount of methamphetamine for purposes of sentencing at 1.8 kilograms. The court properly used expert testimony about the chemicals acquired for use in the conspirators' clandestine lab to approximate the conspiracy's capacity for production of methamphetamine. United States v. Hyde, 977 F.2d 1436, 1440 (11th Cir.1992) (applying rule of approximation in context of offense of possession of listed chemicals for production of controlled substance), cert. denied, --- U.S. ---, 113 S.Ct. 1948, 123 L.Ed.2d 653 (1993). There being no clear error, we affirm the district court's finding with respect to the quantity of methamphetamine producible by this conspiracy.

2. Finding that "Pure Methamphetamine" Under the Guidelines Referred Only to "D-methamphetamine"

[9][10] The Government contends that the district court erred when it declined to find that the quantity of methamphetamine intended for production by the conspiracy was "Pure Methamphetamine" as used in Guidelines s 2D1.1(c). Under s 2D1.1(c), the base offense level for a quantity of "Pure

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(CITE AS: 6 F.3D 735, *743)

Methamphetamine" is higher than that for an equal amount of "Methamphetamine" and, thus, will yield a higher sentence. "Because the interpretation of the United States Sentencing Guidelines is similar to statutory interpretation, the district court's reading of the Guidelines is subject to de novo review on appeal." United States v. Worthy, 915 F.2d 1514, 1516 (11th Cir.1990). We conclude that the district court's decision was based on an erroneous interpretation of the Sentencing Guidelines and that its finding that the substance in this case could not be considered "Pure Methamphetamine" should be reversed. In reaching our decision, we first discuss the facts established at sentencing relating to the controlled substance the defendants sought to produce. We then examine Guidelines s 2D1.1 and its commentary in light of those facts. Finally, we draw on the decisions of other courts interpreting analogous language in 21 U.S.C. s 841, as well as recent clarifying amendments to s 2D1.1 and its commentary.

The experts who testified in this case agreed that there are three different methamphetamine forms: L-methamphetamine, which was described as an inert form with little or no physiological effects; D-methamphetamine, which has the active physiological effects characteristic of this drug; and DL-methamphetamine, which is composed of 50% L-methamphetamine and 50% D-methamphetamine. The conspiracy at issue in this case involved the manufacture of DL-methamphetamine. The district court determined, however, that "pure methamphetamine as used in the Drug Quantity Table refers to D-methamphetamine and thus ha[d] no application in this case." The district court apparently based its decision about the meaning of "Pure Methamphetamine" on the distinction between the inert L-methamphetamine and the more physiologically active D-methamphetamine, concluding that the more active form was "pure." We find that the district court erred in its conclusion that "Pure Methamphetamine" refers only to D-methamphetamine, a conclusion not supported by the Guidelines.

The Drug Quantity Table, U.S.S.G. s 2D1.1(c), [FN6] establishes base offense levels for drug trafficking offenses using a graduated *744 scale that increases the offense level for each incremental increase in the quantity of drugs involved. An explanatory footnote to s 2D1.1(c) provides, "In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater." U.S.S.G. s 2D1.1(c), n.* (November 1, 1990). [FN7] Thus, unlike other controlled substances listed in s 2D1.1(c), methamphetamine and PCP are to be quantified for sentencing using either the weight of a mixture or substance containing the drug, or the weight of the pure drug itself, whichever yields the greater offense level. The mixture to purity ratio at each level of the Drug Quantity Table is ten to one; therefore, it takes one-tenth the quantity of pure methamphetamine to yield the same offense level as a mixture or substance containing methamphetamine. See generally United States v. Brown, 921 F.2d 785, 789 & n. 2 (8th Cir.1990) (discussing Drug Quantity Table's approach to methamphetamine).

FN6. At the time of the defendants' sentencing, the relevant offense conduct section for drug trafficking conspiracies, s 2D1.4, provided that the base offense level should be set "as if the object of the

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(CITE AS: 6 F.3D 735, *744)

conspiracy ... had been completed." U.S.S.G. s 2D1.4 (November 1, 1990); see id. App. C, amend. 447 (November 1, 1992). Thus, s 2D1.1, applicable to drug trafficking offenses, applied to the defendants.

FN7. After the February 1991 sentencing in this case, the Guidelines were amended to replace references in the Drug Quantity Table to "Pure PCP" and "Pure Methamphetamine" with "PCP (actual)" and "Methamphetamine (actual)." U.S.S.G. App. C, amend. 395 (November 1, 1991). Because we apply the Guidelines in effect at the time of sentencing, *United States v. Marin*, 916 F.2d 1536, 1538 (11th Cir.1990), we will use terminology consistent with that used in the sentencing proceedings in the district court and will refer to pure methamphetamine.

We have never before addressed the Guidelines' use of "Pure Methamphetamine," but based on our reading of s 2D1.1 and its commentary, as well as the drug trafficking offense statute at 21 U.S.C. s 841, we hold that the distinction between methamphetamine and pure methamphetamine refers to the relative purity of any methamphetamine compound; it does not refer to a particular form of methamphetamine. As discussed above, the Drug Quantity Table in the Guidelines themselves distinguishes between "Methamphetamine" and "Pure Methamphetamine," but does not distinguish between any chemical forms of methamphetamine. Only in the commentary to s 2D1.1 do we find any reference to different chemical forms of methamphetamine. The commentary's Drug Equivalency Tables do distinguish "L-methamphetamine" from "Methamphetamine" and "Methamphetamine (pure)". For example, 1 gram of methamphetamine and 1 gram of methamphetamine (pure) equal 5 and 50 grams of cocaine, respectively, but 1 gram of L-methamphetamine equals only 0.2 grams of cocaine. U.S.S.G. s 2D1.1, comment. (n. 10) (November 1, 1990). [FN8] The lesser equivalency of the L- form in the commentary is consistent with the expert testimony in this case establishing that L-methamphetamine has far fewer physiological effects. At the time of sentencing in this case, the Guidelines made no further distinctions with respect to the various chemical forms of methamphetamine.

FN8. An amendment effective November 1, 1991, amended the equivalency table by providing for conversions to marijuana instead of cocaine and heroin. U.S.S.G. App. C, amend. 396 (November 1, 1991). In addition, "Methamphetamine (pure)" was replaced by "Methamphetamine (actual)," which is consistent with the use of methamphetamine (actual) in the Drug Quantity Table itself.

We recently addressed the less severe sentences under the Guidelines for the L- form of methamphetamine in *United States v. Patrick*, 983 F.2d 206, 208 (11th Cir.1993), where the defendant appealed his sentence, claiming that the district court should have determined his offense level based on the less potent L-methamphetamine. Because the Government's evidence established only that the drug involved was "methamphetamine" and did not specify which form, we reversed Patrick's sentence and remanded for a determination by the district court of the specific form of methamphetamine. *Id.* at 209-10. However, in *Patrick* we did not decide the definition of "Pure Methamphetamine" as that term is used in the Guidelines. And while our decision appears to have assumed

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CITE AS: 6 F.3D 735, *744)

that if the methamphetamine at issue there was not L-methamphetamine, it was D-methamphetamine, that assumption was not necessary to the Court's disposition of Patrick's appeal. The district court in Patrick did not specify which form of the drug was at issue: *745 L-, D-, or DL-. Patrick claimed it was L-, and the Government claimed it was D-. We remanded for a factfinding by the district court on the form of methamphetamine actually involved. If Patrick's contention was correct, he should have received a lower sentence based on the lower potency of L-methamphetamine as established by the Drug Equivalency Table and, therefore, the sentencing court could not simply assume the drug involved was the form that would yield the harsher sentence. Id. at 209. Because Patrick did not decide any issue related to purity or to the definition of "Pure Methamphetamine," however, that decision is not dispositive of this case.

Based on the express provisions of s 2D1.1, there is no support for the district court's determination that "Pure Methamphetamine" means only D-methamphetamine. The commentary to s 2D1.1 states that "[a]ny reference to a particular controlled substance in these guidelines includes all salts, isomers, and all salts of isomers." Id. s 2D1.1, comment. (n. 5). Except to the extent a particular molecular form of methamphetamine is treated separately by the Guidelines, then, we must read references to "Methamphetamine" as encompassing all forms of that substance. Moreover, the Sentencing Commission demonstrated that it knew how to distinguish the chemical forms of methamphetamine when it singled out L-methamphetamine for different treatment in the equivalency tables. See United States v. Koonce, 991 F.2d 693, 698 (11th Cir.1993) (relying on the well-established principle of statutory construction that the inclusion of one implies the exclusion of others to interpret Guidelines).

The expert testimony at sentencing in this case established that the form of methamphetamine that could be produced with the chemicals obtained by the defendants and the methods used in Booth's clandestine lab was DL-methamphetamine, not D-methamphetamine and not L-methamphetamine. The Government's expert stated that the distinction between D-methamphetamine and DL-methamphetamine did not involve issues of purity as the district court's finding in this case suggests; rather, DL-methamphetamine was simply a combination of methamphetamine's "enantiomers," the D- and L- forms. Enantiomers are like the right and left hand forms of the same compound. Thus, D-methamphetamine, rather than representing the "pure" form of methamphetamine, is merely one form of that chemical compound. It follows that 100% D-methamphetamine, like 100% DL-methamphetamine, would constitute 100% "Pure Methamphetamine" for purposes of sentencing under Guidelines s 2D1.1. (It is only because the Commission chose to distinguish L-methamphetamine from "Methamphetamine" and "Pure Methamphetamine" that 100% L-methamphetamine would not likewise constitute 100% "Pure Methamphetamine.")

While we find no case authority defining "Pure Methamphetamine" as used in the Guidelines, analogous cases dealing with the drug trafficking statute's mandatory minimum sentence provisions support our conclusion that the adjective "pure" is intended only to mean the relative purity of the methamphetamine compound itself, in whichever form. In fact, these cases rely in part for their holdings on the same Guidelines Commentary that supports our decision. In United States v. Stoner, 927 F.2d 45 (1st Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 129, 116 L.Ed.2d 96 (1991), the defendant

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(CITE AS: 6 F.3D 735, *745)

challenged the district court's imposition of a minimum mandatory 5-year sentence for conspiracy and distribution of methamphetamine. The district court sentenced Stoner under 21 U.S.C. s 841(b)(1)(B)(viii), which provides for a mandatory 5-year minimum sentence for offenses involving "10 grams or more of methamphetamine ... or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine." (emphasis added). Stoner argued that the statute's use of the word "or" to distinguish between methamphetamine and mixtures containing methamphetamine meant that the sentencing court could not remove the actual amount of methamphetamine from the mixture and sentence on the basis of the percentage of the mixture that was methamphetamine. Stoner, 927 F.2d at 46. In other words, Stoner argued that because he had a mixture and not pure methamphetamine, he could only be subject to the mandatory sentence *746 if he possessed more than 100 grams, regardless of the purity or concentration of methamphetamine in that mixture. The First Circuit rejected that argument, holding that the mandatory penalty could be triggered by either the net quantity of pure methamphetamine or the gross quantity of a mixture or substance containing any detectable amount of methamphetamine. Id.

Relying in part on Stoner, the Fourth Circuit rejected a similar argument involving application of the mandatory sentencing provisions to the defendants in *United States v. Rusher*, 966 F.2d 868 (4th Cir.), cert. denied, --- U.S. ---, 113 S.Ct. 351, 121 L.Ed.2d 266 (1992). In *Rusher*, the court also found support in the Guidelines, drawing a direct parallel between the alternative sentencing routes in the mandatory sentencing provisions of s 841 and the similar net purity or gross quantity alternatives for determining base offense levels for methamphetamine and PCP as explained in the footnote to the Drug Quantity Table. *Rusher*, 966 F.2d at 880 (quoting U.S.S.G. s 2D1.1(c), n. *). The *Rusher* defendants claimed that the 5-year mandatory minimum sentence provisions of the drug trafficking statute distinguished between "pure" methamphetamine and a mixture containing methamphetamine in such a way that, absent 100% purity in the drugs, the sentencing court could only sentence based on the 100 gram threshold for mixtures. Thus, because the defendants possessed only 72 grams of a "mixture" containing methamphetamine at between 86% and 91% purity, the district court had erred when it imposed the 5-year minimum. The Fourth Circuit rejected that argument and affirmed the district court's imposition of the minimum sentence concluding, "The only way to conduct this analysis is to multiply the purity of the drug times its quantity to obtain the amount of pure methamphetamine." Id.; see also *United States v. Alfeche*, 942 F.2d 697, 698-99 (9th Cir.1991) (relying on Guidelines' treatment of PCP and methamphetamine to hold 10-year minimum sentencing provision of s 841 applies to offenses involving either a net amount of 100 grams of methamphetamine or 1000 grams of a mixture containing methamphetamine). Likewise, we conclude that the only way to calculate the quantity of "Pure Methamphetamine" in determining a defendant's base offense level under s 2D1.1(c) is to multiply the purity of the mixture or substance times the weight of the mixture or substance.

A subsequent clarifying amendment to s 2D1.1 confirms the correctness of our reading of the Guidelines. That amendment replaced "Pure Methamphetamine" with "Methamphetamine (actual)" and added the following explanation: "The term [] 'Methamphetamine (actual)' refer[s] to the weight of the controlled

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(CITE AS: 6 F.3D 735, *746)

substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing [Methamphetamine] at 50% purity contains 5 grams of [Methamphetamine (actual)]." U.S.S.G. App. C, amend. 395 (November 1, 1991). While this clarification was not available to the district court, it supports our reading of the language of s 2D1.1(c) in effect at the time of sentencing. In addition, further amendments effective November 1, 1991, included an addition to the footnote after s 2D1.1(c) that defined the term "Ice" as a mixture or substance containing D-methamphetamine. U.S.S.G. App. C, amend. 370. This, the Guidelines' first express reference to the D- form of methamphetamine, offers additional support for our conclusion that, when the Sentencing Commission intends to distinguish D-methamphetamine from "Methamphetamine" or "Pure Methamphetamine," it can and will do so expressly. We have held previously that clarifying amendments to the Guidelines' commentary

constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would apply the affected guideline [and, thus,] ... courts should consider such clarifying amendments to the guidelines' commentary in interpreting the guidelines, even with regard to offenders convicted of offenses occurring before the effective date of the amendments.

United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir.1989). [FN9] For all of these reasons, *747 we conclude that the district court misinterpreted the Guidelines when it refused to consider for sentencing purposes the percentage of "Pure Methamphetamine" that would be present in the 1.8 kilograms of DL-methamphetamine it found could be produced by the conspiracy.

FN9. We recently noted in United States v. Wilson, 993 F.2d 214, 216 (11th Cir.1993), that in light of the Supreme Court's decision in Stinson v. United States, --- U.S. ----, ----, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993), application of an intervening Guidelines interpretation by commentary promulgated after the offense could run afoul of the Ex Post Facto Clause. In this case, however, the Commission's clarifying amendments did not overrule any prior constructions of s 2D1.1 but, rather, confirmed our reading of that section in the first instance. Therefore, this use of these clarifying amendments to the Guidelines commentary raises no ex post facto concerns.

III. CONCLUSION

Michael Spiker, Thomas Spiker, and Dorlis Spiker were not entitled to reductions for acceptance of responsibility. The district court correctly determined the quantity of methamphetamine the conspiracy could produce, but the court erred in not considering the purity of that substance at sentencing.

Therefore, we REVERSE the sentences of Michael Spiker, Thomas Spiker, Dorlis Spiker, and Larry Jessee, and REMAND for resentencing in accordance with this opinion. The judgments of the district court are in all other respects AFFIRMED.

BRIGHT, Senior Circuit Judge, concurring in part and dissenting in part:

I.

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[31]

CITE AS: 6 F.3D 735, *747)

CONCURRING/DISSENTING OPINION

I concur in the convictions, but would remand for resentencing of the Spikers (Lis, Michael and Thomas). I would affirm the other sentences imposed by the district court. In remanding the sentences of the Spikers, I would permit the district court to adjust the sentences.

In my view, the sentencing court retains sentencing prerogatives on the reversals of sentences and here should be afforded the opportunity to evaluate whether a proper basis exists for sentence reduction based on acceptance of responsibility pursuant to U.S.S.G. s 3E1.1. Even if the Spikers were not entitled to a reduction, resentencing would be necessary so that the district court could decide whether to consider or disregard what it might characterize as "partial acceptance of responsibility" in determining where in the guideline range to fix defendants' sentences. *United States v. Valencia*, 957 F.2d 153, 156 n. 4 (5th Cir.1992).

II.

I dissent from the majority's reversal striking down the district court's resolution of the drug quality issue. The district court concluded that the methamphetamine intended for production was "methamphetamine" and not "pure methamphetamine" for sentencing purposes under s 2D1.1(c). As will become apparent if it has not already, the majority embarks upon a journey through troubled waters emanating from complexities in the Guidelines.

A. Background

There are six forms of methamphetamine referred to in this case: methamphetamine, pure methamphetamine, D-methamphetamine, L-methamphetamine, levo-methamphetamine, and DL-methamphetamine. As discussed below, L-methamphetamine and levo-methamphetamine are sometimes lumped together and referred to as L-methamphetamine/levo-methamphetamine.

The 1990 Guidelines applied by the district court make two distinctions concerning methamphetamine: (1) between methamphetamine and pure methamphetamine, and (2) between methamphetamine, pure methamphetamine and L-methamphetamine/levo-methamphetamine.

The first distinction--between methamphetamine and pure methamphetamine--is found in the Drug Quantity Table of U.S.S.G. s 2D1.1(c) (1990) at pp. 2.42-.47. The table assigns a ten times higher relative offense level to pure methamphetamine (one gram of methamphetamine equals five grams of cocaine; one gram of pure methamphetamine equals fifty grams of cocaine). The asterisk-designated note at the end of the table states *748 that when calculating the offense level for methamphetamine, apply the greater of the level determined by: (1) the entire weight of the mixture or substance containing the methamphetamine, or (2) the entire weight of the pure methamphetamine.

The second distinction--between methamphetamine, pure methamphetamine and L-methamphetamine/levo-methamphetamine--is found in the Drug Equivalency Tables of U.S.S.G. s 2D1.1 at pp. 2.49-.52. This table also assigns a ten times higher relative offense level to pure methamphetamine when compared to methamphetamine, but adds a 250 times higher relative offense level to pure methamphetamine when compared to L-methamphetamine/levo-methamphetamine (one gram of L-methamphetamine/levo-methamphetamine equals .2 grams of cocaine; one gram of pure methamphetamine equals fifty grams of cocaine).

Thus, there are three types of methamphetamine identified for purposes of calculating a defendant's base offense level under the 1990 Guidelines:

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CITE AS: 6 F.3D 735, *748)

CONCURRING/DISSENTING OPINION

methamphetamine, pure methamphetamine, and L-methamphetamine/levo-methamphetamine.

B. The Record in this Case

A problem arose at sentencing because the defendants in this case were convicted of crimes involving DL-methamphetamine, which is not one of the three forms of methamphetamine identified in the 1990 Guidelines. In an attempt to resolve the problem, the district court considered two factors: the subsequent 1991 revisions to the Guidelines and expert testimony.

The Commission made two relevant changes in the November 1991 amendments to the Sentencing Guidelines. The first is in the Drug Quantity Table in s 2D1.1(c) at pp. 76-82 (1991), where "Pure Methamphetamine" is changed to "Methamphetamine (actual)." The official commentary concerning this change provides, in relevant part:

'The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual).'

....
This amendment clarifies the operation of the guideline in cases involving methamphetamine or PCP by replacing the terms 'Pure PCP' and 'pure methamphetamine' with 'PCP (actual)' and 'methamphetamine (actual),' and by providing an example of their application.

U.S.S.G. App. C. P 395 (1991).

The second change is the addition of a new drug called "ice" to the Drug Quantity Table in s 2D1.1(c) at pp. 76-82 (1991). For purposes of establishing a base offense level, "ice" is treated the same as methamphetamine (actual). The asterisk-designated note at the end of the table (p. 82) includes the following definition:

'Ice,' for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

U.S.S.G. s 2D1.1(c) asterisk-designated note at p. 82 (1991).

Both the Government and the defendants had chemists provide expert testimony at trial: Harold Hanel for the Government, and Dr. Owens for the defendants. Both stated that DL-methamphetamine consists of 50% D-methamphetamine and 50% L-methamphetamine, of which the D-methamphetamine is the only physiological active ingredient and the L-methamphetamine is inactive. Owens testified that DL-methamphetamine is not the purest form of the drug, and that the purer D-methamphetamine could be purified from the L-methamphetamine part of the DL-methamphetamine to produce a more potent form of methamphetamine. Owens also testified that D-methamphetamine is processed from a completely different primary chemical, ephedrine, and involves a completely different manufacturing process.

Each expert testified that DL-methamphetamine has one-half the potency and effect of D-methamphetamine. Owens conceded that in pharmaceutical "parlance" D- and DL- are used interchangeably, but argued this is inaccurate because the two are different. Hanel conceded that the DEA *749 distinguishes between D-, DL- and L- in its substance reports.

Apparently, the Government's report merely identified the substances confiscated in this case as "methamphetamine," and Hanel could not determine
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(CITE AS: 6 F.3D 735, *749)

CONCURRING/DISSENTING OPINION

from the report whether the methamphetamine was D- or DL-. Owens stated that perimeter readings are necessary to make this determination and that Booth (defendants' cook) did not use the required equipment in his process.

From this information--the 1991 Guidelines amendments and the testimony of Owens and Hanel--the district court concluded that the type of drug involved in the crimes was "methamphetamine," not "pure methamphetamine."

C. Discussion

The majority states that "the distinction between methamphetamine and pure methamphetamine refers to the relative purity of any methamphetamine compound; it does not refer to a particular form of methamphetamine." Maj. op. at 744-45. Then, in contravention of the expert testimony elicited, the majority concludes that

D-methamphetamine, rather than representing the 'pure' form of methamphetamine, is merely one form of that chemical compound. It follows that 100% D-methamphetamine, like 100% DL-methamphetamine, would constitute 100% 'Pure Methamphetamine' for purposes of sentencing under Guidelines s 2D1.1. (It is only because the Commission chose to distinguish L-methamphetamine from 'Methamphetamine' and 'Pure Methamphetamine' that 100% L-methamphetamine would not likewise constitute 100% 'Pure Methamphetamine'.)

Maj. op. at 745.

D. Additional Comments

Not surprisingly the reader is now experiencing great confusion due to the convoluted chemical rhetoric in the minority and majority opinions. In another case, this writer said:

Now, if the reader is confused by the complexity of a correct application of the guidelines in this case, that confusion is understandable. The guideline system of sentencing has become exceedingly opaque. We judges do the best we can to interpret the increasingly bulky, almost incomprehensible code of the guidelines. Nevertheless, without an overhaul of the entire guideline system, it is nearly impossible to sentence offenders in a straightforward and equitable manner. One commentator characterized the federal guidelines as an "incredibly insane, complicated system." Cris Carmody, Sentencing Overload Hits the Circuits, Nat'l L.J., Apr. 5, 1993, at 32, (quoting Judy Clarke, Executive Director, Federal Defenders of Eastern Washington). Ms. Clarke's somewhat pejorative comments call attention to the frustrations of lawyers, judges and probation officers who must try to understand the complexities of the system.

The federal sentencing guidelines system cries out for change. See Marc Miller & Daniel J. Freed, Suggestions for the President and the 103rd Congress on the Guideline Sentencing System, 5 Fed.Sent.R. 187 (Jan./Feb. 1993).

United States v. Smith, 997 F.2d 396, 399 (8th Cir.1993) (Bright, J., dissenting). In a separate concurrence to Smith, Judge John R. Gibson wrote, in part:

I agree that the sentencing guideline system cries out for change. The guidelines have not eliminated disparity, but have created a complex hypertechnical system consuming great amounts of judicial time for both trial and appellate judges. It is to be hoped that the legislative and executive branches will give careful review to the system. Perhaps a first step would be

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CONCURRING/DISSENTING OPINION

o make the guidelines simply that, guidelines.

I at 398.

I dissent from the majority's decision reversing the district court's resolution of the drug quality issue. In my view the trial court made a actual determination relative to the confusing material in the guidelines. No basis exists for calling that determination an error of law or clearly erroneous.

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008-95

THE SECRETARY OF STATE
WASHINGTON

February 17, 1995

Dear Mr. Chairman:

The Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) significantly increased the penalties for violations of passport and visa statutes (Title 18 United States Code, Sections 1541-1547) which the Department of State has responsibility for enforcing. This was an important step in establishing a more substantial deterrent to these crimes that threaten the integrity of U.S. passport and visa documents, affect the ability to control our borders, and support other serious criminal activities.

To ensure that the actual sentences imposed for these offenses are also increased, the relevant sentencing guidelines (Section 2L2.1 and 2L2.2) must be amended. The Department of State strongly urges the Commission to include amendments raising these guidelines when it submits its proposals to Congress later this year.

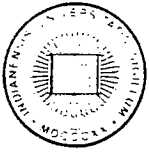
Your consideration of this important matter and the Department's position is appreciated.

Sincerely,



Warren Christopher

The Honorable
Richard P. Conaboy,
Chairman,
United States Sentencing Commission.



INDIANA UNIVERSITY

DEPARTMENT OF CRIMINAL JUSTICE
302 Sycamore Hall
Bloomington, Indiana 47405
(812) 855-9325

March 3, 1995

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

RE: criminalization of HIV transmission

To whom it may concern:

I am a social anthropologist who does ethnographic research on AIDS. More specifically, I am in preliminary stages of a research project on the criminalization of intentional HIV transmission. This letter is in response to the U.S. Sentencing Commission's request for public comment published in the Federal Register, January 9, 1995. I am an assistant professor in the Department of Criminal Justice at Indiana University, however, the opinions expressed herein reflect only my own views.

I believe that it is important for states be able to fairly and effectively prosecute cases of intentional, malicious HIV transmission between individuals and to be able to prosecute organizations such as blood banks for negligence leading to HIV infection of clients. I also believe that it would be advantageous to achieve greater consistency in the way in which such cases are now being handled in the courts. However, given the current state of scientific understanding of the biology and epidemiology of HIV transmission, and the current state of social scientific understanding of the impact of education and counseling on sexual desire, denial, and test-seeking behavior, *I believe it would be a mistake to enact federal laws that make HIV transmission a crime or HIV a "dangerous weapon" or that the definition of "serious bodily injury" or that "permanent and life-threatening bodily injury" should be amended to include HIV-infected bodily fluid.*

The following is an example of how our biological and epidemiological knowledge is insufficient to provide a strong foundation for legal decision-making:

If enacted, the types of laws under consideration would have to place great weight on the significance of the HIV antibody test in determining whether or not someone "knowingly" infected another sexually. As has been known for some time, there is a long latency period (six months or more) between onset of infection and antibody production, so that someone may receive a negative test and yet still be infected. In a study of over 9,000 individuals, researchers from the University of Michigan have found that "a person's chances of getting HIV through unprotected sex was as high as 3 in 10 if a male partner had been infected in the past 60 days. Afterward, once the presence of antibodies makes it possible to detect HIV infection in routine HIV tests, the risk of infection declines to about 3 in 1,000 and stays that way in

an asymptomatic phase which can last for years." In other words, said Carl Simon, a professor of economics and public policy at the university, "*A person with a negative blood test may have a better chance of being highly contagious than a person with a positive test,*" (*AIDS Policy and Law* 1995, v. 10, n. 1, p. 5). The implications of this are staggering in terms of epidemic spread. It points to a much deeper problem than the potential negative impact of proposed laws on the willingness of persons to be HIV tested, challenging the very use of the HIV antibody test as a primary basis for legal intervention in the epidemic, i.e., *if* the goal of criminalizing HIV transmission is to stem the spread of the epidemic, rather than simply punitive.

The following is an example of how our social scientific knowledge is insufficient to provide a strong foundation for legal decision-making:

There has been little research on the question of disclosing HIV status to sex and needle-sharing partners and/or business clients (e.g. prostitutes, blood banks). From what is known so far, it seems that it is not uncommon to disguise a positive HIV status from people with whom one is not intimate in a steady, long-term relationship. There has been little research done evaluating the various forms of counseling that take place when a person receives the news of a positive HIV serostatus. What has been done, seems to suggest that denial mechanisms are quite strong in the initial phases of someone "knowing" of their infection. These denial mechanisms seem to be natural defense mechanisms which may be little affected by initial counseling and education sessions, and would be very difficult to separate from the question of "intent" in the courts. Without evaluation of current counseling techniques, and without an understanding of denial mechanisms (on the individual and corporate level), it is unwise to institute laws and enforcement mechanisms that target HIV positive persons. Such laws and enforcement mechanisms could set the stage for widespread discriminatory, and indeed persecutory, actions against classes of HIV positive persons who are more easily apprehended (gay men, prostitutes, injecting drug users). Beyond the unfairness of this, such legal mechanisms would also provide a dangerously false impression that the epidemic is being controlled, when indeed, the truth is quite the opposite.

Thank you for your attention. Please let me know if I can be of any further service,

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Kane". The signature is written in dark ink and is positioned above the printed name.

Stephanie Kane, Ph.D.

010-95

Congress of the United States
Washington, DC 20515

February 16, 1995

The Honorable Richard P. Conaboy
Chairman
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Chairman:

We are writing to urge the Sentencing Commission to take action to strengthen the sentencing guidelines applicable to passport and visa offenses. The Commission sought comment in the January 9, 1995, Federal Register on this particular matter.

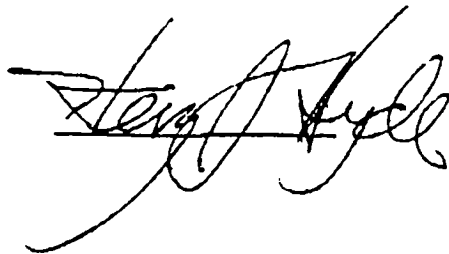
As you know, Section 13009 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) significantly increased the statutory maximum penalties for passport and visa offenses (18 U.S.C. 1541-1546). This provision addressed the growing problems associated with documents which permit illegal travel in and out of the United States and which facilitate numerous other types of crimes. It is important that revised sentencing guidelines now be promulgated to ensure that Section 13009 is fully and effectively implemented.

In almost all cases, the maximum fines and periods of imprisonment for violations of these statutes were increased to not more than \$250,000 and/or ten years. A new Section 1547 set the maximum imprisonment at fifteen years if the violation had been committed to facilitate a drug trafficking offense and to twenty years if committed to facilitate an act of international terrorism.

The sentences called for by the current base offense levels for these statutes range from 0 to 10 months imprisonment. This is unacceptable. To provide a meaningful deterrent to those who would violate our passport and visa laws, actions should now be taken to raise the base offense levels, as well as to provide appropriate penalty enhancements for facilitating drug trafficking, terrorism and any other criminal activity.

We thank you for your attention to this important matter and stand ready to be of assistance in securing adoption of meaningful and effective guidelines.

With best wishes,

A handwritten signature in cursive script, appearing to read "Henry J. Hyde", written over a horizontal line.

BAG\jpm\teh

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles Schuman", written over a horizontal line.

[14]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MICHIGAN
UNITED STATES COURT HOUSE
LETOURNEAU SQUARE

CHIEF CLERK
GERALD E. ROSEN
UNITED STATES DISTRICT COURT

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March 3, 1995

Judge Richard P. Conaboy
Chairman
U. S. Sentencing Commission
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N. E.
Washington, D. C. 20002-8002

Re: Proposed Amendments to Immigration Fraud Guidelines

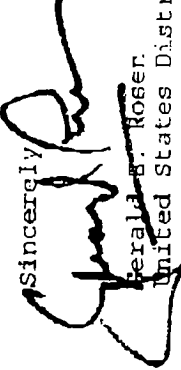
Dear Judge Conaboy:

I write to support the proposed amendments to the passport and visa fraud guideline provisions published in Volume 60, No. 5, of the Federal Register for Monday, January 9, 1995, at pp. 2440-41.

As I apprehend the thrust of the proposed changes, the guidelines would be amended to increase the base offense levels -- or, in some cases, to provide specific offense characteristic enhancements -- for crimes involving immigration document fraud. As a judge on the District Court of an international border state, I believe that current guidelines do not permit sufficient reflection of the often very serious criminal activity that is attendant to the seemingly more benign crimes of immigration fraud. Too often, we know that passport or visa fraud is simply facilitative of more malignant and socially destructive criminal conduct. By enhancing sentences to specifically reflect the true nature of those crimes, in addition to increasing the base penalties for the underlying passport and visa crimes, you will be giving courts and prosecutors more effective tools to deal directly with the true objectives of the fraudulent immigration activity.

In summary, I wholeheartedly support these proposed amendments.

With best wishes, I am

Sincerely,

Gerald E. Rosen
United States District Court

bcc: G. Russell



012 - 95

United States Department of State

The Inspector General

Washington, D.C. 20520-6817

March 2, 1995

The Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, DC 20002-8002

Re: Notice of Proposed Amendments to Sentencing Guidelines, 60 FR
2430 (January 9, 1995)

Dear Mr. Chairman:

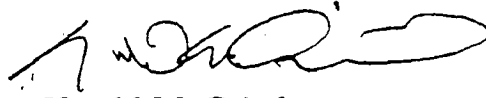
I am writing to express my strong support for Proposed Amendment 23(B) to the federal sentencing guidelines which would increase the base offense levels for passport and visa offenses.

We were pleased that Section 130009 of the Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) contained significant increases in the maximum penalties for violations of passport and visa statutes (Title 18, United States Code, Sections 1541-1547). We understand that to make sure that the actual sentences imposed by judges for these offenses are also increased, the federal sentencing guidelines must be amended. Therefore, we urge you to adopt the proposed amendment, published for comment, which consolidates guideline sections 2L2.1 and 2L2.2 concerning passport and visa offenses, and provides additional enhancements if the offense was committed to facilitate certain unlawful conduct.

The Office of Inspector General (OIG) conducts investigations of passport and visa fraud under the authority of the Inspector General Act of 1978, as amended (5 U.S.C. app. 3). The OIG's focus is on internal employee corruption cases, some of which involve bribery and extortion. Passport and visa fraud cases currently comprise approximately 20% of our caseload. Increasingly, these cases involve identification documents which are being used by international criminal organizations in the pursuit of criminal activities, such as narcotics trafficking, terrorism, prostitution and alien smuggling. Such cases clearly warrant stiffer penalties. In addition, we believe that increased penalties for the more conventional visa and passport offense cases are also necessary to ensure the integrity of the passport and visa issuance process, to vigorously enforce existing passport and visa fraud statutes, and ultimately to provide a stronger deterrence to passport and visa fraud.

Thank you for considering our comments on the proposed amendments.

Sincerely,

A handwritten signature in dark ink, appearing to read "H. W. Geisel", with a stylized flourish at the end.

Harold W. Geisel
Acting Inspector General

TO: UNITED STATES SENTENCING COMMISSION
 #1 COLUMBUS CIRCLE, NE
 SUITE 2-500, SOUTH LOBBY
 WASHINGTON D. C. 20002-8002

ATTENTION: PUBLIC INFORMATION

FROM: C.U.R.E. (CITIZENS FOR THE REHABILITATION OF ERRANTS) because there are now over 95,000 federal prisoners

SUBJECT: REQUEST FOR PUBLIC COMMENT (published in Volume 60, No. 5 of the Federal Register dated 1/09/95 at pages 2430-2469)

C.U.R.E. would like to offer the following comments and proposals relevant to the published request of the Commission. These comments are in the numbered order chosen by the Commission:

1. HIV should not be treated in a class by itself. Other infectious diseases should be treated in a similar fashion (i.e. if sexual activity with intent to expose another to HIV carries a criminal penalty, the same should hold true for hepatitis, tuberculosis, etc.). Furthermore, anyone purposely exposing another to infectious disease should be held criminally responsible (including prison and jail personnel).
2. The words "physical contact" should be replaced with "bodily injury" in §2A2.3(a)(1). Minor physical contact (like a push) should not carry the same penalty as physical contact that results in bodily injury. There should be no cross-reference to §2A2.3 because an offense that is not "aggravated," so as to carry a felony conviction, should not be treated as such. The criteria for "aggravated assault" carries with it penalties that are self-supporting.
3. The base offense levels for involuntary manslaughter are adequate as is. Adequate punishment for a crime involving no criminal intent is already applied. For those egregious situations that arise, a judge can now depart upwards twice the number of months as previously was the case.
4. C.U.R.E. feels that courts should not be involved in family custody disputes, particularly when there are conflicts in court orders from foreign jurisdictions. There should be no further enhancements for parents abducting their own children on top of the existing penalties.
5. C.U.R.E. feels that there should be no additional enhancements in §2A3.1 Extraordinary situations can be dealt with by sentence departures. There are already enough enhancements to deal effectively with violent sexual abuse.
6. C.U.R.E. favors Option #1 to reflect that death to a victim must be found to have resulted from the offense beyond a reasonable doubt. A defendant should never face the death penalty using a preponderance of the evidence standard which can be skewed by prosecutorial misconduct or wilful withholding of exculpatory evidence.
7. C.U.R.E. feels the proposed amendments are more than adequate to support use of upward departures for those who have committed more than one of the same type crime. Higher offense levels because of the similarity of prior conduct (which might be quite minor compared to the instant offense) is not warranted.
8. C.U.R.E. favors Option #2 leaving discretion for but another enhancement to the judge in the case, rather than making an enhancement mandatory.

9. C.U.R.E. strenuously objects to the definition of a "major drug offense" to include Title 21 U.S.C. §846 indiscriminately, since that section can include drug conspiracies involving tiny amounts (parts of grams). Since Title 21 U.S.C. §841(b)(1)(A) or §960(b)(1) also involve amounts that are mixtures (involving tiny amounts of drugs), offenses under these subsections cannot remotely be called "major drug offenses" and should not be used as the basis for any additional enhancements in any situations. Present penalties are adequate for reckless endangerment.
- 10[A]. Why should a violation of 18 U.S.C. §1791 carry greater punishment than the mandatory minimum level of 26 (see cross-reference of §2D1.2 to §2D1.1), when the amount involved is the simple possession of very small amounts of drugs for personal use by mainly narcotic addicts? There is no reason to enhance this punishment any more than the 63 to 150 months already available under Level 26.
- 10[B]. The appropriate offense levels for simple possession of controlled substances in correctional facilities should be the levels set out in §2D1.1, plus the enhancement stated in §2D1.2(a)(2).
11. The enhancements set out in §2D1.2 are more than adequate for drug trafficking in protected locations, simply because criminal intent is not a stated requirement for violation of Title 21 U.S.C. §860. It is not fair to further penalize those who are ignorant of an obscure statute and who had no intention to violate that statute. There should be absolutely no enhancement when the Government chooses the location for the crime.
12. C.U.R.E. takes no position on Proposed Amendment #12.
13. C.U.R.E. objects to the wording of subsection (2) of Proposed Amendment #13 because the phrase "had reasonable cause to believe" severely inhibits a finding of guilt beyond a reasonable doubt, which is a cornerstone of criminal behavior in this country. Nobody should be found guilty of a crime only because the Government, acting through an AUSA, finds that a Defendant should have "had reasonable cause to believe" that perfectly legal behavior was a prelude to illegal behavior. The new statute [21 U.S.C. §843(a)] should itself be declared unconstitutional.
14. C.U.R.E. urges adoption of Option #1 as simpler and more appropriate for hate crime offenses, including implementation of new guidelines for penalty provisions of the Freedom of Access to Clinic Entrances Act of 1994.
15. C.U.R.E. has no comment on this Proposed Amendment.
16. C.U.R.E. favors Option #1, which results in a base offense level of 6 for transfer of a firearm to a juvenile. Such transfers are often by other youngsters, who should not be treated as adults.
17. The enhancement directive from Congress for semi-automatic firearm involvement in crimes of violence or drug trafficking should be implemented only against firearms more dangerous than other firearms, and only where the firearm is actually "involved" in the crime (i.e. not locked in somebody's car trunk). Congress' directive was specific and the Commission should not expand the directive to other crimes.
18. C.U.R.E. favors Option #2, where an application under §2K2.4 would include a recommended departure when the sentence (combined with the sentence of the underlying crime) does not provide adequate punishment. Discretion should be vested in the judge to determine an appropriate enhancement in lieu of a specific enhancement table.
19. The definitions for crime of violence and drug trafficking offense should be con-

sistently the same as those used in §4B1.1, which would eliminate liability for burglary of abandoned buildings and using a telephone to facilitate a drug distribution - crimes which may actually have nothing to do with violence or drugs. The current offense levels in the guidelines should not be increased.

20. C.U.R.E. favors Option #1 and believes that the existing penalties are adequate for these offenses and that no further upward enhancements serve any public purpose.

21. C.U.R.E. believes that the penalty for a conspiracy to violate Title 21 U.S.C. §924(c) should be referenced only to that section and should not be referenced to a guideline for an underlying offense for which there is no relevant conduct attributed to the Defendant.

22[A]. C.U.R.E. opposes any increase in the guidelines for §2L1.1.

22[B]. C.U.R.E. opposes penalties for reentry of aliens after conviction of a felony being extended to misdemeanors.

22[C]. C.U.R.E. opposes the suggested increases in base offense levels for these immigration offenses as suggested by the DOJ.

22[D]. C.U.R.E. opposes this DOJ suggestion for upward departures.

23[A]. C.U.R.E. opposes any change in §§5K2.9 & 5K2.15 guidelines for passport offenses because the existing guidelines adequately cover the offenses.

23[B]. C.U.R.E. opposes this DOJ Proposed Amendment because it skews the penalties for non-violent passport crimes to unwarranted terms of incarceration.

24. C.U.R.E. favors the addition of a non-binding recommendation of a pre-set upward enhancement for a felony that is intended to promote international terrorism.

25[A]. C.U.R.E. favors a two level adjustment commensurate with the adjustment for abuse of trust for involving a person under the age of 18 in other than a drug crime.

25[B]. C.U.R.E. agrees with this DOJ Proposed Amendment for using a minor to commit a crime.

26[A]. C.U.R.E. suggests any enhancement be left to a judge's discretion.

26[B]. C.U.R.E. has no comment regarding this Proposed Amendment.

27[A]. The present guidelines provide sufficiently stringent punishment for crimes against the elderly. There should be no enhancement unless a crime against an older person was committed knowingly and intentionally.

27[B]. C.U.R.E. agrees with this Proposed Amendment.

27[C]. Current victim-related adjustments are adequate for frauds against the elderly; a counterpart presumption for vulnerability of younger victims (under 16) should be established; and, a telemarketing fraud should be treated the same as any other fraud.

28. No action need be taken because the issue is already covered by §5G1.1.

29. C.U.R.E. takes no position on this Proposed Amendment, which is likely to be affected by currently proposed Congressional legislation.

30. C.U.R.E. takes no position on this Proposed Amendment.
- 31[A]. C.U.R.E. has no comment on this Proposed Amendment.
- 31[B]. This proposed amendment of §7B1.4 should specifically recite the old wording of Note 5 that the Court has discretion not to impose reimprisonment for failure of a drug test. There are many reasons why false positives come up on drug tests (i.e. a releasee should not be subject to incarceration merely because he ate a poppy seed roll, etc.). This Proposed Amendment does not adequately deal with the problem.
32. C.U.R.E. makes no comment to this Proposed Amendment.
33. C.U.R.E. urges adoption of Option C. The drug offense levels are too high because use of prosecutorial discretion for enhanced sentences makes them that way. Neither society's interests nor the drug dealer need the enormous amount of time in prison that is presented by the current guidelines and/or Options A or B.
34. C.U.R.E. urges adoption of a maximum level of 28 for those qualifying for a Mitigating Role in a drug offense. C.U.R.E. further urges a maximum level for mitigating roles in drug offenses where ingestion of the drug cannot be done intravenously up to a level of 20 (i.e. marijuana, LSD and other pill offenses would fit this category).
- 35[A]. C.U.R.E. opposes adoption of this amendment. Persons who are not criminally responsible should not be subject to enhancements.
- 35[B]. C.U.R.E. makes no comment on this Proposed Amendment.
36. C.U.R.E. opposes adoption of this Proposed Amendment. First, the words "leader" and "organizer" have never been sufficiently defined and are always manipulated by the prosecution. Second, the Amendment affords far too much discretion to AUSAs to utilize the enhancement. Third, so-called "leaders" and "organizers" are already sufficiently punished. Fourth, a very small amount of drugs would now result in a very large sentence just because of this enhancement. C.U.R.E. further opposes the alternative proposal by the Practitioner's Advisory Group because all firearm offenses in conjunction with drug offenses are already adequately enhanced under Title 18 U.S.C. §924(c).
37. C.U.R.E. strongly urges adoption of this Proposed Amendment to equate all marijuana plant cases to 100 grams per plant.
38. C.U.R.E. strongly urges adoption of a 1:1 ratio between cocaine and crack offenses because there is no scientific evidence of any difference between the two.
39. C.U.R.E. favors a twelve month continuous window on drug crimes for Option #1 because large drug importation schemes may be only one-time affairs. C.U.R.E. also supports the adoption of Option #2.
40. C.U.R.E. strongly urges adoption of this Amendment, so that Defendants are no longer punished for sale or possession of "filler." C.U.R.E. has no position on FAMM's proposal to reduce the methamphetamine ratio relative to other substances (penalties for all drug offenses are still far too high).
41. C.U.R.E. supports adoption of this Amendment so that Defendants are not penalized for "filler."
42. C.U.R.E. takes no position on the hashish/oil amendment; supports adoption of a dry marijuana weight distinction; takes no position on the Commission's definition of marijuana; takes no position on the addition of two obscure drugs for equivalency pur-

poses; opposes the loss of distinction between l-meth (weak) and d-meth (stronger); opposes a rebuttable presumption that if a weapon is present, it is connected with the offense (since most are not)); opposes the new wording of Note 12 to §2D1.1 because it still allows the Government to control offense severity in reverse-sting buys; supports adoption of Note 21 allowing a Defendant to rebut what was reasonably foreseeable in an unusual case; supports adoption of theoretical presumptions for uncompleted drug manufacture cases, but with different percentages for different drugs which more closely mirror reality; opposes Option #3 for drug offenses involving part of the amount for personal use because the Ninth Circuit approach is more realistic (placing a burden on the Defendant to rebut such a presumption may be an impossibility); supports the adoption of Additional Note 2 to §2D1.2, so that the Government cannot determine the location of a drug transaction to enhance the Defendant's sentence; supports the miscellaneous amendments to Application Note 1 of §2D1.8.

43. C.U.R.E. supports adoption of Option #1 of this Proposed Amendment, so that degree of bodily injury and number of participants in the offense carry more weight than the amount of drugs in the crime to determine the degree of punishment.

44. C.U.R.E. favors the use of Level 12 in subsection (a)(2) and Level 6 in subsection (a)(3) of §2S1.1 for setting Offense Levels for money laundering offenses. C.U.R.E. objects to the absence of a specific definition of the word "sophisticated" when adding two levels for such activity. Proposed Table §2S1.1 should not replace the Table in 2F1.1 because the inflated increase in levels is far too high. A downward departure for the Government influencing the amount of money in the crime should be recommended by an Application Note.

45. C.U.R.E. strongly urges changes in the structure of Supervised Release. §5D1.1 should be amended to eliminate required supervision in every case. §5D1.2 should be amended to reduce terms of Supervised Release. Judges should be given complete discretion to set and amend Supervised Release terms.

46. C.U.R.E. supports adoption of Option #2 for §5G1.3(c), so that judges have as much discretion as possible to adjust punishment to individual Defendant characteristics in the case of over-lapping offenses and sentences.

C.U.R.E. thanks the Commission for the opportunity to provide input to the rule-making process that affects all those soon-to-be incarcerated and those already in federal facilities.

C.U.R.E. hopes that the Commission will consider the plight of those very sick and terminally ill elderly federal prisoners and come up with a plan for a dignified release. C.U.R.E. also urges that any measures that shorten the terms of incarceration that take effect as new amendments will also be made a part of §1B1.10 for those already incarcerated.

DATED, this 24th day of February, 1995.

PUBLIC COMMENT FROM MARIJUANA POLICY PROJECT (MPP) (DOCUMENT 014-95,
PAGES 49-54) TRANSFERRED TO WRITTEN TESTIMONY BINDER

JONES, GILBREATH, JACKSON & MOLL

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MAILED
IN OKLAHOMA

March 2, 1995

ATTN: Public Information
United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-800

Gentlemen:

I am opposed to mandatory federal sentencing guidelines as I believe discretion should be left with the judge. Furthermore, the current war on drugs is a failure. Our prisons are overcrowded, courts are congested, violence is at a high level, the availability of drugs has not been reduced, and the whole thing is costing too much money. A new approach needs to be considered.

Be that as it may, I have some comments concerning the proposed amendments to the sentencing guidelines.

1. Drug purity. I support the new guideline which I understand would base the sentencing on the actual amount of the drug in a powder mixture instead of the entire mixture.

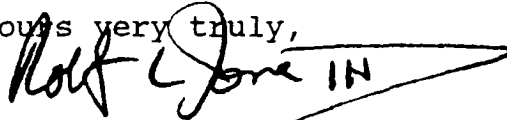
2. Methamphetamine enhancement. It is my information that methamphetamine is now enhanced five to one (1 gram met. -5 grams cocaine) for sentencing purposes as compared to cocaine. Is there a rational basis for this distinction? I thought both drugs were equally bad. One to one would seem to be the desired ratio.

3. Precursor chemicals. When labs are found but no drugs, a determination is made about how much drug could be produced with the chemicals on hand. I understand the current law is you calculate on a 100 percent yield using the most abundant chemical. I would think as a matter of practicality, it would only be possible to produce a drug in the amount of the least abundant chemical.

There are many people in our prisons for drug related offenses who have learned their lesson. They are not violent and not a threat to society. Therefore, it is important that these amendments be made retroactive to reduce the sentences of those in prison and to make room for violent offenders. Protecting society by removing the violent offenders from the street should be our number one priority.

Your consideration of these views is appreciated.

Yours very truly,

A handwritten signature in cursive script that reads "Robert L. Jones III". The signature is written in dark ink and is positioned above the printed name. A long, sweeping horizontal line extends from the end of the signature to the right.

Robert L. Jones, III

cp



COMMITTEE ON CRIMINAL LAW
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March 6, 1995

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

Dear Judge Conaboy:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, I appreciate the opportunity to respond to the proposed amendments and issues for comment published for consideration for the 1995 guideline amendment cycle.

After careful analysis, we have decided to focus on a few amendments which we believe merit the most serious consideration this cycle. We particularly urge the Commission to adopt amendments involving role, supervised release, and undischarged sentences. Our comments on those proposed amendments are outlined in the first few sections below. In addition, we have commented on some of the proposed amendments which would implement the Violent Crime Control and Enforcement Act of 1994, and some of the proposed drug amendments.

I. ROLE AMENDMENTS (Amendments 34-35)

The centerpiece of our presentation this year is the need to refine and improve the role guidelines. The Criminal Law Committee believes that

change in this area is of paramount importance and long overdue. The Committee applauds the work your staff has done in generating the proposed role amendments, attempting to identify and utilize factors which more accurately define what constitutes an aggravating or mitigating role in any particular offense. While the Committee strongly supports the concept of the proposed amendments, we also believe that further refinements are essential.

Need for Change

The role adjustments potentially impact almost every criminal sentence. The present adjustments are not adequately explained or defined, which is perhaps one reason why the role adjustments have been seriously under-utilized to date.¹ For example, there is a two-level distinction between a minimal and minor participant. The former is defined only as one "among the least culpable of those involved in the conduct of a group," while the latter is defined as one "who is less culpable than most other participants" but not enough to be minimal. Similarly, the aggravating adjustments make distinctions between one who is "an organizer or leader" and one who is a "manager or supervisor." We strongly believe that these distinctions are so gossamer that they strip the guidelines of their potential real value. The vice is compounded by the fact that different guideline scores result from the use of these very imprecise terms. As a result, judges are frequently inclined to simply avoid going down a road that is so poorly marked. Our beliefs are confirmed by tests recently conducted by the Probation Advisory Group, which concurs that major reform is needed in this area.

The role adjustments that we support would further the goal of simplifying the guideline system. Since role adjustments apply day in and day out in virtually every case, we believe that the role guidelines should be amended now, regardless of what action the Commission chooses to take or not take with respect to drug guidelines. In that connection, however, the Judicial Conference has repeatedly urged that sentences in drug cases be driven less by drug quantity. It is our firm belief that a realistic, practical scheme of making role adjustments would go a long way toward balancing the quantity factor in drug cases. We further believe that such an adjustment would be far better than attempting to totally remove quantity from the sentencing formula and would also be more logical and appropriate than ad hoc efforts to arbitrarily adjust some present drug offense levels.

¹ The Commission's 1993 Annual Report, page 88, indicates that only approximately 10% of defendants received any mitigating role adjustment in 1993: 3% received "minimal," 6.5% received "minor," and .6% received between minor and minimal. Only 7.3% of defendants received any aggravating role adjustment in 1993: 2.4% received +4, 1.6% received +3, and 3.5% received +2.

Our Proposal

While the Committee strongly endorses the concept of the currently proposed role amendments, we believe that the proposed role amendments are too lengthy and too complicated. Moreover, to a considerable extent the amendments are still overly mechanical and rigid, considering the fact that, as stated in one of the proposed application notes, the difference in roles in any particular case is always one of degree, depending upon the presence and intensity of various factors. For that reason, the cornerstone of our proposal is that there be only a "mitigating" or an "aggravating" role adjustment. One could receive an increase or decrease of anywhere from one to four levels, depending upon the number and intensity of the factors existing in that particular case. More specifically, our proposal would include the following significant features:

1. The adjustment would be simply an "aggravating role" or a "mitigating role" adjustment. Both guidelines would be similar, and symmetrical.
2. The court would be asked to consider a list of factors, and the court would determine if the defendant's role was predominantly aggravated or mitigated, or neither, depending on the presence and intensity of the factors.
3. The court would decide, based on the presence and intensity of the factors, how large an adjustment to apply (1-4). This gives the court a "sliding scale" upon which to place the defendant's role.
4. Key terms would either be defined or would be self-evident; no adjustment would depend on a single terminology distinction (such as organizer or manager; minor or minimal).
5. It would not be necessary for the court to perform the difficult and meaningless task of comparing the defendant's activity to a defendant who might commit the entire offense alone.
6. There would be no mechanical measurements, such as a requirement that a certain number of persons be involved or be supervised, in order for the adjustment to apply.

Based on the above criteria, we have redrafted the role amendments in the **Attachment**, to illustrate at least one form that they might take.

Summary

This proposal: a) provides needed definition and guidance, b) assists in providing more proportional sentences, c) eliminates ambiguous terms, d) encourages full use of the role adjustments, e) provides for a judgment by the court based on multiple factors, and f) remains relatively simple in organization and application. The court's findings, which would usually be based on a combination of fact-based factors, will not be easily reversed on appeal because of the multiple-factor basis of the findings.

We urge the Commission to make a significant contribution this amendment cycle by enacting new role guidelines which would be similar to, and embody the significant features of, our proposed amendments.

II. SUPERVISED RELEASE (Amendment 45)

The Committee asked the Commission to publish an "Issue for Comment," asking whether "...the supervised release guidelines should be amended to permit greater consideration of the individual defendant's need for supervision after imprisonment...?" More specifically, we asked whether §5D1.1 should be amended to eliminate the current requirement that supervised release be imposed in all cases where a term of imprisonment of one year or more is imposed, and whether §5D1.2 should be amended to reduce the terms of supervised release required to be imposed? We believe that these questions very definitely should be answered in the affirmative.

Changing Numbers and Character of Supervised Offenders

The court system and, most particularly, the probation system, is already beginning to feel a heavy burden from the rapidly growing numbers of supervised release cases. For example, in 1989 there were 1,673 offenders on supervised release and 53,589 offenders on probation. All categories of supervision (including parole, mandatory release, and military parole) totaled 77,284 offenders on supervision. In 1996 the projected numbers show 49,100 on supervised release and 34,800 on probation, with a total on supervision of 92,100.²

Not only are the total numbers rising, but the character of the supervised offenders is markedly changing. In 1989, 32% of offenders under supervision had been released from prison (69% were on probation). In 1994, 54% of offenders under supervision had been released from prison (46% were

² The numbers on supervised release are rising far faster than the numbers on probation and parole are falling. The consecutive years between 1989 and 1996 show the following figures for supervised release: 6,138 (in 1990), 11,949 (in 1991), 19,362 (in 1992), 26,384 (in 1993), 33,900 (in 1994), and 42,600 (in 1995).

on probation). It is projected that in 1996, 61% of the 92,100 offenders under supervision of the court will have been released from prison (with only 39% on probation).

Supervised release offenders are post-custodial offenders. Such offenders generally demonstrate a higher violation rate than probationers. For example, in fiscal 1993, the violation rate for post-prison release cases was 37% compared to 15% for individuals on probation. Supervised releasees also require more intensive supervision by probation officers than probationers, and are more likely to require substance abuse treatment and tests. With 92,100 offenders on supervised release in 1996, if 37% require violations, that means there will be 34,040 violation hearings in federal court in 1996. This is a significant new demand on court time, especially given that parole violation hearings did not involve the courts.

Varying Needs for Supervised Release

It is also clear that not all defendants need supervision and those that do, do not need the same term of supervision. While some period of supervision may be helpful for most defendants, there is no convincing evidence that extensive periods of supervised release are needed to meet the goals of the criminal justice system. In fact, there is evidence that shorter periods of supervised release serve the purpose of rehabilitation and permit a determination to be made of whether the offender is likely to recidivate or not. A 1994 study by the Bureau of Prisons indicates that most people who are going to recidivate do so within the first year after release.

Statutory Authority

Title 18 U.S.C. § 3583(a) allows for court discretion in imposing supervised release: "The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, [but shall do so if a statute requires it]." (emphasis added). In addition, the Commission has the authority to promulgate guidelines for use by the court in making "a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term." 28 U.S.C. § 994(a)(1)(C).

The courts have read guideline sections 5D1.1 and 5D1.2, which mandate terms of supervised release, to be consistent with the discretion provided in section 3583(a), on the theory that courts could "depart" from the terms of supervised release set out in the guidelines. U.S. v. Chinske, 978 F.2d 557, 558-9 (9th Cir. 1992); U.S. v. West, 989 F.2d 1493, 1503 (11th Cir. 1990). However, courts are understandably reluctant to depart, given the burden to

be met by the court (*i.e.*, the court must find "aggravating or mitigating circumstance[s] of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." §5K2.0), which would be unlikely to be met if the sentence was not otherwise a departure.

Our Proposal

The Committee urges that the Commission amend the guidelines to reflect the discretion provided in the statute, *i.e.*, to allow the court to decide whether supervised release should be imposed or not, and what the length of the term of supervision should be if it is imposed, unless a term of supervised release is mandated by the offense or otherwise set by law.

Specifically, the Committee requests that the Commission change its current guideline section 5D1.1 to the following:

- (a) *The court shall order a term of supervised release to follow imprisonment when required by statute.*
- (b) *The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, unless the court specifically finds that supervised release is not required to protect the public from further crimes of the defendant, for the facilitation of payment of a financial penalty or participation in a drug treatment program, and for the reintegration of the defendant into society.*
- (c) *The court may order a term of supervised release to follow imprisonment when a sentence of imprisonment of one year or less is imposed.*

This language would create a rebuttable presumption in favor of the imposition of supervised release when the sentence is over one year, but allow the court the flexibility, without requiring a departure (as currently suggested in the notes), not to impose it where the court makes specific findings that it is not necessary.

The Committee further requests that the Commission change the current guideline section 5D1.2 to the following:

- (a) *If a defendant is convicted under a statute that requires a term of supervised release, the term shall be not more than five years unless otherwise provided by law.³*

³ This proviso is designed to account for any longer mandatory minimum sentences in title 21 cases. It does not attempt to account for the holding in the Fifth Circuit

- (b) *Otherwise, when a term of supervised release is ordered, the court shall order a term of supervised release that is no longer than that required to protect the public from further crimes of the defendant, to facilitate payment of a financial penalty or participation in a drug treatment program, and to reintegrate the defendant into society.*

We believe these changes would result in much more efficient and rational allocation of judicial resources and serve the purposes for which Congress intended supervised release.

III. UNDISCHARGED TERMS OF SENTENCE (Amendment 46)

General Comments

The Committee strongly urges the Commission to significantly change Policy Statement §5G1.3(c). The Probation Officers' Advisory Group has urged simplification of this provision two years in a row. We believe, as well, that the Policy Statement is desperately in need of simplification.

Although not all courts have yet experienced the extreme difficulty of attempting to carry out the commentary's suggested procedure, nearly all probation officers have been required to do so in order to provide the court with the option of following this Policy Statement.

The confusion and excessive use of resources caused by this provision are, simply put, not worth the benefits that may occasionally result from its application. The few cases in which a perceived injustice might take place if the suggested procedure were not followed could easily be prevented by the exercise of discretion which the statute (18 U.S.C. § 3584) grants the court. The suggested §5G1.3(c) procedure raises the frustration level, wastes resources, and erodes confidence in the guideline system. The harm sought to be avoided is no worse than the harm brought about by the process; indeed, the cure may well be worse than the disease.

We believe the procedure itself is far too complicated and esoteric, and asks courts to rely on unreliable information. It also asks courts to "credit" the instant sentence with time served on other sentences. This not only may result in double crediting by the Bureau of Prisons, but is something the

that the caps on supervised release terms in section 3583(b) limit the terms of supervised release in title 21 cases. *See, U.S. v. Kelly*, 974 F.2d 22, 24 (5th Cir. 1992); *But see, U.S. v. Eng*, 14 F.3d 165, 173 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 54. Courts in that circuit may not be able to impose terms of supervised release up to five years in some cases.

Supreme Court has said only the Bureau of Prisons is authorized to do. See, Wilson v. U.S., 112 S.Ct. 1351 (1992).

Also, the Commission's desired result of imposing only an incremental increase for the instant offense, as if all sentences were imposed simultaneously with the federal one, is not necessarily appropriate. That is, there is no clear policy underpinning for §5G1.3(c) as there is for sections (a) and (b).

Finally, the disparities created by the provision are as great or greater than those sought to be avoided. For example, a defendant receiving a §5G1.3(c) adjustment off a federal sentence fares better than a similarly situated co-defendant who did not commit another crime for which there is an undischarged term, and better than one who had recently completed serving another term who will also not receive the adjustment.

Our Proposal

Our proposal is to change §5G1.3(c) to simply state:

"(Policy Statement) In any other case, the court should exercise its discretion in complying with 18 U.S.C. § 3584 to sentence the defendant concurrently or consecutively, to effect a reasonable punishment for the instant offense."

Further, the current commentary should be omitted. No "incremental" sentence is suggested, merely a just and reasonable sentence. No detailed explanation is necessary. We believe that the statutory discretion given the court, combined with the advocacy on which the judicial system depends, would generally provide just sentences by the use of concurrent sentencing in those few cases in which purely consecutive sentences would generate an apparently unjust result. The guidelines would be a couple of pages shorter, the hot line would be relieved, and the resources currently expended on this exercise could be directed elsewhere.

In the alternative, if the Commission decides to retain the suggested result of an incremental sentence, we suggest that the Commission add to our proposed Policy Statement, above, some simple commentary which merely states the desired result, such as:

"In effecting a reasonable punishment for the instant offense, the court should attempt to determine what reasonable incremental punishment should be imposed for the instant offense, in addition to the time already served on the other offense, taking care not to generate successive consecutive sentences which would result in significantly more total imprisonment than if the offenses were sentenced federally, together. This

should be done only to the extent that the court can accurately determine the information necessary,"

If the Commission does not accept our primary or alternative proposals, we strongly urge that, at a minimum:

- a) Section 5G1.3(c) should remain a Policy Statement, no matter what; and
- b) Option 2 is far superior to Option 1 or the current Policy Statement, because it only suggests that this complicated procedure be done when the undischarged term is another federal (non-departure) sentence, ensuring reliable information regarding the guidelines and time to be served.

IV. OTHER AMENDMENTS

Our comments on the other proposed amendments will be relatively brief. We will comment only on those which we either oppose, or which we believe deserve comment or support.

A. Violent Crime Control and Enforcement Act of 1994

Where the Commission has suggested alternative ways to implement a provision, we would generally prefer the use of a suggested departure, where possible. This is particularly true for sentencing factors which would appear relatively infrequently. We believe new Chapter Three guidelines should only be created sparingly.

Amendment 7 - Repeat Sex Offenses

The Commission's proposed amendments insert departure suggestions in certain sexual offenses under Chapter Two. They also provide for a departure under "Adequacy of Criminal History Category" for prior convictions involving death, serious bodily injury (or attempts to inflict either), as well as sexual offenses which are similar to the instant offense, if not otherwise accounted for by Career Offender or Armed Career Offender guideline provisions. The proposal also seeks comment on whether Chapter Two sexual offenses should provide for an adjustment rather than the suggested departure for similar prior offenses.

After careful review, we believe that there are advantages to the broader approach and, thus, recommend a departure under Chapter Four (adequacy of criminal history) not only for sexual offenses, but for all similarly serious prior violent offenses. As the Commission notes,

this change implements the congressional directive more broadly than required, but it recognizes that all forms of aggravated assault, sexual or non-sexual, deserve the same treatment. It thus avoids creating disparities which would result from suggesting departures only for prior similar sex crimes but not for prior similar murders, attempted murders, or other violent felonies. If this approach is adopted, it would seem unnecessary and repetitive (as well as incomplete) to also note the same possible departure under each sex offense.

Amendment 11 - Drug Offenses Near Protected Locations

We prefer a modification of the proposed revision listed in subpart eleven of **Amendment 42**, discussed below, to this proposal.

Amendment 22(B) - Immigration Offenses

This provision involves statutory changes for unlawfully entering or remaining in the United States. The statutory sentence limitations in some parts of 8 U.S.C. §§ 1252(e) and 1326(b) are decreased, but most are dramatically increased. In addition, a new offense is created for reentry after convictions for 3 or more certain misdemeanors. Again, the Commission asks if any adjustments should be made. We recommend that, at a minimum, a specific offense characteristic (SOC) be added to §2L1.2(b) to accurately and completely track the statute involving the three misdemeanors. If not changed, the guideline would track part, but not all, of the statute's aggravating factors.

Amendment 22(D) - Immigration Offenses

We recommend the amendment as proposed by the Department of Justice. It suggests a departure, rather than a high point within a sentencing range, for §2L1.2 when a defendant has repeated prior instances of deportation without a criminal conviction. Because of the large numbers of these types of immigration cases, the use of aliases by defendants, and the overburdened court system, it is often easier to use voluntary deportation rather than to seek a criminal conviction when dealing with a defendant's first or second illegal entry. This is a very common factor in many immigration cases, and it is not specifically accounted for in the guidelines other than with a non-specific departure based on the adequacy of criminal history. We believe that the amendment we recommend would make it easier for a judge to depart and be sustained on appeal.

B. Drug Amendments

While we support the general intent of the more sweeping proposed changes to the drug guidelines,⁴ we believe such proposals require more detailed study and extensive analysis before being adopted by the Sentencing Commission. We urge the Commission to move cautiously in this area, and to study how these proposals would interact with each other and with current statutory penalties, and what effect, if any, they would have on the safety valve.

Before these kinds of fundamental changes are made, there needs to be a consensus on the need for and direction of these kinds of revisions. While we do not dismiss these proposals out of hand, we urge caution and study of their interaction and effect on actual cases and court practice. We believe that the worst thing that could occur would be to change the drug guidelines dramatically, only to discover that other dramatic changes are needed soon thereafter to accommodate the revisions.

Also, if simplification is, indeed, given serious consideration in the near future, major drug guideline reform should be commensurate and consistent with whatever changes are made, to achieve a coherent whole.

Finally, as we noted in our first section, we believe that an intelligent redefinition and expansion of the role determination would relieve many of the problems perceived with the drug guidelines, at least for the time being, until comprehensive change of the drug guidelines can be agreed upon and effected, perhaps as part of a simplification scheme.

However, there are some proposals within Approach One which would be helpful this year. They would refine the accuracy and fairness of the application of the drug guidelines, and would not effect a dramatic, fundamental change to the drug guidelines. We will comment briefly on those, below.

Amendment 37 - Marihuana Plants

This proposal would use a consistent scheme for counting marihuana plants. This appears sensible and fair, and represents a fine-tuning, based on experience, of the application of the drug guideline to marihuana plants.

⁴ These would include the drug chart compression options, the cap for mitigating role, and the purity amendment in Approach One, and all of Approach Two.

Amendment 38 - Crack

The crack ratio question is a critical issue. We applaud the Commission for doing a study, and urge it to resolve the issue as fairly and expeditiously as possible.

Amendment 41 - Counting Pills

This proposal appears to be another reasonable, fine-tuning of the drug guideline as applied to certain drugs. The information regarding drug weight is apparently easy to obtain, and this amendment would be consistent with prior amendments regarding LSD and cocaine base.

Amendment 42 - Twelve Miscellaneous Drug Amendments

Most of the twelve sub-parts of this proposal are reasonable, non-disruptive, and helpful improvements to the drug guideline calculations. Where alternatives are offered, we support a departure suggestion, where possible. We wish to specifically comment on only three sub-parts of this proposal, one we specifically support, and two which we oppose.

Parts 8 and 10

We have serious reservations about *Parts 8 and 10* of proposed **Amendment 42**. These relate to possible departures for a defendants who allegedly did not know the type or quantity of the controlled substance which they possessed (*Part 8*), and for defendants who allegedly intended personal use of some portion of the controlled substance that they otherwise possessed for distribution (*Part 10*).

With respect to *Part 8*, our concern is that such a claim, *i.e.*, ignorance of the type or amount of contraband, is very frequently made. At the same time, it is a claim almost always impossible to verify. We suggest that it might be more prudent to await the development of caselaw in this area before inviting departures on that ground.

With respect to *Part 10*, it is our experience that such a case, *i.e.*, where the defendant claims that part of the contraband possessed for distribution is intended for personal use, is rare, and therefore we would not ordinarily support making any changes in this regard. However, it may be reasonable to resolve the circuit split by noting that ordinarily amounts claimed for personal use should not be subtracted from amounts possessed for distribution. Beyond that, a departure

should not be encouraged, because to do so would benefit drug users over non-users.

Part 11

The Committee asks the Commission to adopt a slightly modified version of the proposed change listed in the eleventh subpart of **Amendment 42**, which amends Application Note 2 of §2D1.2 dealing with drug trafficking near protected locations. The Committee believes that this amendment is preferable to the proposed **Amendment 11**, which we understand would arbitrarily fix the offense level at 13 if the stipulated condition(s) were met, apparently regardless of the amount of narcotics involved, or regardless of whether the persons or locations intended to be protected by the statute are exposed to the criminal activity.

We do, however, believe that it is desirable to provide the court with an appropriate remedy in the rare instance when this kind of law enforcement activity occurs. We suggest the following form for Application Note 2 of §2D1.2 (our changes are underlined):

If the offense was committed at or near a protected location, but (A) the offense did not create any increased risk for those this guideline was intended to protect; and (B) the location was determined by law enforcement personnel or someone acting under the direction or control of law enforcement personnel, rather than by the defendant, a downward departure (to the offense level that would have applied if the offense had not involved a protected location) may be warranted.

The proposed change from "or" to "and" restricts the use of this departure only to cases where not only the law enforcement agents selected the location, but also where it is clear that no additional risk to protected persons or locations is created by the offense (such as if the offense took place near a school at night or in the summer, or in a motel out of sight of the protected location). This modification of the proposed amendment reflects our belief that the statute is intended to provide for serious punishment when there is harm done to protected persons and places, regardless of who selected the location. Our proposal also adds a phrase which we borrowed from proposed **Amendment 11**, to include confidential informants as well as actual law enforcement agents.

We believe this proposal, as modified, will sufficiently deter the selection of locations by law enforcement agents for the purpose of impacting the sentencing process.

Amendment - 43

The Committee believes that sentences in drug cases should not be driven so completely by drug quantities, which is why we so strongly support meaningful amendments to the role adjustments. At the same time, however, we believe it unwise and unrealistic to almost totally eliminate the quantity factor.

C. Money Laundering (Amendment 44)

We support this amendment's goal of tying the money laundering offense level more closely to the underlying criminal activity, where known. With regard to choosing among the various forms of this proposal, we generally support making sentences for drug offenses higher than for fraud offenses.

D. Career Offender Circuit Split

On February 15, 1995, we wrote the Commission asking that consideration be given to an amendment which would resolve the circuit split regarding whether drug conspirators can be sentenced as career offenders, sometimes referred to as the "Price issue." We asked that the Commission consider issuing a second publication just for this amendment, if it believes that publication is necessary in order to resolve the issue this amendment cycle. We ask that our letter of February 15 be considered, along with this letter, regarding proposed amendments for this amendment cycle.

V. CONCLUSION AND OTHER THOUGHTS

The Committee on Criminal Law appreciates the opportunity to comment on this year's proposed amendments. We know that the duties of implementing the Violent Crime Control and Enforcement Act of 1994, combined with several significant reports required by Congress, has impacted the Commission's usual business of attending to the yearly amendment cycle. We hope that our comments are helpful.

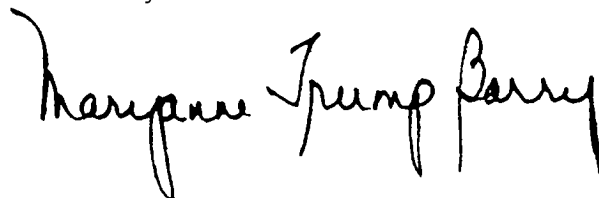
We have two final requests which relate to the amendment cycle process itself. First, we would request that the Commission publish each cycle's proposed amendments and issues as early as possible, preferably in December, and that the Commission make the "reader friendly" version available at the time of publication. (Incidentally, we appreciate the Commission's preparation of the "reader friendly" version, which helps our analysis greatly.)

If we are to be able to conduct a careful analysis of the published amendments and issues and make intelligent and helpful comments, we need, and would appreciate, more time for response than was available this year.

Second, we request that the Commission make available a package of purely legal, or "technical" amendments, designed to avoid or eliminate needless litigation or resolve circuit splits, well in advance of the time necessary to decide what to publish. This would allow response groups to support those amendments which they believe would be most helpful, and make it less likely that such amendments would be lost in a larger packet of amendments involving policy changes, simplification, or consolidation.

Again, we appreciate the Commission's consideration of our views, and we look forward to the meeting on March 13, 1995.

Sincerely,

A handwritten signature in black ink, reading "Maryanne Trump Barry". The signature is fluid and cursive, with the first name "Maryanne" written in a larger, more prominent script than the last name "Trump Barry".

Maryanne Trump Barry

cc: Honorable Michael S. Gelacak, Vice Chairman
Honorable A. David Mazzone, Vice Chairman
Honorable Wayne A. Budd, Commissioner
Honorable Julie E. Carnes, Commissioner
Honorable Michael Goldsmith, Commissioner
Honorable Deanell R. Tacha, Commissioner
Honorable Jo Ann Harris, ex-officio
Honorable Edward F. Reilly, Jr., ex-officio

ATTACHMENT

Part B - ROLE IN THE OFFENSE

Introductory Commentary:

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), (*i.e.*, all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction). Sections 3B1.1 and 3B1.2 are designed to work in conjunction with §1B1.3, which focuses upon the acts and omissions in which the defendant participated (*i.e.*, the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused) and, in the case of jointly undertaken criminal activity, the acts and omissions of others in furtherance of the jointly undertaken criminal activity that were foreseeable.

Only one role adjustment, either a §3B1.1 (Aggravating Role) or a §3B1.2 (Mitigating Role), is to be applied. In making this determination, the court shall assess whether the defendant's role is predominately aggravating or predominately mitigating and, if neither predominates, no role adjustment shall be applied.

For §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been apprehended, convicted, or identified, so long as the court is satisfied that another participant(s) was involved in the criminal activity. In some cases, some defendants may warrant an upward adjustment under §3B1.1, other defendants may warrant a downward adjustment under §3B1.2, and still other defendants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may also apply to offenses committed by any number of participants.

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level by 1, 2, 3, or 4 levels, according to the presence and intensity of the factors listed in Application Note 1.

Application Notes:

1. Characteristics ordinarily associated with an aggravating role include:
 - (A) the defendant planned or initiated the criminal activity;
 - (B) the defendant had decision-making authority or management responsibility over the property, finances, assets, or other participants involved in the criminal activity;
 - (C) the anticipated or total compensation or benefit to the defendant would have been or was greater than that anticipated or received by the other participants in the criminal activity;
 - (D) the defendant had an ownership interest in, or helped finance, the criminal activity;
 - (E) the defendant induced other participant(s) to engage in the criminal activity;
 - (F) the defendant performed sophisticated tasks in furtherance of the criminal activity;
 - (G) the defendant possessed substantial knowledge or understanding of the scope and structure of the criminal activity or of the relevant criminal activity of other participants; and
 - (H) the defendant possessed a firearm or directed or induced other participant(s) to possess a firearm.
2. When applying this section, the court must make specific findings regarding the defendant's role in the offense, and clearly articulate the factors the court is relying on to impose a 1, 2, 3, or 4-level increase. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed in Application Note 1 (A)-(H).
3. Because the court's determination of the amount of the aggravating role adjustment requires a weighing of the factors listed in Application Note 1 (A)-(H), the Commission recognizes that such a determination will be heavily dependent upon the facts of each case.

4. Consistent with the overall structure of the guidelines, the government bears the burden of persuasion in establishing the factors associated with an aggravating role adjustment. In determining whether an aggravating role adjustment is warranted, the court should consider all of the available facts that may be relevant to a determination of the defendant's role in the offense.

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level by 1, 2, 3, or 4 levels, according to the presence and intensity of the factors listed in Application Note 1.

Application Notes:

1. Characteristics ordinarily associated with a mitigating role include:

- (A) the defendant did not plan or initiate the criminal activity;
- (B) the defendant had no more than minimal decision-making authority or management responsibility over the property, finances, assets, or other participants involved in the criminal activity;
- (C) the anticipated or total compensation or benefit to the defendant would have been or was less than that anticipated or received by the other participants in the criminal activity;
- (D) the defendant neither had an ownership interest in, nor helped finance, the criminal activity;
- (E) the defendant held or transported contraband for others;
- (F) the defendant primarily performed unsophisticated tasks, whether necessary or unnecessary to the successful completion of the criminal activity;
- (G) the defendant did not possess substantial knowledge or understanding of the scope and structure of the criminal activity or of the relevant criminal activity of other participants;
- (H) the defendant facilitated the successful commission of the criminal activity, but was not essential to that activity; and
- (I) the defendant did not possess a firearm or direct or induce other participant(s) to possess a firearm.

2. When applying this section, the court must make specific findings regarding the defendant's role in the offense, and clearly articulate the factors the court is relying on to impose a 1, 2, 3, or 4-level decrease. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed in Application Note 1 (A)-(I).
3. Because the court's determination of the amount of the mitigating role adjustment requires a weighing of the factors listed in Application Note 1 (A)-(I), the Commission recognizes that such a determination will be heavily dependent upon the facts of each case.
4. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted, because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.
5. Consistent with the overall structure of the guidelines, the defendant bears the burden of persuasion in establishing the factors associated with a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all of the available facts that may be relevant to a determination of the defendant's role in the offense.

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3134 Woods Circle
Davis, California 95616
March 6, 1995

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

Re: Amendment #37

Commissioners:

I am writing in support of proposed Sentencing Guidelines Amendment #37. This amendment calls for the Commission to adopt a standard marijuana plant weight of 100 grams per plant, regardless of the number of plants involved in a case. The most notable benefit of this amendment is that it addresses the major sentencing inequity that exists between a person convicted of distributing a certain amount of bulk marijuana (i.e., 100 kilos) and one convicted of growing the same number (100) of marijuana plants. Under the existing guidelines, these two offenders receive the same sentence, even though it is impossible for 100 marijuana plants to produce anywhere near 100 kilos of "finished product". The current law obviously leads to a patently unfair result. Adoption of this amendment would also eliminate the huge increase in sentence that occurs between 49 and 50 plants. This arbitrary increase serves no legitimate sentencing purpose.

I also support two provisions being considered under Amendment #42. The first, which calls for approximating the dry weight of wet marijuana for sentencing purposes, is simply a matter of consistency and fairness. If the weight of a drug is to be the determining factor in sentencing, every effort must be made to ensure that the method of weighing a particular substance is consistent in every case. To allow wet marijuana to be used in one case and dry marijuana in another would lead to inconsistent sentences for the same offense. This is not only unfair, but it undermines the most important policy consideration underlying the Guidelines, which is consistency in sentencing in every case in the Federal Court system.

The second provision I support under Amendment 42 is the proposed definition of a marijuana plant. This definition, requiring, among other things, that plants have roots, is consistent with the holdings of at least four United States Circuit Courts. Adopting this definition will give guidance to courts in determining the correct number of "plants" to support sentencing calculations. Again, it will help lead to more consistent systemwide sentencing results.

Thank you for your consideration of these suggestions.

Sincerely,

Martha J. Hanna
Martha J. Hanna

SPENCER ABRAHAM, MICHIGAN

STROM THURMOND, SOUTH CAROLINA
 ALAN K. SIMPSON, WYOMING
 CHARLES E. GRASSLEY, IOWA
 ARLEN SPECTER, PENNSYLVANIA
 HANK BROWN, COLORADO
 FRED THOMPSON, TENNESSEE
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 PATRICK J. LEAHY, VERMONT
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 PAUL SIMON, ILLINOIS
 HERBERT KOHL, WISCONSIN
 DIANNE FEINSTEIN, CALIFORNIA
 RUSSELL D. FEINGOLD, WISCONSIN

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

March 6, 1995

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

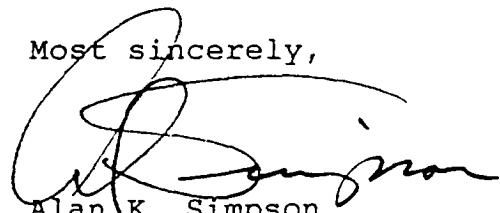
Dear Mr. Chairman:

The Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) includes three provisions that impact Part L of the Sentencing Guidelines relating to offenses involving Immigration, Naturalization, and Passports. Section 60024 provides enhanced penalties for alien smuggling; Section 130001 alters penalties concerning failing to depart or reentering; and Section 130009 increases the penalties for passport and visa offenses.

Each of these provisions addresses an important element of border security as well as other criminal activities so often associated with those who would violate our borders. Passport and visa violations, for example, not only permit illegal travel in and out of the United States, but facilitate a host of other crimes. Raising the offense levels for travel document offenses, along with providing penalty enhancements for those who supply or use passports or visas to further other criminal acts, is necessary to reflect the intent of Congress in enacting Section 130009. Appropriate guideline revisions are also necessary for Sections 60024 and 130001.

Although there are a large number of issues before the Commission this year, I am hopeful that amendments in the guidelines will be promulgated to ensure that these three sections of P.L. 103-322 are effectively implemented. I strongly urge the Commission to take such action.

Most sincerely,



Alan K. Simpson
 Chairman
 Subcommittee on
 Immigration

AKS:cw

Carol Carayannis
 AMERICAN ASSOCIATION FOR CONSTITUTIONAL
 LAWS AND JUSTICE (AACLJ)
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February 27, 1995

Judge Richard P. Conaboy, Chairman
 United States Sentencing Commission
 1 Columbus Circle N.E.
 Suite 2-500, South Lobby
 Washington D.C. 20002-8002

Fax: (202) 662-7631

SUBJECT: U.S. Sentencing Commission's Guidelines on Laundering Monetary Instruments;
 Abuses of the "sting" money laundering statute, 18 U.S. Code, Section 1956 (a)(3);
 Need for sentencing guideline amendments; Need to amend or repeal 18 U.S. Code,
 Section 1956 (a)(3). a statute which has been used unconstitutionally and has
 become an instrument of oppression.

Dear Judge Conaboy:

Reference is made to the U.S. Sentencing Commission's Proposed Amendments to the Sentencing Guidelines for which the Commission held a public hearing on March 22, 1993. The purpose of my letter is:

- (1) to inquire why the Commission's proposed amendments have not yet been implemented when there was such overwhelming support by the Commission itself and by participants who testified at the hearing;
- (2) to ask for the Commission's support in calling immediate Congressional attention to the urgent need for ratification of these proposed sentencing amendments and for reevaluation and modification of the money laundering laws, particularly of the "sting" money laundering statute (18 U.S. Code, Section 1956 (a)(3)). This is a law which, in its present form, prearranges a "crime" and its evidence with guaranteed conviction and level of sentencing, in violation of Constitutional amendments, including the Eighth, in that it produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines; This statute has become an instrument of oppression.
- (3) to bring to your attention, as an example, how the abuse of 18 U.S. Code, Section 1956 (a)(3) in Hawaii and its unjustifiable sentencing levels have resulted in the orchestrated conviction and ludicrous 41 month sentencing of my husband, Dr. George Pararas-Carayannis, a prominent international scientist with 25 years of outstanding U.S. government service, 35 years of community service, a man who never had a criminal record (not even a traffic ticket) and who never engaged in any type of criminal activity.

As an American and as a member of The American Association for Constitutional Laws and Justice, (AACLJ), I am particularly concerned that abuses in the application of 18 U.S. Code, Section 1956 (a)(3) and in sentencing are continuing, in spite of the public opposition clearly evidenced at the Commission's own hearing. I am particularly concerned and very angry of my husband's

ludicrous conviction and sentencing for a crime that did not occur, for which there was no victim, for an alleged "sting" offense which was never represented as such, and which -if indeed had occurred - would have been at worse a petty misdemeanor punishable with a small fine and probation. Instead, **more than \$2 million of taxpayers' money has been already wasted in this frivolous prosecution** (money which could have been spent to fight real crime) and a law-abiding, professional scientist contributing enormously to society was destroyed emotionally, physically, financially and professionally. In support of my concerns and request for action on the above stated matters, I wish to bring to your attention the following documentation:

(A) The U.S. Sentencing Commission's own report and record of its hearing of March 22, 1993, summarizing the criticism expressed pertaining to the abuse of 18 U.S. Code, Section 1956 (a)(3) and its associated disproportionate sentencing levels, as well as of the overwhelming support the Commission's proposed amendments received.

(B) To illustrate further the statute's improper application and extreme and cruel sentencing level under the present guidelines, I will provide a brief account of how the statute was grossly abused to target selectively and to prejudicially prosecute my husband (a member of a Greek ethnic minority), in order to destroy him emotionally, financially and professionally, and to convict and sentence him to a preposterous 41 months imprisonment for alleged "laundering of monetary instruments". This was for an alleged petty misdemeanor offense that did not occur, which was not represented as such and for which there was no victim (other than my husband). This ludicrous and unprecedented sentence was imposed on my husband in spite of the fact that the stress of the four year long, unreasonable and relentless prosecution and persecution recently culminated in a nearly fatal heart attack.

A. Criticism of the "Sting" Money Laundering Statute. Support of U.S. Sentencing Commission's Proposed Amendments.(U.S. Sentencing Commission's Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993, Washington DC)

The U.S. Sentencing Commission generated an internal report proposing amendments to its own sentencing guidelines for money laundering offenses. Specifically for offenses prosecuted under the "sting" money laundering statute the Commission proposed amendments would tie the sentencing level to those of the underlying "sting" offenses, when properly represented. The following are abstracted portions of the U.S. Sentencing Commission's hearing proceedings pertaining to sentencing levels for money laundering offenses and particularly those prosecuted via the "sting" statute. There was an overwhelming support for the Commission's proposed amendments from those who testified at the public hearing. There was also severe criticism of the abuses of 18 U.S. Code, Section 1956 (a)(3) and its associated disproportionate sentencing levels.

One of the people that testified at the public hearing was one of the principal authors of the money laundering statutes, Mr. Charles W. Blau (Transcripts of the hearing p.256-261). Mr. Blau is presently in private practice, but has worked for the Department of Justice in different capacities, including Chief of Narcotics, Associate Deputy Attorney General and Associate Attorney General. He played an active role in drafting the money laundering statutes and the memorandum of understanding between the various law enforcement agencies in using these statutes. He was extremely critical of the unexpected abuses of the laws that he helped draft. At the hearing he stated:

"In looking at these statutes, I think basically the intent, or at least my intent, was to create a broad criminal statute which would reach every kind of sophisticated money laundering that was out there. In short, I thought, and I think basically the people that were in the process with me felt, that the real intent of this statute was to get at professional money launderers, principally those associated with narcotics and organized crime.

In retrospect, I think there are probably two mistakes that we made....I think I would have liked to have limited this statute to instances where there was sophisticated criminal activity present, either with narcotics or with organized crime.

Secondly, I think I would have required the Department (Justice) to have exercised some central control over the use of this statute much more so than we did. The Department, in my view, basically has failed to have what I would call a realistic or a centralized process dealing with the use of this statute. There are, in essence, 94 separate policies, and each U.S. Attorney, basically, in essence, decides how the statute is going to be abused or used, as the case may be.

What we are seeing at least in my part of the country, which is Texas and the Southwest, is a continual threatening of the use of the money laundering statute in non-drug and non-organized crime cases."

On page 259 of the Sentencing Commission's Hearing proceedings, Mr. Blau continues:

"My view, however, I think is that this statute is a very, very important powerful prosecution tool. I think that it has tremendous potential to be abused. I think in at least my area of the country, and particularly in the white collar non-drug area, we are seeing an abuse of the use of this statute. Plea negotiations, in short, have been replaced by threat negotiations, and using a very substantial and heavy-wielding club, the money laundering statute. This is a real threat. One may argue that it is either good plea bargaining on the part of the government or, alternatively, it is a little bit overzealous and coercive of the criminal justice process.

The question that I raise with the use of this statute, without any centralized controls, is whether the criminal justice process is being undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or with organized drug activity. And the question with these guidelines has been, should a person be subjected to severe criminal sanctions, when his conduct amounts to no more than the base underlying offense. It is a bit like using a nuclear weapon against a single individual.

I think these changes proposed by the Commission are essential in bringing a little reality back into the prosecution charging process. I would have preferred that the department basically would have taken this on itself, would have overseen basically the use of this statute and would have culled out the cases where it was clearly an abuse of process to bring such an enormous charge against underlying conduct which did not deserve it.

My view of these guidelines, until basically Congress gets around to amending the statute, is that the underlying offense should be relevant and important factor in determining what penalties for money laundering connected with those type of offenses are.

I do believe that the courts are going to I think reach a position where they will not forever tolerate these charging abuses, and a very valuable prosecution tool will be unnecessarily limited, or bad case law. So I support your amendments completely."

Mr. Stephen R. LaCheen, representing the Pennsylvania Association of Criminal Lawyers, in his endorsement of the Commission's guideline amendments commented (page 75):

"We also comment favorably on your money-laundering amendments, as well as the amendments regarding sting operations, and there both, again, informed out of

the concern to avoid manipulation of the guidelines in the plea-bargaining process, which in vast majority of cases, as you know, are resolved in plea negotiations."

Mr. James M. Becker, representing the Criminal law Committee of the Federal Bar Association, commented as follows (p. 157):

".....Our group has identified several instances in the Eastern District of Pennsylvania, and we think they exist nationwide, where the mere addition of that money laundering charge, especially under 18 U.S.C. sections 1956 and 1957, artificially raises the guideline level beyond that of the underlying offense, when there is no real money laundering activity that somehow makes the person's conduct more culpable than if they were just charged with a fraud offense, so for that reason, we applaud the proposed Amendment No. 20, heartily endorse it."

Mr. Chuck Morley, an expert on the subject of money laundering and currency reporting laws under the Bank Secrecy Act, having served with the Criminal Investigation Division of the IRS and as Chief investigator of the U.S. Senate Subcommittee on Investigations, stated (p. 224):

".....I come here today to urge you to approve the money laundering and the structuring guidelines as proposed by the committee staff." ".....the revised guidelines reflect greater sensitivity to such factors as sophistications of money laundering conduct." ".....the staff (Sentencing Commission) found that, historically, prosecutors have been stretching these guidelines significantly,..."

"Offenses that technically qualify as money laundering are frequently simply incidental to or component parts of the underlying crime. This has given rise to extensive disproportionate sentencing.....The sentencing report indicated that 68 percent of the defendants convicted of structuring either didn't know or did not believe the funds were illegal. Yet, these people could still get the same type of sentence as a major money launderer, somebody involved in a huge smurfing operation. So do the guidelines work? I don't think they work, unless what we are trying to do is fill the jails up....." The Justice Department has said to me informally that we are trying to decriminalize money laundering or that we are trying to greatly lessen the offense of money laundering....." ".....To continue under the current guidelines is to ignore the realities of money laundering totally, while continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants."

Mr. David Stewart of the law firm of Ropes and Gray, commented:

The basic principle announced by the Commission, which I strongly endorse, is an attempt to tie the base offense levels for this offense (money laundering) more closely to the underlying conduct that was the source of the illegal proceeds.....in non-drug offenses you really do get an extraordinary increase in the penalty by including the money laundering charge. I would even report that prosecutors confirm that is why they add money laundering counts, because the guidelines are so powerful with them. It is a bigger hammer. One case I saw that was 27 months in prison versus 6 months in prison.....Finally, I would note my agreement with the observation to the American Bar Association on the subject of stings, again, the concept of the money laundering offense to the underlying offense seems to me very important in that context, as well. It is a little trickier, of course, because there is no true underlying offense, so it has to be the represented underlying offense, but, again, it seems to me the proper ways to approach the problem."

Mr. Paul B. Bergman, representing the New York Council of Defense Lawyers, had the following comments:

"I think that this proposed amendment on the guidelines for money laundering goes one way towards eliminating what we consider to be unfair leverage and sometimes abusively exercised leverage with money laundering."

B Illustration of the abuse of 18 U.S. Code, Section 1956 to (a)(3) to convict and sentence Dr. George Pararas-Carayannis.

18 U.S. Code, Section 1956 to (a)(3), (alleging "laundering monetary instruments") was abused to prejudicially target, selectively prosecute, and wrongfully convict and sentence my husband, Dr. George Pararas-Carayannis (a member of a Greek ethnic minority), for the purpose of terminating him from 25 years of honorable Federal service. On December 21, 1994, he was sentenced to 41 months of imprisonment, in spite of the fact that he had a recent, almost fatal heart attack and two angioplasties. His doctors testified at the sentencing hearing on the seriousness of his emotional trauma, progressing congestive heart failure and the fact that incarceration will be detrimental to his health and may even result in his death. Arguments for departure were made that his extraordinary impairment and advanced age were reasons to impose a sentence other than imprisonment, under U.S.S.G. Ch. 1, Part A, 4(b) and Chapter 5, Part K of the Guidelines (U.S.S.G. § 5K2.0 and U.S.S.G. § 5H1.4), and as honored in precedent cases (*United States v. Long*, 977 F.2d 1264 (8th Cir. 1992) and *United States v. Lara*, 905 F.2d 599, 605 (2nd Cir. 1990)). These arguments were rejected.

Ironically, my husband was not found guilty of an actual crime but of a "sting", make -believe "crime" for his alleged, circumstantially established, "state of mind". The alleged underlying offense of the "sting" was a fabricated petty misdemeanor, which was not even represented as such as due process of the law requires. There was no victim for this hypothetical "crime" and there was no demonstration of his knowledge or intent of breaking any law. He was not charged with violation of either the underlying, non-represented State petty misdemeanor, or of any federal Travel Act or Rico violations. These federal laws require substantive rather than hypothetical state offenses and cannot borrow the "sting" provision of another statute. These laws were only used for definitional purposes in "structuring" the statutory tracking necessary to bridge the hypothetical State petty misdemeanor and thus fabricate my husband's conviction under the money laundering "sting" statute, 18 U.S. Code, Section 1956 to (a)(3), alleging the hypothetical "laundering of monetary instruments". Through such nebulous statutory tracking, my husband's sentencing level was artificially and enormously escalated. This is an unprecedented and preposterous extrapolation of the money laundering "sting" statute for an alleged State petty misdemeanor violation that does not even come under the Travel Act and certainly not under any of the RICO offenses.

There were violations of my husband's constitutional rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments in selectively targeting him and prejudicially prosecuting him. He was not engaged in an ongoing criminal misconduct to justify a "sting". Probable cause for an indictment was obtained through misrepresentations and false information from a coerced government witness (a Confidential Informer) threatened with deportation to Japan, and whose criminal record, questionable credibility, wrong motivation and other exculpatory materials (proving my husband's innocence) were improperly withheld from the Grand Jury. This became clear at trial following this government key witness's testimony. The "sting" prosecution against my husband was highly selective and prejudicial for the purpose of removing him from 25 years of honorable Government service. The scenario of the "sting" was artificially orchestrated to fabricate nexus with his work place in order to cause his termination from Federal Service.

Clearly, my husband's conviction was improperly obtained through the abuse and misapplication of Title 18, U.S. Code, Section 1956 (a)(3), for an alleged fabricated offense which is outside the

intent of Congress. Allegedly he "laundered monetary instruments" representing a few hundred dollars for a hypothetical government escort service. There were serious misinterpretations and statutory extrapolations of the statute in escalating artificially a petty misdemeanor offense level of a non-represented State, underlying, hypothetical offense (and its alleged "monetary instrument proceeds" - something that the banks process every day) to the sentencing level of a 22 "money laundering" offense. Congress intended the law to apply to organized crime involved in drug trafficking, not for regulating or punishing hypothetical, non-represented petty misdemeanors.

Furthermore, there were serious violations of procedural and evidentiary rules before and during the trial in orchestrating my husband's conviction. The videotaped "evidence" of his conversation with the undercover agent was sent twice to a government audiovisual laboratory in the Washington D.C area for "enhancement" - a euphemism for tampering. There was no chain of custody for this "evidence". The tapes sent back as "originals" were altered copies which had been grossly tampered (See feature article on tampering videotapes in the February 1994 issue of Scientific American entitled, "Seeing is not Believing"). Critical exculpatory portions showing my husbands' innocence were crudely erased from these tapes, blaming later television station interference. The most critical of the videotapes contained over 150 inaudible parts. The jury was provided by the government prosecutor with creatively-edited transcripts as an "aid" in understanding the inaudible "evidence". Jurors were seen taking written notes from these creative transcripts because they could not hear what was on the videotapes. After being admitted officially as "evidence" in court, and during trial, it was accidentally discovered that these videotapes, transcripts, and other government evidence were illegally being removed from the court by the government prosecutor every afternoon after trial because allegedly the court did not have an evidence storage facility (this has been a standard practice of handling evidence by the Hawaii Federal District Court). Worse yet, during trial, the videotapes admitted as evidence were improperly removed from court and taken by the government prosecutor to a hotel room (Hilton Hawaiian Village Hotel, Room 1362). The room was registered to a government audiovisual expert who had been brought in from the Washington D.C. area, together with his electronic equipment. He had set up an audiovisual laboratory during the entire duration of the six week trial to "enhance" the evidence (from approximately November 1 to December 21, 1993). At a special hearing outside the presence of the jury, government witnesses (IRS agents) testified and confirmed that indeed the court's evidence had been removed without the Court's authorization, during trial, and taken to the hotel room where electronic equipment capable of tampering had been brought in. Allegedly nothing was done to the videotapes. This type of misconduct is unprecedented and legal research failed to find a single case of such outrageous handling of the court's evidence anywhere else in the country.

The jury was not allowed to hear these facts or hear the testimony of the government witness or that of the audiovisual expert who was occupying the hotel room. Regardless, the jury was allowed to view this tainted evidence (the videotapes) during their 12 day long deliberation period. The erroneous claim was made that it was my husband and his attorney who wanted the jury to view this tainted evidence when, in essence (and the record shows it), they had complained vigorously and demanded that the tainted evidence should be stricken and not be shown. Finally, there were erroneous jury instructions on entrapment and what constitutes "predisposition". Exculpatory evidence showing my husband's innocence and wrong motivation for his prosecution was withheld from the trial jury. His defense of entrapment was nullified in advance through the orchestrated, Hollywood-like scenario and design of the "sting", and through the confusing 75-page jury instructions given to the jury at the end of the trial. In these instructions, the nebulous statutory tracking pertaining to the "definitional" Travel Act violation necessary for my husband's conviction was completely de-emphasized and buried near the end. The jury was totally confused as to the elements of the "crime" for the alleged "laundering of monetary instruments" under the money laundering "sting" statute. They were further confused by the vague and confusing definitions of what constitutes "proceeds", "unlawful activity", "some form of unlawful activity" and "though not necessarily which form of unlawful activity". Worse yet, facts and important

testimony pertaining to the "validity" of the evidence and the illegality of removing it from court during trial, was withheld from the jury.

It is interesting to note that the jury's verdict of guilty on only two of the seven trumped up counts of "laundering monetary instruments" (amounting to an insignificant amount of money), was reached with great difficulty and after a six week trial and twelve days of deliberations. It was not a clear cut decision. The jury looked and asked questions as to when entrapment begins having determined that there was entrapment because of the outrageous government conduct in the structuring of the "sting". However, the design of the "sting" nullified this defense by creating circumstantially and artificially "predisposition". The jury was forced to abandon entrapment. Nonetheless, after 11 days of deliberations, the jury found my husband not guilty on five of the seven trumped up counts of laundering monetary instruments. However, the jury was confused by the instructions. They were "hung" on the two "sting" money laundering counts of "disguising and concealing" the "proceeds" of the hypothetical government escort service. The instruction was clear on this issue. If he "deposited in an intrastate bank" the two checks from American Express and Diner's that was "disguising and concealing", even if he declared it on his income tax return. This is the low threshold element of the "crime" that always guarantees conviction under the "sting" money laundering statute (18 U.S. Code, Section 1956 (a)(3)). The jury was forced to deliberate further and resolve their "hung" decision on this issue. It was three days before Christmas and the trial had lasted almost two months. The members of the jury were anxious to go home. At that time they were allowed to view the most critical of the videotapes taken to the hotel room (the one which had 150 inaudible portions). They were given once again the creatively-edited copies of the transcripts as an "aid" to help understand the inaudible portions of this further tempered "evidence". Jurors were again seen taking written notes from these transcripts. Shortly thereafter, the jury returned with a guilty verdict on the two counts on which they had been "hung" which alleged the "disguising and concealing" of the "proceeds" of the hypothetical government escort service which was allegedly the unlawful activity (but for which no representation had been made). The jury missed completely the statutory "definitional connection" with the Travel Act violation necessary to convict my husband under the vague wording of the "sting" money laundering statute. They failed to understand that he was not charged with committing or participating in the alleged underlying offense for which no representation had been made. They failed to understand that a representation of a Travel Act violation had not been made, either, and that he was not charged with a violation of the Travel Act. They failed to understand the complex statutory tracking and that there was no underlying offense, or victim. Through the abuse of the "sting" money laundering statute, the government prosecutor had reduced the issue of my husband's guilt on whether a representation had been made that the proceeds were from an escort service, even if that service was hypothetical. Such representation indeed had been made and my husband (believing there was nothing unlawful about an escort service since dozens operate legally in Hawaii) had agreed at the first meeting with the undercover agent to process through his merchant account, as a personal favor, a few hundred dollars of credit card slips. This was the "predisposition" established through the scenario of the "sting" to nullify the jury's consideration of my husband's entrapment defense. However, it is important to note that the jury found my husband not guilty of any "substantive" counts of "laundering monetary instruments" or of promoting any unlawful underlying activity. Obviously the jury did not believe that my husband was motivated by profit.

In summary, the alleged "proceeds" (allegedly the monetary instruments that were "laundered") were never represented to my husband as being from an actual unlawful activity as due process of the statute requires. **Hearsay testimony was admitted as evidence that "all escort services are fronts for prostitution"** and therefore that satisfied the representation requirement of the statute. Such misrepresentation is the pattern of the abuse of 18 U.S. Code, Section 1956 (a)(3). The U.S. Sentencing Commission's internal report on the need for amendments related to mandatory sentencing guidelines suggests that 68% of those convicted under this statute did not really know or believe the proceeds to be from a "specified unlawful

activity". More often than not, there is no clear representation by the undercover agent that the proceeds are indeed those of an "unlawful activity", or even a hint of "some form of unlawful activity" to satisfy the statute's due process requirement. It was certainly true in my husband's case. There was never a representation made and no due process was followed by the prosecutor in staging and directing a "sting" involving a few hundred dollars of credit card slips from the alleged escort service. The "proceeds", monetary instruments he allegedly "laundered", were never represented even circumstantially to be from prostitution. Ironically, even presently, dozens of escort services openly advertise in the Yellow Pages acceptance of credit cards and are issued merchant accounts by the banks. If indeed "all escort services are fronts for prostitution" why is it that neither the banks nor the escort services were ever prosecuted for "laundering monetary instruments", which is something they do on a daily, routine basis and in large amounts. No effort was ever made by the credit card companies to stop issuance of merchant accounts to escort service business, or to prevent the advertising of credit card acceptance or the Yellow Pages' display of credit card logos. The Yellow Pages, the telephone companies, and the State and Federal government receive escort service "proceeds" in the form of fees or taxes. Ironically, American Express Company, the company that provided the government with credit cards of fictitious card holders to help the government prosecutor fabricate the sting against my husband, was fined recently \$50 million by the government for actual laundering of Colombian drug money. In this case and in many other cases, there were no criminal indictments for such actual, hard-core, illegal money laundering, on-going activity. This and other cases have been settled as civil cases through the imposition of fines. Obviously a double prosecutorial standard exists on how the money laundering laws are applied. My husband's prosecution was downright hypocritical, selective and prejudicial. His conviction was improperly obtained through the abuse and misapplication of Title 18, U.S. Code, Section 1956 (a)(3), a statute which has become an instrument of oppression. **The cost of his prosecution to the American taxpayers has been enormous (over \$2 million) and unjustifiable.** My husband's 41-month sentencing is ludicrous and hypocritical. His life, health and reputation have been ruined. He was forced to spend all his life's savings and retirement funds on defending himself for these frivolous charges. His job was taken away and he was left penniless and in extremely poor health.

Conclusions

18 U.S. Code, Section 1956 (a)(3) is a statute which prearranges a "crime" and its evidence with guaranteed conviction and level of sentencing. It has become an instrument of oppression. It produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines. Congress should amend the statute and provide guidelines for its proper constitutional application. Congress needs to ratify the U.S. Sentencing Commission's proposed sentencing guidelines on laundering monetary instruments.

18 U.S. Code, Section 1956 (a)(3) clearly violates the Eighth Amendment, because it imposes excessive bail, excessive fines, and cruel and unusual punishment often totally out of proportion to the underlying offenses. It produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines. For each count it provides for \$250,000 in fines and up to 20 years imprisonment; the same as a major drug trafficking violation, even if the alleged, misrepresented, underlying offense of the "sting" is only a petty misdemeanor. Often the alleged unlawful activity does not fall within the predicate offenses of section (7) of the law to qualify as a money laundering offense. A nebulous and circuitous statutory tracking is often used by prosecutors to bring the alleged offense within the ambit of money laundering offenses with considerable, unusual and cruel escalation of the offense level. Clearly, this was not the Congressional intent.

Often, 18 U.S. Code, Section 1956 (a)(3) has been misapplied and abused to target individuals for a variety of misrepresented minor offenses which do not fall within the ambit of offenses for which the law was intended by Congress. As it was pointed out by Mr. Blau at the Commission's hearing, the only reason for passing the money laundering laws, was to get at professional money launderers, principally those associated with narcotics and organized crime. Furthermore, that the "sting" statute is too overboard and that the Department of Justice did not exercise some central control over its use. As a result, "ninety-four different interpretations of this statute exist presently throughout the country and each U.S. Attorney decides how this statute will be used or abused". Mr. Pauley, a Department of Justice official and ex-officio member of the Commission mentioned at the hearing that the Department of Justice is planning to decriminalize certain money laundering offenses, particularly for non-drug related minor offenses. However, the Department of Justice has not acted on these promises. Neither Congress nor the Department of Justice have provided guidelines for the statute's proper application. Guidelines for proper implementation are needed.

At the Commission's hearing, concerns were expressed of the need for changes of the money laundering laws, particularly of the "sting" statute. They warned that "the criminal justice process is being subverted and undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or with organized drug activity", as Congress intended. They questioned the existing sentencing guidelines and endorsed the need of correlating the money laundering offense level to that of the underlying conduct. Finally, they looked to the courts as the guardians of fairness and proportion in sentencing by stating that the Courts "will reach a position where they will not forever tolerate these charging abuses". Unfortunately the courts have been reluctant to deviate from the constraints of the present sentencing guidelines.

In conclusion, the U.S. Sentencing Commission's Charter mandates evaluation of the effects of the sentencing guidelines on the criminal justice system by providing advice to Congress regarding the modification or enactment of statutes relating to criminal law and sentencing matters. Furthermore, the sentencing guidelines proposed by the Commission are designed to further the purposes of just punishment, and provide fundamental fairness in meeting the purposes of sentencing by avoiding unwarranted disparities as related to the criminal justice process. I wish to reiterate that 18 U.S. Code, Section 1956 (a)(3) produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines. The U.S. Sentencing Commission has the responsibility to call immediate Congressional attention to the urgent need for ratification of the proposed sentencing amendments (Amendment no 20 in particular) and for reevaluation of the money laundering laws, particularly of the "sting" money laundering statute (18 U.S. Code, Section 1956 (a)(3)). This statute needs to be amended by appropriate Congressional Committees as its abuse has resulted in unwarranted convictions and in intolerable prosecutorial excesses and conduct. It has become an instrument of oppression. Most convictions have been obtained through abuse of this statute and through coercion in plea bargaining made possible by the threat of the guaranteed high and disproportionate sentencing.

Thank you for your consideration and action on these very important concerns.

Sincerely,



Carol Carayannis

Association of Americans for Constitutional Laws and Justice (AACLJ)

cc:

Commissioner Michael S. Gelacak, U.S. Sentencing Commission
Judge A. David Mazzone,

Commissioner Wayne A. Budd,	"
Judge Julie E. Carnes,	"
Commissioner Michael Goldsmith,	"
Judge Deanell R. Tacha,	"
Commissioner Edward F. Reilly, Jr.,	"
Commissioner Jo Ann Harris	"

Ms. Phyllis J. Newton, Staff Director, U.S. Sentencing Commission
 Mr. Michael Courlander, Public Information Specialist, "

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Hon. Orrin Hatch, Chairman, Senate Judiciary Committee

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Members of Senate Banking Committee

Hon. Henry Hyde, Chairman, House Judiciary Committee

Members of House Judiciary Committee

Hon. Jim Leach, Chairman, House Banking Committee

Members of House Banking Committee

Hon. Dan Inouye, Senator, Hawaii

Hon. Dan Akaka, "

Hon. Neil Abercrombie, Rep., Hawaii

Hon. Patsy T. Mink, Rep. Hawaii

PARTICIPANTS WHO TESTIFIED on Money Laundering Sentencing Guidelines / Public hearing on proposed Guideline Amendments of the U.S.SENTENCING COMMISSION, (Monday March 22, 1993, Ceremonial Courtroom, Federal Courthouse, 2nd & Constitution Ave. N.W. Washington DC)

Mr. Charles W. Blau (former Associate Attorney General, Department of Justice)

Mr. Stephen R. LaCheen, Pennsylvania Association of Criminal Lawyers

Mr. James M. Becker, Criminal law Committee of the Federal Bar Association

Mr. Chuck Morley (EX Criminal Investigation Division of the IRS; EX Chief investigator of the U.S. Senate Subcommittee on Investigations)

Mr. David Stewart, Law firm of Ropes and Gray

Mr. Paul B. Bergman, New York Council of Defense Lawyers

American Civil Liberties Union

AHEPA

Mr. Jim McGee, The Washington Post

New York Times

Ms. Jill Smolowe, Time- Life Magazine

Ms Elaine Lafferty, "

Ms. Andrea Sachs, "

ASSOCIATION OF AMERICANS
FOR CONSTITUTIONAL LAWS AND JUSTICE (AACLJ)

(A Free Association of Americans seeking community, legislative, and judicial assistance and support in preserving and restoring constitutional laws and Justice in America.)

MANDATE: RESTORING CONSTITUTIONAL LAW AND JUSTICE IN AMERICA

PLAN OF ACTION

Unconstitutional laws, or laws used unconstitutionally, have no place in a great, free, and democratic country such as ours that advocates and supports human and civil rights. Our Constitution is still the supreme law of the land. Improperly used laws can undermine the legal process to become an instrument of repression. If we allow laws to be used unconstitutionally, without even protesting, it is only a question of time before our basic civil rights and liberties are forever lost. Loss of freedom can become an insidious progression.

We, as Americans, cannot seat placidly by as our neighbors are wrongfully seized and their property is confiscated. We cannot simply capitulate to improperly used laws that dilute our right to be secure in our homes against unlawful searches and secure in the courts against nebulous, new unconstitutionally used laws and unlawfully fabricated evidence. Our sacred rights are not the "loopholes" by which our enemies, the murderers and rapists and thieves, and drug dealers, allegedly escape. Our juries can be responsible and trusted and should not be manipulated. Our legal system should protect us and uphold our civil rights. Finally, we cannot forget the lessons of history, that when the rights of our "enemies" have been wrestled from them, then our rights have been lost as well, for the same rights serve both citizen and "criminal".

All of our laws need to be adjudged constitutionally accurate in their intent and language so as to adhere strictly and hold true to the Rules and Principles of the Constitution of the United States of America and its Bill of Rights and subsequent Amendments. We, The People, and our Congressional representatives need to be vigilant of abuses and injustices of improperly applied laws. Only through civil responsibility, vigilance, and determination, we can restore a higher degree of fidelity to the American Criminal Justice System and to our country's Founding Principles.

AN ISSUE FOR IMMEDIATE ACTION

Title 18, U.S. Code, Section 1956 (a)(3), The Money Laundering "Sting" Statute is an unconstitutional law that needs to be amended or repealed.

Title 18, U.S. Code, Section 1956 (a)(3), the Money Laundering "sting" statute has been selected and targeted as the best example of a "new law" that has become an outmost instrument of oppression and repression in our country. It is an unconstitutional law that needs to be repealed or drastically amended.

The statute, when abused, as it has been well-documented in many cases around the country, "prearranges the 'crime' and its evidence with guaranteed conviction and level of sentencing" Such abuse of the law is clearly unconstitutional and undermines the integrity of the judicial process. Our Congress needs to provide guidelines for the proper and ethical use of this money laundering law so that there can be some measure of balance and fundamental fairness in its intended restricted application against organized crime and drug traffickers.

Title 18 U.S. Code, Section 1956 (a)(3), hereafter referred as the STING STATUTE, was enacted on November 18, 1988 as part of the Money Laundering Amendment Act and as a component of anti-drug legislation. However, the statute has been misinterpreted and applied frequently, selectively, improperly, prejudicially and unconstitutionally by federal prosecutors to target and convict individuals, through outrageous conduct, unethical deceptions, and abuse of the judicial process and of the federal criminal justice system. It has resulted in a terrible waste of government resources and taxpayer's money. Furthermore, the statute has been grossly misapplied and abused to target and convict individuals for a variety of misrepresented hypothetical minor offenses which do not fall within the ambit of offenses for which the law was intended by Congress.

When improperly used, the STING STATUTE violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of our Constitution by permitting the orchestration of a "crime" and its evidence thus guaranteeing conviction and a very high level of sentencing, obtained through a predetermined and unavoidable low threshold of proof. Abuses of the STING

STATUTE have been attested and documented by numerous sources, testimonies, newspaper and magazine articles, government records of public hearings, improper prosecutions documented by caselaw, and even by the U.S. Sentencing Commission's internal and independent finding; the latter suggesting that due process was not followed in the application of the STING STATUTE and that as many as 68% of the persons that have been convicted may be due to misrepresentations by law enforcement officials.

In brief, there has been unprecedented abuse of the STING STATUTE of the money laundering laws: the STING STATUTE does not provide the constitutional safeguards and it is a law which has become an instrument of oppression. Its continuing misapplication by federal prosecutors is subverting and undermining our Criminal Justice System.

Congress needs to repeal or amend drastically 18 U.S. Code, Section 1956 (a)(3), the STING STATUTE of the Money Laundering laws and to provide proper guidelines that guarantee Constitutional safeguards. Congress needs to review and adopt the amendments to the sentencing guidelines proposed by the U.S. Sentencing Commission for convictions obtained through the abuse of the STING STATUTE.

Criticism of the "Sting" Money Laundering Statute

(U.S. Sentencing Commission's Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993, Washington DC)

The U.S. Sentencing Commission generated an internal report proposing amendments to its own sentencing guidelines for money laundering offenses. Specifically for offenses prosecuted under the "sting" money laundering statute, the Commission's proposed amendments would tie the sentencing level to that of the underlying "sting" offense, when properly represented. There was an overwhelming support for these amendments by the Chairman of the U.S. Sentencing Commission, and all of the Commissioners and staff, as well as from those who testified at the public hearings. The judiciary committees of the 103rd Congress did not get around to reviewing or acting on the Commission's proposed sentencing amendments.

The following are a few examples of comments made at the Sentencing Commission's hearing (Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993) regarding abuses and inequities of the money laundering laws, particularly the "sting" statute. One of the people that testified at the public hearing in Washington D.C. was the principal author of the money laundering statutes, Mr. Charles W. Blau, (Transcripts of the hearing p.256-261). Commenting on the abuse of the money laundering "sting" statute, he stated: "It is a bit like using a nuclear weapon against a single individual". Mr. Charles W. Blau is presently in private practice, but has worked for the Department of Justice in different capacities, including Chief of Narcotics, Associate Deputy Attorney General and Associate Attorney General. He played an active role in drafting the money laundering statutes and the memorandum of understanding between the various law enforcement agencies in using these statutes. He is now extremely critical of the abuse of the laws that he helped draft. At the hearing he stated:

"In looking at these statutes, I think basically the intent, or at least my intent, was to create a broad criminal statute which would reach every kind of sophisticated money laundering that was out there. In short, I thought, and I think basically the people that were in the process with me felt, that the real intent of this statute was to get at professional money launderers, principally those associated with narcotics and organized crime.

In retrospect, I think there are probably two mistakes that we made....I think I would have liked to have limited this statute to instances where there was sophisticated criminal activity present, either with narcotics or with organized crime.

Secondly, I think I would have required the Department (Justice) to have exercised some central control over the use of this statute much more so than we did. The Department, in my view, basically has failed to have what I would call a realistic or a centralized process dealing with the use of this statute. There are, in essence, 94 separate policies, and each U.S. Attorney, basically, in essence, decides how the statute is going to be abused or used, as the case may be.

What we are seeing at least in my part of the country, which is Texas and the Southwest, is a continual threatening of the use of the money laundering statute in non-drug and non-organized crime cases."

On page 259 of the Sentencing Commission's Hearing proceedings, Mr. Blau continues:

"My view, however, I think is that this statute is a very, very important powerful prosecution tool. I think that it has tremendous potential to be abused. I think in at least my area of the country, and particularly in the white collar non-drug area, we are seeing an abuse of the use of this statute. Plea negotiations, in short, have been replaced by threat negotiations, and using a very substantial and heavy-wielding club, the money laundering statute. This is a real threat. One may argue that it is either good plea bargaining on the part of the government or, alternatively, it is a little bit overzealous and coercive of the criminal justice process.

The question that I raise with the use of this statute, without any centralized controls, is whether the criminal justice process is being undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or with organized drug activity. And the question with these guidelines has been, should a person be subjected to severe criminal sanctions, when his conduct amounts to no more than the base underlying offense. It is a bit like using a nuclear weapon against a single individual.

I think these changes proposed by the Commission are essential in bringing a little reality back into the prosecution charging process. I would have preferred that the department basically would have taken this on itself, would have overseen basically the use of this statute and would have culled out the cases where it was clearly an abuse of process to bring such an enormous charge against underlying conduct which did not deserve it.

My view of these guidelines, until basically Congress gets around to amending the statute, is that the underlying offense should be relevant and important factor in determining what penalties for money laundering connected with those type of offenses are.

I do believe that the courts are going to I think reach a position where they will not forever tolerate these charging abuses, and a very valuable prosecution tool will be unnecessarily limited, or bad case law. So I support your amendments completely."

Mr. Stephen R. LaCheen, representing the Pennsylvania Association of Criminal Lawyers, in his endorsement of the Commission's guideline amendments commented (page 75):

"We also comment favorably on your money-laundering amendments, as well as the amendments regarding sting operations, and there both, again, informed out of the concern to avoid manipulation of the guidelines in the plea-bargaining process, which in vast majority of cases, as you know, are resolved in plea negotiations."

Mr. James M. Becker, representing the Criminal law Committee of the Federal Bar Association, commented as follows (p. 157):

".....Our group has identified several instances in the Eastern District of Pennsylvania, and we think they exist nationwide, where the mere addition of that money laundering charge, especially under 18 U.S.C. sections 1956 and 1957, artificially raises the guideline level beyond that of the underlying offense, when there is no real money laundering activity that somehow makes the person's conduct more culpable than if they were just charged with a fraud offense, so for that reason, we applaud the proposed Amendment No. 20, heartily endorse it."

Mr. Chuck Morley, an expert on the subject of money laundering and currency reporting laws under the Bank Secrecy Act, having served with the Criminal Investigation Division of the IRS and as Chief investigator of the U.S. Senate Subcommittee on Investigations, stated (p. 224):

".....I come here today to urge you to approve the money laundering and the structuring guidelines as proposed by the committee staff." ".....the revised guidelines reflect greater sensitivity to such factors as sophistications of money laundering conduct." ".....the staff (Sentencing Commission) found that, historically, prosecutors have been stretching these guidelines significantly...."

"Offenses that technically qualify as money laundering are frequently simply incidental to or component parts of the underlying crime. This has given rise to extensive disproportionate sentencing.....The sentencing report indicated that 68 percent of the defendants convicted of structuring either didn't know or did not

believe the funds were illegal. Yet, these people could still get the same type of sentence as a major money launderer, somebody involved in a huge smurfing operation. So do the guidelines work? I don't think they work, unless what we are trying to do is fill the jails up....." The Justice Department has said to me informally that we are trying to decriminalize money laundering or that we are trying to greatly lessen the offense of money laundering....." ".....To continue under the current guidelines is to ignore the realities of money laundering totally, while continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants."

Mr. David Stewart of the law firm of Ropes and Gray, commented:

The basic principle announced by the Commission, which I strongly endorse, is an attempt to tie the base offense levels for this offense (money laundering) more closely to the underlying conduct that was the source of the illegal proceeds.....in non-drug offenses you really do get an extraordinary increase in the penalty by including the money laundering charge. I would even report that prosecutors confirm that is why they add money laundering counts, because the guidelines are so powerful with them. It is a bigger hammer. One case I saw that was 27 months in prison versus 6 months in prison.....Finally, I would note my agreement with the observation to the American Bar Association on the subject of stings, again, the concept of the money laundering offense to the underlying offense seems to me very important in that context, as well. It is a little trickier, of course, because there is no true underlying offense, so it has to be the represented underlying offense, but, again, it seems to me the proper ways to approach the problem."

Mr. Paul B. Bergman, representing the New York Council of Defense Lawyers, had the following comments:

"I think that this proposed amendment on the guidelines for money laundering goes one way towards eliminating what we consider to be unfair leverage and sometimes abusively exercised leverage with money laundering."

What is interesting from the above statements and other criticism, and what the Sentencing Commission's own report suggests, is that the money "sting" laundering statute has been abused. Two of the people who testified at the Sentencing Commission hearings had been with the Justice Department and had been responsible for the drafting of the money laundering statutes. The same people now indicate that their real intent, was to get at professional money launderers, principally those associated with narcotics and organized crime. The principal author of the money laundering statutes, Mr. Blau, admits that the Department of Justice made two mistakes in making the "sting" statute too overboard and not limiting it to sophisticated criminal activity present, either with narcotics or with organized crime. Furthermore, that the Department of Justice did not exercise some central control over the use of this statute and that 94 separate policies exist, with each U.S. Attorney's Office, often misapplying and clearly abusing the statute.

Concerns have been expressed by the Sentencing Commission members and the supporters of proposed sentencing guideline amendments and of the changes of the money laundering laws, that the criminal justice process is being undermined by the use of a very easily proven criminal statute which "is not connected in any way, shape or form with any organized crime activity or with organized drug activity", as Congress intended. They question the existing sentencing guidelines and they endorse the need of correlating the money laundering offense level to that of the underlying conduct. Finally, they look to the courts as the guardians of fairness and proportion in sentencing by stating that the Courts will "reach a position where they will not forever tolerate these charging abuses" (by federal prosecutors).

IMMEDIATE OBJECTIVES FOR ACTION:

The abuses of the "sting" statute of the money laundering laws should be stopped. They have resulted in the subversion of the criminal justice system, in unfair convictions, and in gross waste of taxpayer's money. Congress needs to review and revise, not only the sentencing guidelines on non-drug related money laundering offenses, but the statutes themselves. The Department of Justice should be required to exercise better control to prevent abuses of the "sting" statute by overzealous prosecutors. Congress has an obligation to change this unconstitutional law, or at least provide proper guidelines of due process, in its implementation. In its present form, this unfair, unconstitutional law is undermining our criminal justice system and is responsible for improper convictions and unprecedented prosecutorial misconduct that has no place in a democratic society.

AACLJ has identified two immediate objectives for community support and for Congressional action :

1. The money laundering "sting" statute (18 U.S. Code, Section 1956 (a)(3)), needs to be repealed or at least amended by Congress.
2. The U.S. Sentencing Commission's Proposed Amendments to the Sentencing Guidelines need to be adopted, particularly those pertaining to money laundering offenses and more specifically to non-drug related offenses prosecuted by the "sting" money laundering statute.

JUSTIFICATION OF OBJECTIVES:

THE STATUTE: Congress needs to reevaluate the language of the statute and provide proper guidelines for its use. "Ninety-four different interpretations of this statute exist presently throughout the country and each U.S. Attorney decides on his or her own how this statute will be used or abused". Neither Congress nor the Department of Justice have provided guidelines for the statute's proper application. The U.S. Sentencing Commission's internal report on the need for amendments related to mandatory sentencing guidelines suggests that 68% of those convicted under this statute did not really know or believe the proceeds to be from a "specified unlawful activity". This is because no clear representation was made and no due process of the law was followed. It means that perhaps as many as 68% of the people that have been convicted may be innocent; people serving long prison sentences through coercive plea bargaining and because of prosecutorial abuse of this "sting" statute of the money laundering laws. The statute has an extremely low threshold of proof, provides for a disproportionate sentencing level, and it has been grossly abused by overzealous prosecutors. It is unconstitutional, because it violates the Fourth, Fifth, Eighth, and Fourteenth Amendments. The statute's low threshold of proof, makes it easy for government prosecutors to engage in outrageous behavior, to fabricate crimes and evidence, and almost automatically obtain indictments and convictions by prearranging a "crime", the evidence, conviction and extremely high level of sentencing.

The "sting" statute violates the Due Process and the equal protection provisions of the Fourteenth Amendment in that, more often than not, there is no clear representation by the undercover agent that the proceeds are indeed those of an "unlawful activity", but of "some form of unlawful activity" without ever disclosing what is the activity. It violates the Fourteenth Amendment because of the low threshold of proof in the form of the key words "any representation". There are more nebulous definitions that are vague and subject to deliberate prosecutorial misinterpretations.

THE SENTENCING: Amendments proposed by the U.S. Sentencing Commission pertaining to money laundering offenses received overwhelming support at a public hearing. The U.S. Sentencing Commission's prepared its own favorable internal report recommending changes. Congressional committees failed to consider the proposed amendments in 1993 or in 1994. Congressional attention should be called to the need for ratification of these amendments.

The statute clearly violates the Eighth Amendment, because it imposes excessive bail, excessive fines, and cruel and unusual punishment totally out of proportion to the underlying offenses. For each count it provides for \$250,000 in fines and up to 20 years imprisonment; the same as a major drug trafficking violation, even if the alleged, misrepresented, underlying offense of the "sting" is only a petty misdemeanor. Often the alleged unlawful activity does not fall within the predicate offenses of section (7) of the law to qualify as a money laundering offense. A circuitous statutory tracking is often required to bring the alleged offense within the ambit of money laundering offenses with considerable, unusual and cruel escalation of the offense level.

NEEDED ACTION AND SUPPORT

AACLJ asks Patriotic Americans and groups sharing the common goal of preserving and restoring constitutional laws and justice in America to assist and support this initial effort to have this most outrageous law, the Money Laundering "sting" statute, 18 U.S. Code, Section 1956 (a)(3) repealed or amended by writing to the chairmen and members of the Congressional Banking and Judiciary committees, to their elected representatives in Congress and to the U.S. Sentencing Commission. The statute needs to be repealed or drastically modified and amended.

Guidelines should be provided by Congress and the Department of Justice on how targets should be selected for deceptive government investigations using 18 U.S. Code, Section 1956 (a)(3); on how government confidential informants should be qualified, screened and monitored; on what is the effect of the Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers seeking convictions by any

means; on how outrageous government invasion of privacy can be rationalized, on what are appropriate sentencing levels when the underlying offense is nothing more than a petty misdemeanor; finally on what the due process requirement of "representation" should be.

Please sign and return the accompanying "Petition to Repeal" which clearly outlines the unconstitutionality of the "Sting" money laundering statute. Please circulate this notice, write and send copies of the attached petition to your elected officials in the 104th Congress bringing to their attention the abuse of this law and urging them to act on our common goals and objectives. BY SO DOING, YOU WILL BE UPHOLDING OUR CONSTITUTION, AND YOU WILL HELP PRESERVE OUR CIVIL RIGHTS, OUR BASIC CONSTITUTIONAL FREEDOMS, AND THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

PETITION TO REPEAL 18 U.S. Code, Section 1956 (a)(3)

"Issuing A Petition calling for the REPEAL of 18 U.S. Code, Section 1956 (a)(3), the "Sting" Money Laundering Statute which, in its present form, is an Unconstitutional Law;

CONSTITUTIONAL BASIS

WHEREAS, our Founding Fathers in 1787 adopted a Constitution at our First Congress and subsequent Congresses supplemented it with Constitutional Amendments or what is known as The Bill of Rights and the Reconstruction Amendments and, most importantly, the 14th Amendment with its due process and equal protection clauses; and

WHEREAS, our Constitution, the Bill of Rights and subsequent amendments, are the Supreme Law of the Land, and all individual rights and liberties are guaranteed therein, within the Bill of Rights and by the 14th Amendment; and

WHEREAS, all laws must mesh both democratic values and the need for public order and integrity in government and, most importantly, honor the rights guaranteed citizens under the Constitution; and

WHEREAS, if a law is ratified by Congress in good faith but its enforcement and prosecution is intentionally misinterpreted, applied selectively, improperly, prejudicially and unconstitutionally, abolishing liberties guaranteed by the Bill of Rights and violating the Due Process of the Fourteenth Amendment and UPON THIS HAPPENING this law to be hereby declared to be in violation of the Constitution of the United States, and subject to Congressional review and REPEAL; and,

THE UNCONSTITUTIONAL "STING" STATUTE OF MONEY LAUNDERING LAWS - CONGRESSIONAL RECORD

WHEREAS, 18 U.S. Code, Section 1956 (a)(3), the "sting" money laundering statute hereafter referred as the STING STATUTE), enacted on November 18, 1988 as part of the Money Laundering Amendment Act, is such a law requiring review and repeal because, frequently, it is misinterpreted and applied selectively, improperly, and prejudicially by federal prosecutors to target and convict citizens, through outrageous government conduct, unethical deceptions, abuse of the judicial process, and violations of Constitutional rights and principles, and

WHEREAS, the record shows that this STING STATUTE has been consistently, systematically and improperly applied and implemented, in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of our Constitution by permitting the improper fabrication of evidence and orchestration of a "crime" with guaranteed conviction and level of sentencing, obtained through a prearranged, low threshold of proof, and

STING STATUTE'S VAGUE LANGUAGE and DEFINITIONS

WHEREAS, the STING STATUTE makes such improper prosecution possible through vague, confusing and generic language and definitions which do not meet the simple language requirement of the law or sufficiently and clearly informing targeted persons of the charges against them; and

WHEREAS, the definitions and due process requirements that hold true for other laws, are not applied in the implementation of this STING STATUTE by federal prosecutors guiding, directing and supervising "sting" operations against targeted individuals; and

WHEREAS, the vague language of the STING STATUTE downgrades the threshold of proof necessary for convictions with such definitions of terms as "represented" substituted with "any representation", and "specified unlawful activity" substituted with "some form of specified unlawful activity", further substituted and downgraded with "though not necessarily what form of specified unlawful activity"; and

WHEREAS, the "specified unlawful activity" or "some form of specified unlawful activity" , though not necessarily what form of specified unlawful activity, covers a wide range and an unimaginable variety of hypothetically committed offenses, including any of the offenses in section 1961 (1) (RICO violations) and subviolations under this section, encompassing in turn a variety of other offenses, some of which may be even State misdemeanors, "represented" vaguely and circumstantially by undercover officers through "any representation" but only for definitional purposes in the structuring of a "sting" and thus making it possible to obtain a guaranteed guilty conviction through such confusing, circuitous, statutory tracking and by the vague language of the STING STATUTE; and

WHEREAS, these misrepresented "sting" subviolations used in the statutory tracking require a substantive rather than a hypothetical federal or State offense, prosecutors do not charge defendants with these offenses but use the vague "representation" or "any representation", including a circumstantial omission of further inquiry by a targeted person, to establish "willful neglect" or a "blind eye" as a substitute for their failure to follow the Due Process requirement of the law, and to claim hypothetical underlying offenses which are used for definitional purposes in structuring "stings" and only for the purpose of indicting and prosecuting for money laundering under the STING STATUTE, and independently of the nature or offense level of these hypothetical, underlying offense; and

LACK OF CONGRESSIONAL GUIDELINES IN THE APPLICATION OF THE STING STATUTE

WHEREAS, without proper Congressional or Department of Justice guidelines on the STING STATUTE's proper application, its vagueness has been often misinterpreted, exploited and abused by law enforcement agents and federal prosecutors to engage in outrageous conduct in order to obtain easy convictions of improperly targeted individuals by avoiding conformance to the due process requirements of the Fifth and Fourteenth Amendment of the Constitution; and

WHEREAS, no other Guidelines have been provided by Congress or the Department of Justice on how targets for such deceptive investigations should be selected; on how government confidential informants should be qualified, screened and monitored; on what is the effect of the Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers seeking convictions by any means; or on how outrageous government invasion of privacy can be rationalized, or what are appropriate sentencing levels when the underlying offense is nothing more than a petty misdemeanor artificially and enormously escalated to a money laundering offense level through abuse of the STING STATUTE; and

STING STATUTE'S MISAPPLICATION AND ABUSE

WHEREAS, no uniformity in the application of this law exists and Ninety-four different interpretations of this STING STATUTE exist presently throughout the country and each U.S. Attorney decides on his or her own how this STING STATUTE will be used or abused; and

WHEREAS, the STING STATUTE has been grossly misapplied and abused to target individuals for a variety of misrepresented minor offenses which do not fall within the ambit of offenses for which the law was intended by Congress; and

WHEREAS, this misapplication of the STING STATUTE has resulted in unprecedented misconduct, abuse of power, abuse of the federal criminal justice system, waste of government resources, taxpayer's money and wrongful convictions; and

WHEREAS, the continuous abuse of the STING STATUTE for frivolous, unnecessary prosecutions diverts valuable government resources from fighting real crime; and

WHEREAS, the STING STATUTE has already been used to violate fundamental constitutional rights of United States citizens; and

STING STATUTE'S CRUEL AND UNUSUAL PENALTIES

WHEREAS, the STING STATUTE provides for severe, disproportionate and artificially escalated sentencing levels and penalties and seizures even when the underlying "represented unlawful activity" is minor; and

WHEREAS, most convictions are obtained through coercive plea bargaining effected by prosecutors through the use and threat of the high sentencing levels under this STING STATUTE; and

WHEREAS, the U.S. Sentencing Commission's internal report on the need for amendments related to mandatory sentencing guidelines suggests that 68% of those convicted under this STING STATUTE did not really know or believe the proceeds to be from a "specified unlawful activity", which is a frightening statistic, clearly suggestive of due process violations and possible wrongful convictions; and

STING STATUTE'S VIOLATIONS OF THE BILL OF RIGHTS AND OF THE 14TH CONSTITUTIONAL AMENDMENT

WHEREAS, the STING STATUTE violates the Fourth Amendment's guarantee of the right of the people to be secure in their persons against unreasonable searches and although secret videotaping of persons in public places may be permitted, clandestine sound recording of private conversations is a form of unreasonable search protected by the Fourth Amendment; and

WHEREAS, the STING STATUTE violates the Fifth Amendment and due process against self-incrimination in that no warning is given to the targeted person and no Miranda rights are read that any statements made, or not made (labeled as willful neglect), will be used against this person for money laundering or any other type of collateral prosecution; and

WHEREAS, the STING STATUTE violates further the Fifth Amendment of Due Process and encourages outrageous government conduct in obtaining convictions; and

WHEREAS, the STING STATUTE violates the Sixth Amendment because its language is ambiguous and vague and in most "sting" money laundering cases an indicted person is not informed clearly in the indictment of the nature and cause of the accusation which often is not clear and does not correspond with an underlying offense which was properly represented; and

WHEREAS, the statutory tracking of the accusation in the STING STATUTE is often circuitous, nebulous, semantically vague and therefore not understood as it involves the targeted individual's alleged guilt for an extreme money laundering offense based, not on an actual violation of an underlying federal or state offense (often a misdemeanor), but for his alleged "intent" or "state of mind" in that he "believes" to participate or commit the misrepresented, hypothetical underlying offense which is used for definitional purposes only in the structuring of the money laundering "sting", and that the target's "intent" or "state of mind" (and therefore guilt for money laundering) can be circumstantially and subjectively established by the undercover officer's "representation" or "any representation" of "some form of unlawful activity, although not necessarily which form unlawful activity"; and

WHEREAS, alleged ongoing investigation of defendants for "other crimes" allegedly revealed to the undercover agent earlier during the "sting" and subsequent piecemeal or a series of superseding indictments are used often by prosecutors as the excuse to violate further a defendant's sixth Amendment right to speedy trial; and

WHEREAS, the STING STATUTE clearly violates the Eighth Amendment, because it imposes excessive bail, excessive fines, and cruel and unusual punishment totally out of proportion to the underlying offense which often may be minor; and

WHEREAS, the STING STATUTE provides for \$500,000 in fines and up to 20 years imprisonment, same as a major drug trafficking violation, even if the alleged, misrepresented, underlying offense of the "sting" is only a petty misdemeanor punishable ordinarily with a small fine if indeed it was committed; and

WHEREAS, prosecutors use the severity of the STING STATUTE's punishment or "other crimes" revealed during the "sting" to coerce and force most defendants to plead guilty to one or more counts of money laundering rather than risk longer imprisonment through the guaranteed conviction process made possible by the improper prosecutorial use of the STING STATUTE and its intentionally low threshold of proof; and

WHEREAS, if the alleged and misrepresented "unlawful activity" does not fall within the predicate offenses of section (7) of the STING STATUTE to qualify as a money laundering offense (i.e. drug related), the circuitous statutory tracking mentioned earlier is used to bring the alleged hypothetical offense of the "sting" within the ambit of money laundering offenses by charging a defendant not guilty of the misrepresented minor offense but guilty of his "intent" and of a circumstantially derived "state of mind" (guaranteed through the design of the scenario of the "sting"), in allegedly intending to commit the hypothetical lesser offense, with considerable, unusual and cruel escalation to the money laundering offense level in further violation of the Eighth Amendment; and

WHEREAS, the STING STATUTE violates the Due Process and the Equal Protection provisions of the Fourteenth Amendment in that, often, there is no clear representation by the undercover agent that the proceeds are indeed those of an "unlawful activity", but of "some form of unlawful activity" often without even remotely disclosing the nature of this "unlawful activity"; and

WHEREAS, the STING STATUTE violates further the Fourteenth Amendment because of the low threshold of proof in the form of the key words and phrases downgrading the term "represented" to "any representation", and the term "unlawful activity" downgraded to "some form of unlawful activity", which is further downgraded by the phrase "though necessarily which form of unlawful activity", and the terms "proceeds", "property" "concealing" "disguising", "promoting", "interstate commerce" to have a plethora of incomprehensible definitions and interpretations; and

WHEREAS, the financial transaction of a simple deposit in a financial institution such as a bank from "some form, though not necessarily which form of unlawful activity" of intentionally misrepresented "property" or "proceeds" (often of insignificant value) becomes the automatic and low threshold criterion and element of the money laundering "crime" thus guaranteeing conviction, through the abuse of the STING STATUTE, to an artificially escalated money laundering offense, in further violation of the Due Process requirement of the Fourteenth Amendment; and

WHEREAS, the STING STATUTE has an extremely low threshold of proof which makes it easy for government prosecutors to engage in outrageous behavior, to fabricate crimes and evidence, entrap individuals, mislead Grand Juries, and almost automatically obtain indictments and convictions of targeted citizens by nullifying their valid entrapment defense through the design of the "sting" scenario; and

STING STATUTE'S ABUSE VIOLATES CONGRESSIONAL INTENT

WHEREAS, Congress and its authors in the Department of Justice intended the STING STATUTE to be used against organized crime and criminals involved in money laundering activities and drug trafficking but the STING STATUTE has been used and abused by federal prosecutors to prosecute (i.e tax protestors, ethnic minorities, the politically incorrect) and primarily for purposes and in ways other than those intended by Congress.

PETITION TO REPEAL THE STING STATUTE OF THE MONEY LAUNDERING LAWS

IN CONCLUSION IT IS NOTED that the above abuses of the STING STATUTE have been attested and documented by numerous sources, testimonies, government records of public hearings (U.S. Sentencing Commission Hearings, March 22, 1993), improper prosecutions documented by caselaw, and by the U.S. Sentencing Commission's internal and independent finding suggesting that due process was not followed in the application of the STING STATUTE and that as many as 68% of the persons that have been convicted may be innocent people serving long prison sentences because of prosecutorial abuse of this STING STATUTE in the misrepresentation of the hypothetical "unlawful activity";

BE IT FURTHER NOTED that the STING STATUTE of the money laundering laws does not provide the constitutional safeguards and it is a law which has become an instrument of oppression and abuse because of the lack of proper guidelines in its application;

BE IT FURTHER NOTED that the continuing misapplication of the STING STATUTE by federal prosecutors is subverting and undermining our judicial system by the very same people who are supposed to protect it;

WE CONCLUDE that prosecutions under 18 U.S. Code, Section 1956 (a)(3), the money laundering STING STATUTE, have not been to the best interest of the citizenry of the United States of America and have been the source of abuse and prosecutorial misconduct and subversion of our Criminal Justice System;

WE ARE EXTREMELY CONCERNED THAT our judicial system is being subverted and undermined through unlawful prosecutions and abuse of this particular law but, also, WE ARE EXTREMELY CONCERNED that other greater issues and philosophies emerge that basic constitutional freedoms and guarantees are threatened in our country and that our democracy can rapidly degenerate into tyranny if such unconstitutional and unfair laws, as 18 U.S. Code, Section 1956 (a)(3), the money laundering STING STATUTE are allowed to stay in effect and be further abused;

WE FURTHER RESOLVE, that all laws, including 18 U.S. Code, Section 1956 (a)(3), the STING STATUTE, need to be adjudged constitutionally accurate in their intent and language so as to adhere strictly and hold true to the Rules and Principles of the Constitution of the United States of America and its Bill of Rights and subsequent Amendments;

THEREFORE, WE PETITION Congress to REPEAL 18 U.S. Code, Section 1956 (a)(3)), the money laundering STING STATUTE, as being a law which is unconstitutional, to review and amend all other money laundering laws and assigned sentencing guidelines, to ratify the amendments to the mandatory sentencing guidelines proposed by the U.S. sentencing Commission; and to be vigilant of further abuses and injustices of improperly applied laws, and for the additional benefit of engendering a higher degree of fidelity to the American Criminal Justice System and a re-awakening awareness to our country's Founding Principles.

RESPECTFULLY SUBMITTED

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE

[illegible]

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-

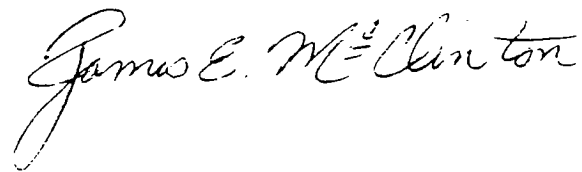
ber of transactions over a period of time, the offense level from the drug quantity table should be determined by the quantity of controlled substance with which the defendant was involved on any one occasion using the quantity that results in the greatest offense level].

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

EMMANUEL H. DIMITRIOU, P.C.
LAW OFFICES
522-24 COURT STREET
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READING, PA 19603

OFFICE: 610-376-7466

FAX: 610-376-1259

February 24, 1995

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

Dear Mr. Courlander,

This letter is in response to the Sentencing Commission's request for public comment on the proposed amendments to the Sentencing Guidelines published in the December 21, 1993 edition of the Fed.Reg (Vol. 58 No. 243 Part V). Specifically, I wish to comment on proposed Amendment No. 11, which would amend and consolidate USSG Sections 2S1.1 and 2S1.2 (money laundering offenses).

I am strongly in favor of the proposed Amendment No. 11 and urge it be adopted by the Commission with the following modifications:

1. Where the defendant committed the underlying offense, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level as in proposed Section 2S1.1(a)(2)(4). The offense level of the underlying offense would then be increased by any specific offense characteristics under proposed Section 2S1.1(b). Therefore, I suggest deleting from the instruction in 2S1.1(a) the term "(Apply the greatest)" and insert in its place, the term "otherwise" after sub-paragraph (3).
2. The Commission make the base offense level in proposed 2S1.1(a)(3) the same as the base offense level for fraud and deceit (Section 2F1.1). Further, that the Commission change proposed 2S1.1(a)(3) to a base offense level of six (6) plus the number of offense levels from the table in Section 2F1.1.
3. That all amendments to the Sentencing Guidelines, specifically including but not limited to the ones above mentioned, be made retroactive.

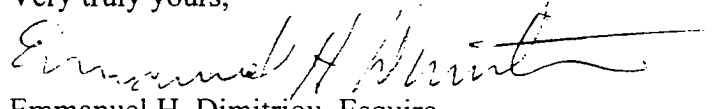
Mr. Michael Courlander

February 27, 1995

Page - 2 -

I have not elaborated on all the reasons for my requests that the Sentencing Commission adopt the above amendments, since I am aware that there have been many letters sent to you setting forth all the appropriate reasons. I have been a criminal defense attorney for thirty-five (35) years, practicing both in the state and federal courts, and I am presently Vice-Chairman of the Pennsylvania Supreme Court Criminal Rules Committee. I strongly urge that the Commission adopt the above amendments to the sentencing guidelines.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Emmanuel H. Dimitriou", with a long horizontal flourish extending to the right.

Emmanuel H. Dimitriou, Esquire

EHD:bc

Bruce R. Bryan

Attorney at Law

Member:
New York and
Florida Bars

333 E. Onondaga Street
Syracuse, New York 13202
315-476-1800
Fax 315-474-0425

February 21, 1995

The Honorable Richard Conaboy
Chairman, United States Sentencing Commission
1 Columbus Circle Northeast
Suite 2-500, South Lobby
Washington, DC 10002-8002

RE: Proposed Amendment to Section 2S1.1 of the United
States Sentencing Guidelines (Money Laundering
Offenses)

Dear Judge Conaboy:

I am writing you to express support for the proposed Amendment for the Sentencing Guideline pertaining to money laundering offenses, and to urge the Sentencing Commission that in justice and fairness said Amendment should be made retroactive.

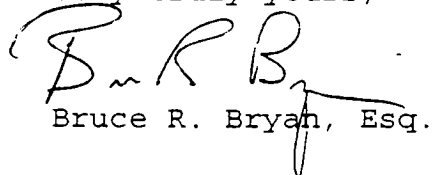
I commend the Sentencing Commission for recognizing that the present Sentencing Guideline pertaining to money laundering offenses has been inequitably applied in the past, and has not reflected the intent of Congress at the time that Congress enacted Section 1956. I agree with the Sentencing Commission's conclusion that Congress intended that heavier sentences be imposed for money laundering when connected with illegal drug activity. Unfortunately, the present Sentencing Guideline has been used by prosecutors to obtain more severe sentences than those intended by Congress in non-drug related activities, such as white collar crimes involving fraud or deceit.

Justice dictates that an individual defendant should not be subjected to a sentence for money laundering that greatly exceeds the sentence imposed for the underlying criminal charge from which the money laundering charge was derived. I believe that the proposed amendment of the United States Sentencing Commission more fairly reflects the intent of Congress, and differentiates between activities considered more severe and less severe by Congress.

I am especially writing to urge the Sentencing Commission to rule that the proposed Amendment be retroactive. I respectfully submit that in the interest of fairness and justice, defendants who have been previously unfairly sentenced under the now existing Sentencing Guideline should have the benefit of this proposed Amendment. I believe that standard statutory construction mandates retroactive application of the Amendment, once adopted. The basis of the Amendment is that Congress, at the time that it enacted Sections 1556 and 1557 of Title 18 of the United States Code did not intend for the more severe sentences for a money laundering charge to be applied to non-drug related activities, such as white collar fraud and deceit. Based upon the foregoing, an Amendment would then be a clarification of the intent of Congress as it existed in 1986 when Congress enacted such statutes. The Sentencing Commission, during the interim period, did not have the benefit of case law to interpret the intent of Congress. The Sentencing Commission has now concluded that Congress' intent in 1986 was to only impose the more severe sentences in drug related crimes. Therefore, I respectfully submit that the defendants sentenced in the interim have a right to the benefit of such re-interpretation and clarification of Congressional intent as it existed in 1986 and should be permitted the benefit of such reduction. Defendants may well have rights to such an interpretation under the due process and equal protection clauses of the United States Constitution. Moreover, I simply state as a matter of justice and fairness that it would be improper to differentiate between defendants subsequently sentenced under the new Amendment, and those who had been unfairly sentenced under the previous guidelines.

In sum, I applaud the Sentencing Commission for taking the steps to propose the foregoing Amendment, and I urge the Sentencing Commission to adopt such Amendment and to make it retroactive.

Very truly yours,


Bruce R. Bryan, Esq.

BRB/mcf

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA
730 WARREN E. BURGER BUILDING
316 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55101-1461

CHAMBERS OF
PAUL A. MAGNUSON
CHIEF JUDGE
(612) 290-3967

March 3, 1995

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

Dear Commissioners:

I understand that an amendment to the United States Sentencing Guidelines has been proposed relating to the calculation of drug quantities for marijuana offenses. I submit this letter as a comment on the proposed amendment, which would change the Drug Quantity Table in § 2D1.1 of the guidelines to replace the one plant = one kilogram equivalency used for offenses involving more than 50 marijuana plants with the one plant = 100 grams equivalency. This amendment is practical, reasonable, and fair, and I support it wholeheartedly.

In my experience as a United States District Court Judge in Minnesota, I have presided over trials in which defendants were convicted of growing numerous marijuana plants. In many if not all of these cases, the one plant = one kilogram equivalency did not reflect the facts of the situation, nor did it accurately reflect the culpability of the defendants. For example, in *United States v. Angell*, 11 F.3d 806 (8th Cir. 1993), an expert witness *for the Government* testified at sentencing that a one plant = one pound ratio was more appropriate in this region of the country. Nevertheless, because of the equivalency set forth in § 2D1.1, the Eighth Circuit held that the defendants could only be sentenced using the one plant = one kilogram equivalency.

As you no doubt are aware, it is common knowledge that many of the marijuana plants that are used in calculating drug quantities would never reach the drug marketplace. Weather and other environmental forces often reduce the number of plants before the plants reach maturity. In addition, marijuana plants that grew not from cultivation by the offender but through the natural spread of

vegetation are typically included with those counted for the offense, despite the fact that the defendant frequently had no intention of selling those plants. The proposed amendment would help reduce the inequities resulting from the one plant = one kilogram method of calculation.

I strongly support the adoption of the proposed amendment and add that provision should be made to allow its retroactive application. Thank you for your consideration of these remarks.

Warm regards,

A handwritten signature in black ink, appearing to read "Paul A. Magnuson", written in a cursive style.

Paul A. Magnuson
United States District Court



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 Parole & Prob. Service — Parole & Prob. Officers
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 Dept. of Trans. — Investigation — Special Agents
 U.S. Coast Guard — Intcl. Officers & S.A.
 Federal Aviation Admin. (FAA) — Investigators
 Dept. of Treasury
 B.A.T.F. — Special Agents
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March 6, 1995

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

Dear Commissioners,

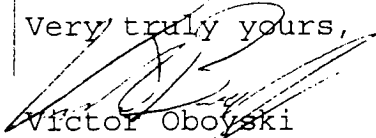
On behalf of the members of the Federal Law Enforcement Officers Association (FLEOA), the largest representative of Federal law enforcement officers in the nation, I want to urge the Commission to raise the sentencing guidelines for those offenses that have been outlined in the Department of Justice published proposal.

Passport and visa fraud have become the means by which terrorists and international narcotics traffickers are able to operate with impunity. Stricter penalties are needed as a deterrent against these international criminals. Today the deterrence factor does not exist. Many individuals arrested with fraudulent documents serve little to no prison time.

Since the bombing of the World Trade Center the public has come to realize how vulnerable our nation is to international terrorism. The amount of confidence the public has in our criminal justice system is vital our national security. A system that does not punish those who violate the law erodes that confidence.

Raising the sentencing guidelines for passport and visa fraud will send a message to criminals around the world that the United States is serious about enforcing its laws and protecting its citizens.

Very truly yours,


 Victor Oboyski
 National President

025-95



DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

MAR 7 1995

CC-44,818 FE:BSO

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

Dear Sir:

This is in response to the Notice of Proposed Amendments to the Sentencing Guidelines published in the Federal Register on January 9, 1995. The Bureau of Alcohol, Tobacco and Firearms would offer the following comments on the Commission's proposals.

I. FIREARMS

A. Felons Possessing Firearms with Previous Violent Felony Convictions

The Violent Crime Control and Law Enforcement Act of 1994 (hereinafter "the Act") provides that the United States Sentencing Commission (Commission) shall amend the guidelines to appropriately enhance sentencing in cases where a defendant, who is a felon in possession of a firearm in violation of section 922(g) of the Gun Control Act of 1968 (GCA), Title 18 U.S.C., has 1 or 2 prior convictions for a violent felony or a serious drug offense as defined by 18 U.S.C. § 924(e).

The current sentencing guideline in section 2K2.1 for a section 922(g) offense provides a base offense level of 14. The offense level for felons who have 1 prior conviction for a crime of violence or a controlled substance offense is 20, and the level for felons who have 2 prior convictions is 24.

The Commission requests comments on whether the current offense levels should be increased and, if so, by what amount. In our view, there is no discretion with respect to an increase because the Act requires the Commission to enhance the penalties in the above-described cases.

Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), whoever violates section 922(g) and has 3 previous convictions for violent felonies or serious drug offenses is

- 2 -

United States Sentencing Commission

subject to a mandatory sentence of not less than 15 years. Therefore, we believe it appropriate to enhance by 3 levels the sentence of felons having 1 predicate conviction and an additional 3 levels for felons having 2 such convictions. This would result in a sentence of approximately 5 years in the first instance and 10 years in the second instance.

Furthermore, we would point out several disparities between the 2K2.1 guidelines and the section 924(e) treatment of commercial burglary, foreign convictions, convictions which occurred more than 15 years ago, and related offenses. With respect to commercial burglaries, the guidelines include only burglaries of dwellings as crimes of violence. See section 2K2.1, Application Note 5 and section 4B1.2, Application Note 2. However, under section 924(e), burglaries of any building or structure are violent felonies. The Supreme Court has noted that all burglaries carry an inherent potential for harm to persons. See Taylor v. United States, 495 U.S. 575, 588 (1990). Therefore, we believe that the guidelines should be amended so that commercial burglaries are treated similarly to other violent felonies.

Likewise, under the current guidelines, foreign convictions for crimes of violence or controlled substances offenses are not treated as prior felony convictions and do not result in an increase in offense levels under section 2K2.1. Rather, section 4A1.2(h) provides that sentences resulting from foreign convictions may be considered in determining the defendant's criminal history category. On the other hand, foreign convictions for violent felonies and serious drug offenses are considered to be convictions for purposes of mandatory sentencing under section 924(e).¹ Therefore, we

¹ See United States v. Winson, 793 F.2d 754 (6th Cir. 1986), holding that a foreign felony conviction was a conviction for purposes of 18 U.S.C. 922(h), the predecessor to section 922(g). The court suggested that a foreign conviction should be treated as a disabling conviction if it was not the result of a violation of civil rights or contrary to other American constitutional principles.

- 3 -

United States Sentencing Commission

recommend that the guidelines be amended to provide that foreign convictions for crimes of violence or controlled substance offenses be treated consistently with domestic offenses.

In addition, section 2K2.1 provides that prior sentences for crimes of violence or controlled substance offenses must have been imposed within certain time limits. More specifically, a conviction which is more than 15 years old cannot be viewed as a predicate for enhancing the sentence of a felon in possession of a firearm. On the other hand, convictions more than 15 years old count as predicate convictions for purposes of sentencing under section 924(e). See, e.g., United States v. Daniels, 3F.2d 25, 28 (1st Cir. 1993). We recommend that section 2K2.1 be amended so that all prior felony convictions for crimes of violence or controlled substance offenses be considered as predicates to increase the defendant's offense levels regardless of when they occurred.

Section 2K2.1 also provides that sentences imposed for controlled substance offenses count as only 1 prior conviction. See section 4A1.2(a)(2) and Application Note 3. Application Note 3 states that prior sentences are not considered related if they were for offenses separated by an intervening arrest, i.e. the defendant was arrested for the first offense prior to committing the second offense. Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single scheme or plan, or (3) were consolidated for trial or sentencing. On the other hand, under section 924(e), a defendant who has committed violent felonies or serious drug offenses on 3 different occasions has committed the requisite 3 predicate offenses. See, e.g., United States v. Maxey, 989 F.2d 303 (9th Cir. 1992); United States v. Arnold, 981 F.2d 1121 (9th Cir. 1992). The fact that the offenses are consolidated for trial or sentencing is immaterial. We, therefore, recommend that section 2K2.1 be amended so that multiple crimes of violence and controlled substance convictions count as multiple convictions so long as the offenses were committed on different occasions.

- 4 -

United States Sentencing Commission

B. Manufacture, Transfer, or Possession of Semiautomatic Assault Weapons

The Act amended the GCA to make it unlawful to manufacture, transfer, or possess "semiautomatic assault weapons." 18 U.S.C. § 922(v). It also increased the penalty in 18 U.S.C. § 924(c) for using or carrying a semiautomatic assault weapon "during or in relation to any crime of violence or drug trafficking crime" to a mandatory term of 10 years or, in the case of a second or subsequent conviction, 20 years.

Section 2K2.1 covers firearms offenses involving semiautomatic assault weapons. For example, the base offense level for possession of an unlawfully imported semiautomatic assault weapon is level 12, with an upward departure recommended if the offense involved multiple military-style assault weapons. Section 2K2.1(a)(5) further provides for an offense level of 18 if the offense involved a National Firearms Act (NFA) firearm, as defined in 26 U.S.C. § 5845(a).

The Commission recommends that section 922(v) offenses be included in section 2K2.1. The Department of Justice (DOJ) proposes an enhanced offense level under section 2K2.1 for a conviction under section 922(v). We support the DOJ's position and recommend that section 922(v) offenses have a base offense level of 18. This is consistent with the level provided for unlawful possession of National Firearms Act (NFA) weapons, e.g., machineguns, as set forth in guideline section 2K2.1(a)(5). Since semiautomatic assault weapons and NFA weapons are highly restricted under Federal law, consistent sentencing guidelines for these offenses are warranted.

C. Juveniles

The Act added a new section 922(x) to the GCA making it unlawful to sell or transfer handguns to juveniles. It also prohibits the possession of handguns by juveniles. The maximum penalty for violating the subsection is 1 year. However, an adult who transfers a handgun to a juvenile knowing that the juvenile intends to carry, possess, or use the handgun in a crime of violence is subject to a maximum penalty of 10 years.

- 5 -

United States Sentencing Commission

Section 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a juvenile or to a person prohibited under section 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant. A defendant who transfers a firearm knowing or having reason to believe that it may be used in connection with another felony offense is subject to the greater of a 4-level adjustment with a minimum offense level of 18, or a cross-reference to the guideline for the other offense.

The Commission offers 3 different options to deal with violations of new section 922(x). We favor option 3 which would amend section 2K2.1(a)(6) by inserting "or if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person or was underage," resulting in a base offense level of 14 for such transfers. We believe that the 2-level increase is warranted since Congress has indicated its desire to impose greater punishment on persons providing firearms to juveniles.

D. Persons Under Restraining Orders in Possession of Firearms

The Act amended 18 U.S.C. § 922(d) and (g) to make it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to persons subject to specific types of court-issued restraining orders or for any person subject to such orders to possess or receive any firearm or ammunition.

Violations of section 922(d) and (g) are addressed in section 2K2.1 of the guidelines. Section 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a person prohibited under section 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant.

The proposed guideline adds persons under a disabling restraining order to the definition of a "prohibited person" in the commentary section under Application Note 6. This

- 6 -

United States Sentencing Commission

proposal would result in such persons being treated similarly to persons under other Federal firearms disabilities. We support this proposal.

E. Sentence Enhancements for Using Semiautomatic Firearms
During Crimes of Violence or Drug Trafficking Crimes

The Act directs the Commission to provide an appropriate enhancement for a conviction under section 924(c) (using or carrying a firearm during the commission of a crime of violence or drug trafficking crime) if a semiautomatic firearm is involved in the violation.

Currently, section 924(c) provides that persons who use or carry a firearm in the commission of a crime of violence or drug trafficking crime shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to a mandatory 5-year term of imprisonment, and if the firearm is a short barreled rifle or shotgun or a semiautomatic assault weapon, to imprisonment for 10 years, and if the firearm is a machinegun or a destructive device or is equipped with a silencer, to imprisonment for 30 years. In the case of a second or subsequent conviction under section 924(c), the person shall be sentenced to imprisonment for 20 years and if the firearm is a machinegun, or a destructive device or is equipped with a silencer, to life imprisonment.

The Commission requests comment on the appropriate offense level for an offense involving a semiautomatic firearm. We believe that use of a semiautomatic firearm in crimes of violence or drug trafficking crimes should result in a sentence enhancement of 2-4 levels. Such an enhancement is warranted since Congress specifically increased the penalty for using or carrying a "semiautomatic assault weapon," a specific type of semiautomatic firearm, during such crimes. Specifically, Congress provided a mandatory prison term of 10 years.

The Commission also requests comment on whether such an increase should apply to all semiautomatic firearms or whether the Commission should focus this enhancement on firearms that have characteristics that make them more dangerous than other firearms (e.g., semiautomatic firearms with large magazine capacity). We believe that any increase

- 7 -

United States Sentencing Commission

should apply to all semiautomatic firearms. Moreover, we also believe that an additional 2-level enhancement be applied with respect offenses involving semiautomatic firearms equipped with large capacity magazines.

F. Firearms Which Have Moved in Interstate Commerce

The Act added a new section 924(k) providing a term of imprisonment of not more than 10 years for stealing a firearm which has moved in interstate or foreign commerce. It also amended section 922(j) to clarify that it is unlawful to receive or possess any stolen firearm that has moved in interstate commerce, regardless of whether the movement occurred before or after the theft. Further, it added a new section 924(l) making it a Federal crime to steal any firearm from a licensed importer, manufacturer, dealer, or collector.

Section 2K2.1 covers offenses involving stolen firearms. These offenses are subject to a base offense level of 12. A 2-level enhancement applies if a firearm is stolen, unless the only count is a stolen firearm offense.

Section 2B1.1 governs general theft offenses, including offenses of goods traveling in interstate commerce. The general theft statute, 18 U.S.C. § 659, provides a maximum term of 10 years imprisonment for theft from an interstate shipment. Guideline 2B1.1(b)(2)(A) provides for a 1-level increase (to no less than 7) if a firearm or destructive device was taken, compared with a base offense level 12 under section 2K2.1.

The proposed guideline contains 2 options to address the disparity between guideline sections 2B1.1 and 2K2.1. We favor option 1, which would amend section 2B1.1 to include a cross reference to section 2K2.1 applying the greater offense level of the two provisions. This option accurately reflects Congress concern about theft of firearms.

G. Conspiracy to Commit Section 924(c) Violations

The Act adds a new section 924(n) making conspiracy to commit a section 924(c) violation a Federal crime. The penalty is imprisonment for not more than 20 years, and if the firearm is a machinegun or destructive device, or is

- 8 -

United States Sentencing Commission

equipped with a silencer or muffler, imprisonment for any term of years or life.

Despite the creation of this new conspiracy offense, the proposed guideline would not provide specific penalties for such violations. Rather, it merely provides a cross-reference to the guideline for conspiracy in general. Congress set the penalty for conspiracy to violate section 924(c) at a level 4 times greater than the penalty for other conspiracy violations. Accordingly, we believe the offense level for violations of section 924(n) should be 4 times greater than the offense level for the general conspiracy statute.

II. EXPLOSIVES AND ARSON

The Act directed the Commission to provide an appropriate enhancement for cases in which a defendant convicted under 18 U.S.C. 844(h) (use of fire or explosives during a felony) has previously been convicted under that section. In addition, it revised the mandatory 5-year penalty for a first offense to a range of 5 to 15 years and changed the mandatory penalty for a second offense from 10 years to a range of 10 to 25 years.

The Commission requests comment on how section 2K2.4 should be amended to address the directive. We believe that the mandatory 5-year minimum for first offenses and the mandatory 10-year minimum for second offenses should be enhanced by an analysis of the risk factors set forth in section 2K1.4 with respect to arson. These risk factors take into account the risk of death or bodily injury caused by the offending conduct.

In addition, the Act adds a new section 844(k) providing for a term of imprisonment of not more than 10 years for stealing explosives which have moved in interstate commerce and a new section 844(l) making it a Federal crime to steal explosives from licensed dealers. We incorporate our previous comment favoring option 1, which amends section 2B1.1 to include a cross reference to section 2K2.1, applying the greater offense level of the two provisions. We believe this option accurately reflects the seriousness

United States Sentencing Commission

of offenses involving stolen explosives.

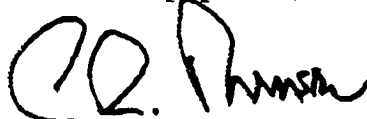
The Act adds a new section 844(m) increasing to 20 years the maximum penalty for a conspiracy to violate section 844(h). We incorporate our previous comment that, pursuant to the direction of Congress, the Commission should establish an offense level which is 4 times greater than that for general conspiracy.

III. PROVISIONS NOT ADDRESSED

Several amendments in the Act are not addressed in the Commission's proposals, including an increase in the penalty for making a false statement to a firearms licensee in connection with the acquisition of a firearm (18 U.S.C. § 922(a)(6)) and adding a new section making it an offense punishable by not more than 10 years imprisonment to acquire firearms interstate to carry on an illegal firearms business (18 U.S.C. § 924(m)). Another significant amendment made it unlawful for felons to possess explosives (18 U.S.C. § 842(i)). We believe the Commission should address the guidelines relative to these provisions at the next opportunity.

We appreciate the opportunity to comment on the proposed guidelines. If we can be of further assistance to the Commission, please let us know.

Sincerely yours,



Charles Thomson
Associate Director
(Enforcement)



026 - 95

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March 7, 1994

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

Re: Proposed Guideline Amendments
& Issues for Comment-1995 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1995 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit

conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

* * *

COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 1 will be our comment on proposed amendment (or issue for comment) number 1 and so forth. We also are enclosing a disc with this letter on it, in case you wish to print out or edit any of our proposals.

1. Proposed Amendment #1 - HIV Exposure

The PAG supports the general concept of this proposed amendment, but is concerned about how intent will be interpreted. An argument could be made for the position that an individual who engages in casual sexual activity, knowing that he or she is HIV-infected, does so with the expectation and knowledge that the sexual partner is likely to become HIV-infected, and therefore could be deemed to have intended that the partner become so infected. Any new commentary should provide clear guidance regarding how intent is to be determined and indicate that there must be a clear pre-disposed and malicious specific intent on the part of the defendant to cause another to become HIV-infected through sexual activity.

The PAG opposes "**infectious bodily fluid of a person**" being defined expressly as a "**dangerous weapon**" on the grounds that it makes the term overly broad. **Dangerous weapon** is set forth and defined in the Commentary to §1B1.1(d), thereby making it generally applicable throughout the guidelines. To so define **infectious bodily fluid** as a **dangerous weapon** means that any person whose saliva contains an infectious influenza virus could be deemed to be in possession of a **dangerous weapon**, and thereby making it generally applicable to pertinent provisions throughout the guidelines. Even if the term were further narrowed to include "**HIV-infected bodily fluid of a person**" into the definition of a **dangerous weapon**, this still would be overly broad since it would include the bodily fluid of an individual with no knowledge that he or she was HIV-infected, or an individual with knowledge, but whose bodily fluid had no involvement in the particular crime of conviction, e.g., mere possession of a dangerous weapon is a 2 level enhancement under §2B2.1 (Burglary of a Residence or a Structure Other than a Residence).

The PAG supports the amendment of the definitions relating to "serious bodily injury" and "permanent or life-threatening bodily injury" so as to include the "intentional infection by HIV-infected bodily fluid." The PAG emphasizes its position that there must be an intentional infection and that the term "intentional" be incorporated into these two proposed amended definitions. Again, any new commentary should provide clear guidance regarding how intent is to be determined and indicate that there must be a clear pre-disposed and malicious specific intent on the part of the defendant to cause another to become HIV-infected through sexual activity.

The PAG has no opinion as to whether basing enhanced penalties for willful sexual exposure to HIV will have any implications for HIV testing.

2. Proposed Amendment #2 - Minor Assault (§2A2.3)

The PAG believes that §2A2.3 already provides an adequate penalty for violation of 18 U.S.C. § 113(a)(7). No amendment is necessary.

3. Proposed Amendment #3 - Involuntary Manslaughter (§2A1.4)

The PAG believes that §2A1.4 already provides an adequate penalty for violation of 18 U.S.C. § 1112. No amendment is necessary.

4. Proposed Amendment #4 - Kidnapping, Abduction, Unlawful Restraint (§A4.1)

The PAG endorses this amendment and believes that it should be referenced as proposed under Option 2. Although 18 U.S.C. § 1204 is entitled "International Parental Kidnapping," it uses terms like "removes" or "retains" which are significantly less harsh than the terms of the substantive kidnapping statute, 18 U.S.C. § 1201, which contains terms like "seizes," "kidnaps," or "abducts." The heart of 18 U.S.C. § 1204 is "the intent to obstruct the lawful exercise of parental rights." The PAG believes that the underlying conduct of this offense involves interference with a court order - not violent conduct like kidnapping, and therefore is more suitably addressed as obstruction of justice than as kidnapping.

5. Proposed Amendment #5 - Aggravated Sexual Abuse; Sexual Abuse
(§§2A3.1; 2A3.2)

The PAG favors no action at this time. The Commission should complete the study required by § 40112 of the crime bill, disseminate the results, seek comment and only then publish a concrete proposed amendment.

6. Proposed Amendment #6 - Death of the Victim

The PAG favors Option 1 which would amend the Statutory Index to reference the new provisions to guidelines in Chapter Two, Part A, when death results from the underlying offense. Option 1 is favored because by referencing the new provisions to Chapter 2, Part A, the standard of proof for establishing that the death of the victim resulted from the underlying offense will be "beyond a reasonable doubt." Because of the severe potential penalties associated with these types of crimes, the standard of proof must be "beyond a reasonable doubt" instead of "by a preponderance of the evidence."

7. Proposed Amendment #7 - Adequacy of Criminal History Category;
Abusive Sexual Contact (§§4A1.3; 2A3.4)

The PAG favors the proposed amendment which builds on §4A1.3 by specifically listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense. As a result, an application note would be added under the Commentary to each of the offenses in Chapter Two, Part A, Subpart Three (Criminal Sexual Abuse), providing for such an upward departure. We oppose changing the offense levels.

8. Proposed Amendment #8 - Offenses Involving Counterfeit Bearer Obligations of the United States; Fraud and Deceit (§§2B5.1; 2F1.1)

The PAG opposes Option 1 because of its automatic enhancement to a level 13 when a dangerous weapon is merely possessed in connection with the §§2B5.1 and 2F1.1 offenses. Enhancement to level 13 would more than double the base offense level of 6 for §2F1.1 when in fact the defendant may have merely possessed a dangerous weapon without necessarily having displayed, brandished or otherwise used it. The present §2F1.1(b)(4) already provides for an automatic enhancement to level 13 "if the offense involved the conscious or reckless risk of serious bodily injury." Since mere possession of a dangerous weapon, with nothing further, is less egregious conduct than required for a subsection (b)(4) offense, it should not be equated and elevated to that same level. If the defendant elevates his or her conduct from mere possession to the conduct included in §2F1.1(b)(4), then adequate penalties are already provided.

The PAG favors Option 2 because it properly provides for an upward departure if warranted. However, PAG believes that any upward departure should be limited to 2 levels for mere possession of a dangerous weapon in both §§2B5.1 and 2F1.1 if the offense does not involve the conscious or reckless risk of serious bodily injury.

The PAG believes that the form of any enhancement for a dangerous weapon should be that used in the current Chapter Two, Part D (Offenses Involving Drugs), particularly in regard to the inclusion of an application note similar to Application Note #3 under the current Commentary to §2D1.1. The current Application Note #3 provides that the enhancement for weapon possession should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. It gives as an example that enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

9. Proposed Amendment #9 - Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession: Continuing Criminal Enterprise (§2D1.1)

The PAG favors Option 1, which references this offense to §2D1.1, especially if proposed amendment #36 is approved as proposed by the PAG. Under comments submitted by the PAG as to proposed amendment #36, an enhancement of up to 9 levels under §2D1.1(b)(4) and (7) is proposed for various uses of firearms. The PAG proposal for proposed amendment #36 also advocates a five level enhancement for merely discharging a weapon, whether injury results or not. This would encompass the situation for which the Department of Justice has requested comments as to whether there should be an enhancement for reckless endangerment by firing a weapon into a group of two or more persons when no injury occurs.

10. Proposed Amendment #10 - Providing or Possessing Contraband in Prison (§2P1.2); Drug Offenses Occurring Near Protected Locations (§2D1.2)

Amendment 10 (A).

The PAG does not oppose the enhanced offense level (two levels plus the offense level from §2D1.1) that would be provided by the cross reference in §2P1.2 being expanded to apply to all drug trafficking offenses under 18 U.S.C. § 1791(a)(1); however, the cross reference should not be expanded to cover the offenses under 18 U.S.C. § 1791(a)(2). It is obvious that this cross reference is limited in application and is intended to provide increased punishment for violation of 18 U.S.C. § 1791(a)(1), which is directed at the provider or facilitator of drugs and other controlled substances going to an inmate, rather than for the violation of 18 U.S.C. § 1791(a)(2), which is directed at the inmate who makes, receives, possesses, or obtains the drugs and other controlled substances.

For the same reasons stated above as to the intent and application of the cross reference in §2P1.2, the PAG does not believe that the minimum offense level of 26, provided by the cross reference, should be applied to all methamphetamine offenses. It should be limited to the trafficking violations under 18 U.S.C. § 1791(a)(1) and not the making, receiving, possessing, or obtaining offenses set forth in 18 U.S.C. § 1791(a)(2).

Amendment 10 (B).

In regard to an offense under 21 U.S.C. § 841 that involves distribution of a controlled substance in a federal prison or detention facility, the PAG believes that these offenses should be referenced to §2D1.2, which provides enhanced penalties for controlled substance distribution offenses involving protected locations.

With respect to simple possession of a controlled substance under 21 U.S.C. § 844 that occurs in a federal prison or detention facility, the PAG believes that a 2 level enhancement to §2D2.1 for these possession offenses would be an appropriate enhancement. However, these enhanced offense levels would not reconcile with the offense levels provided for under §2P1.2 (Providing or Possessing Contraband in Prison).

The PAG would recommend reconciling the offense levels under §§2D2.1 and 2P1.2 for simple possession offenses in a federal correctional facility. This could be accomplished by creating two new base offense level categories under §2P1.2 and renumbering two of the existing categories of §2P1.2.

The first new base offense level category under §2P1.2 would be (a) (3) which would include any Schedule I or II opiate, an analogue of these, or cocaine base and which would provide for an offense level of 10. This new base offense level of 10 under §2P1.2 would equate to an offense level of 8 under §2D2.1 for these same drugs, plus its proposed 2 level enhancement for possession in a federal correctional facility.

The second new base offense level category under §2P1.2 would be (a) (4) which would include cocaine, LSD, or PCP and which would provide for an offense level of 8. This new base offense level of 8 under §2P1.2 would equate to an offense level of 6 under §2D2.1 for these same drugs, plus its proposed 2 level enhancement for possession in a federal correctional facility.

The current §2P1.2 base offense level (a) (3) would be renumbered to become (a) (5) and would include controlled substances other than those listed in (a) (3) and (a) (4) above. It would retain its current offense level of 6. This renumbered category equates to an offense level of 4 under §2D2.1 for these same drugs, plus the proposed 2 level enhancement for possession in a federal correctional facility.

The current §2P1.2 base offense level (a) (4) would be renumbered to become (a) (6) and would retain its current offense level of 4. In addition the reference in the current §2P1.2 base offense level category (a) (2) to "LSD, PCP, and narcotic drug" would be deleted because these drugs would be included in the proposed new base offense level categories.

If the Commission agrees to amend the offense level categories of §2P1.2 to make them comparable to those of an enhanced §2D2.1, as proposed by the PAG, then it would be much simpler to merely reference the simple possession of a controlled substance in a federal correctional facility offenses to §2P1.2 rather than to §2D2.1. This would avoid having to amend §2D2.1 to provide for the enhancement and would make the offense more appropriately related to those offenses involving federal prisons and correctional facilities.

11. Proposed Amendment #11 - Drug Offenses Occurring Near Protected Locations (§2D1.2)

The PAG believes the current guideline enhancement is adequate to cover the requirement of Crime Bill § 90102 which directs the Commission to amend the guidelines to provide an appropriate enhancement for a defendant convicted of drug trafficking in protected locations. In light of the fact that it appears that Congress was seemingly unaware of the current enhancement, no additional Commission action is necessary.

The PAG also supports the position of the Federal and Community Defenders that the guidelines should be amended to provide a lower base offense level if an offense is committed in a protected location which has been selected by law enforcement or its agents. Specifically, the PAG supports the specific language set forth in the Additional Issue for Comment which would provide a base offense level of 13.

12. Proposed Amendment #12 - Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical (§2D1.11)

The PAG supports the technical amendments to the drug Guidelines. The proposed amendment would conform §2D1.11 to the new terminology to avoid confusion.

13. Proposed Amendment #13 - Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment (§2D1.12)

The PAG supports this proposed amendment. We specifically urge the Commission to revise §2D1.12 to provide a three-level reduction in the offense level for cases in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance.

14. Proposed Amendment #14 - Vulnerable Victim (§3A1.1); Civil Rights (§§2H1.1, 2H1.3, 2H1.4, and 2H1.5)

The PAG supports the general goal of consolidation and simplification embodied in Option 1 of this proposal. The PAG does not take any position on which of the several offense levels should be selected.

15. Proposed Amendment #15 - Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition (§2K2.1)

Consistent with the position of the PAG on the need for Guideline simplification, we support the generic approach reflected in the proposed amendment. We vigorously oppose the Additional Issue for Comment -- the request of the Department of Justice to create a new enhancement for semi-automatic assault weapons.

16. Proposed Amendment #16 - **Firearms** (§2K2.1)

The PAG supports Option 1 regarding the offense level for transfer of a firearm to a juvenile. Option 1 would result in a base offense level of 6.

17. Proposed Amendment #17 - Firearms (§2K2.1)

The PAG believes that no action is required. Offenses involving semi-automatic firearms already represent the typical or "heartland" cases.

18. Proposed Amendment #18 - **Firearms (§2K2.4)**

If §2K2.4 is amended to address the Congressional directive and statutory change, the PAG supports approach number 2, which would call for the application under §2K2.4 of the minimum term of imprisonment required by statute, with a departure recommended when this sentence, combined with the sentence for the underlying offense, does not provide adequate punishment.

*19. Proposed Amendment #19 - Firearms (§2K2.1)

The PAG opposes any action in connection with the Issue for Comment issued by the Commission. We note in general that it appears that Chapter 4 of the Guidelines already provides for an appropriate enhancement based on a defendant's prior criminal record.

20. Proposed Amendment #20 - Firearms (§2K2.1); Theft (§2B1.1)

Two options are proposed by the Commission to address the disparity in §2B1.1 and §2K2.1 penalties. The PAG supports Option 2 which would amend §2B1.1 to recommend an upward departure.

21. Proposed Amendment #21 - Firearms '(\$2K2.1); Explosives (\$2K1.3)

The PAG supports this proposed amendment which would amend the statutory index to take into account the new subsection in 18 U.S.C. § 924.

22. Proposed Amendment #22 - Immigration; Naturalization and Passports (§§2L1.1, 2L1.2)

The PAG does not believe that the decision of Congress to increase the statutory maximum penalty for bringing in or harboring an alien or for failing to depart and re-entering the United States warrants another amendment to the Guidelines to provide for increased offense levels. Thus, we oppose Issue for Comment 22(A) and (B).

The PAG also opposes the proposed amendments of the Department of Justice under 22(C) and (D).

23. Proposed Amendment #23 - Immigration, Naturalization and
Passports (§§2L1.1, 2L1.2)

The PAG opposes any amendment to the Guidelines with respect to passport and visa offenses merely because Section 130009 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory maximum penalties for passport and visa offenses to ten years.

The PAG also opposes the proposed amendment sponsored by the Department of Justice in 23(B).

24. Proposed Amendment #24 - Terrorism (§5K2.15); Career Offender (§4B1.1)

The PAG opposes the promulgation of a Guideline amendment based on a narrative description of the issue, rather than a specific published proposal. The PAG does not believe that Commission action is necessary in light of the existing Guideline provision recommending an upward departure in cases involving terrorism.

25. Proposed Amendment #25 - **Juvenile Involvement**

As to 25(A) - the Issue for Comment - the PAG supports the implementation of Section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 by a Chapter 3 adjustment.

The PAG opposes Proposed Amendment #25(B), sponsored by the Department of Justice.

26. Proposed Amendment #26 - **Criminal Street Gangs**

The PAG opposes the creation of a specific offense characteristic for conduct involving "street gang activity." This is a factor that is best left to the departure authority of the sentencing court. Thus, we support no action in this area.

The PAG opposes Proposed Amendment #26(B) sponsored by the Department of Justice.

27. Proposed Amendment #27 - Elderly Victims

The PAG does not believe that any action is necessary in connection with 27(A) - Issue for Comment. The Guidelines already provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim.

The PAG supports Proposed Amendment #27(B) which recommends a departure under §3A1.1 (Vulnerable Victim).

The PAG opposes any action under Proposed Amendment #27(C) - Issue for Comment.

28. Proposed Amendment #28 - Career Offender (§4B1.1)

The PAG urges the Commission not to incorporate the "three strikes" in the Guidelines. Section 5G1.1 already provides instructions on the application of mandatory statutory penalties that conflict with the Guidelines.

29. Proposed Amendment #29 - "Safety Valve" Provision (§5C1.2)

The PAG supports the "safety valve" proposal in the crime bill, because it does mitigate the harsh impact of mandatory minimum sentences on low-level drug offenders.

The PAG supports the re-promulgation of §5C1.2.

30. Proposed Amendment #30 - Restitution, Fines, Assessments,
Forfeitures (Chapter 5, Part E)

The PAG supports Proposed Amendment #30, which simply implements a mandatory restitution provision in the crime bill.

31. Proposed Amendment #31 - Supervised Release (§§7B1.3, 7B1.4)

The PAG supports Proposed Amendment #31, which simply implements a provision in the crime bill regarding supervised release.

32. Proposed Amendment #32 - Amendments to Appendix A and
Guideline Titles

The PAG supports Proposed Amendment #32, which adds new offenses, conforms the Guidelines to revisions in existing statutes and revises the titles of several offense Guidelines.

Amendments Relating to Drug Offense Guidelines
and Role in the Offense

33.-43. Drug Trafficking and Role in the Offense

CONTROLLED SUBSTANCES

INTRODUCTION

The PAG believes that, without a doubt, the most problematic area of guidelines coverage concerns the sentencing of defendants charged with drug crimes.

The changes we recommend will:

1. Increase dramatically the sentences for those who use violence to further the drug trade. (Proposed Amendment 36, PAG alternative)
2. Slightly reduce the influence of weight in drug sentencing. (Proposed Amendment 33, Option B)
3. Remove the racial discrimination of the current crack-powder ratio, but provide for appropriate increased punishment for the violent acts that led to the political decision to create the ratio in the first place. (Proposed Amendment 38)
4. Provide a reasonable sentencing limit for defendants whose role is mitigated. (Proposed Amendment 34)
5. More clearly spell out who qualifies for aggravating and mitigating role. (Proposed Amendment 35)

The PAG believes that the guidelines which affect controlled substance violators must be altered, and change must occur now. We believe that weight of substance currently plays too great a role in sentencing, that use of weapons and violence are not emphasized enough, that the 100 to 1 crack to powder ratio results in unintentional but clear racial disparity, and that the adjustments concerning role in the offense are too vague and often misapplied. We favor a comprehensive approach to remedy these flaws, but we don't believe that the changes require a drastic reinvention of drug sentencing.

No area of the Guidelines has received more internal commission study with such a comprehensive examination of data and actual case comparisons. The working group reports for 1992 and 1993 provide strong support for the amendments we endorse. Many similar changes were approved by a majority of the Commission which

initially considered them, but simply fell short of the necessary total votes needed for enactment. We strongly urge those who supported these kinds of changes before to do so again, and we ask the new Commissioners to give serious consideration to our proposal.

We favor a building block approach to this problem, with each block representing an amendment currently under consideration. While each amendment can be enacted on its own merits and will cure part of the problem, we favor a comprehensive approach which incorporates several amendments which we believe will cure the current evils of drug sentencing.

The central problem with the drug guidelines is that they paint with too broad a brush. Those who commit horrible crimes too often receive the same sentence as those who are far less culpable or whose crimes are not nearly as serious.

The proposal we endorse selects out those who commit the most egregious acts for the harshest punishment.

We understand that new Commissioners may be reluctant to act so soon after appointment, and we also understand that the Congressional landscape has changed. But the alterations we endorse have taken into consideration these political factors and represent adequate compromise which we believe will meet with Congressional approval. We want the Commission to understand that, as defense lawyers, we might favor more drastic change, but as advisors to this Commission, we have had to take a broader public policy view that considers the totality of the current political reality. However, where fairness in application of these sentencing mechanisms demands change, we have not hesitated to endorse it. We ask no less of this Commission.

33. Proposed Amendment #33 - **PAG Endorses Approach One, Option B. Reduces Influence of Weight by Table Reduction of 4 Levels**

As to the drug table, we favor Option B of Approach One. While Commissioner Gelacak's approach (Proposed Amendment #43 - Approach 2) has merit, we feel that in reality weight continues to play a significant factor in sentencing under either approach. We believe that some of the specific offense characteristics in Approach Two will create disparity and, while we favor a leaner drug table, we are concerned that by using Commissioner Gelacak's suggested drug type formula, and by more heavily relying on number of participants, fairer drug sentencing will not occur. For example, marijuana is placed in the intermediate category, but there have never been any recorded deaths from cannabis overdose. Also, certain drugs, like imported marijuana as opposed to that which is domestically grown, require more participants so that organizational size does not necessarily translate into offense seriousness. We also note that in both options of Approach Two weight continues to play a significant factor in sentencing. When we considered the totality of circumstances, we found no compelling reason to shift from the formula that most professions now understand to a new approach that will not result in fairer drug sentences. We, therefore, chose Approach One.

If the political landscape had not changed, we probably would have endorsed Option C in Approach One. But because a six-level decrease might meet with Congressional resistance, and because Option C appears to be in potential conflict with Section 80001 of the 1994 Crime Bill (See page 51 of Proposed Amendments), we endorse Option B.

There is strong legislative history supporting the argument that those targeted by the mandatory minimum sentences were the leaders of drug organizations who distribute significant quantities. Therefore, adding four levels to a level that already considers leadership results in double counting, and this is exactly what occurs currently when the pre-adjusted range is tied to the ten and five-year mandatories. Option B ties the post-leadership adjusted sentence to the mandatories which not only eliminates double counting, but which drives down those levels not subject to mandatory sentencing. The resulting punishment levels remain severe but fair and represent significant increases over those imposed prior to the guidelines.

34. Proposed Amendment #34 - PAG Endorses Synopsis: Limits Sentences for Defendants with Mitigated Role

Because minor and minimal participants in large conspiracies can still receive extremely severe sentences under Option B, we favor a Level 28 cap for these peripheral players. A Level 34 conspiracy results in a final offense level of either 29 or 27 for significantly less culpable defendants who accept responsibility. These levels yield sentencing ranges of 87 to 188 months and 70 to 162 months, respectively, depending upon criminal history. A Level 28 cap yields ranges of 46 to 115 months for the minor participant and 37 to 96 months for the minimal participant, depending on criminal history. We believe a floor of 3 years and a ceiling of 11 years 7 months provides adequate punishment for peripheral participants. Such ranges are also fully consistent with the language of Section 80001 of the Crime Bill which authorizes a mandatory minimum abrogation so long as the final range permits no sentence lower than 24 months.

35. * Proposed Amendment #35 - PAG Endorses with Minor Modifications
Synopsis: Clarifies the Role in Offense Adjustment

We also endorse the modifications proposed for the role in offense adjustment embodied in Proposed Amendment 35 with a few brief changes. We propose to eliminate the phrase "very small compensation" and substitute the phrase "small compensation" in proposed §3B1.2's application note 2(B) so that exclusions from mitigated role do not occur because of a hyper-technical interpretation of the word "very." We propose to treat "mules" the same as those who sell, own or finance contraband but include a departure for those who sell, own, finance or transport in a manner that is clearly outside the heartland of these transactions, such as the girlfriend or relative who is manipulated into performing an illegal act by a far more culpable co-conspirator. We consider those who regularly transport as a business to be as culpable as dealers, but recognize the need for departures for those less involved. Finally, because we have significantly increased the penalties for firearms and violence, we favor deleting the firearms exclusion from mitigating role because it is inconsistent to factor this characteristic into this adjustment.

Working group reports for 1992 and 1993 have shown that role adjustments are currently unevenly applied. These proposed changes will help judges provide more consistent role adjustments which will lead to less sentencing disparity.

36. Proposed Amendment #36 - PAG Endorses Our Own Alternative
(Issue for Comment, Page 63)

SYNOPSIS: PROVIDES FOR GRADUATED INCREASE IN SENTENCES FOR VIOLENCE AND GUNS IN DRUG CRIMES UP TO AS MUCH AS 20-YEAR INCREASE FOR PERMANENT INJURY CAUSED BY FIREARMS DISCHARGE.

The linchpin of the PAG compromise between Approaches One and Two is the enhancement for violence and firearms reproduced on page 63 of the proposed Amendments. These specific offense characteristics act in a proportional and systematic way to provide for incremental sentencing increases depending upon the degree of violence occurring in a drug offense. These provisions re-establish deterrence for drug-related violence. Currently there is no deterrent to violence for a crack organization that distributes more than 1,500 grams. In fact, there may be an incentive to obstruct justice with violence. The leader who uses no violence is subject to life, while the leader who uses violence to intimidate witnesses receives no increase in sentence if violence does not obstruct, but receives no sentence if violence eliminates all evidence of guilt.

Once the drug table is downsized and the crack-powder ratio is reduced, a significant increase in the penalty for violence provides a strong deterrent and provides just punishment for violent drug-distribution predators. The leader of a 50 kilogram cocaine conspiracy who uses no violence has a new sentencing range under this proposal of 188 - 405 months, depending upon criminal history. Under this proposal the same defendant is subject to penalties up to mandatory life if permanent injury occurs as a result of firearms discharge, even if the leader has no prior convictions. By isolating these perpetrators for extremely severe penalties, the justifications of punishment, protection, deterrence and retribution are fulfilled.

Our proposal's elimination of the Pinkerton approach for these specific offense characteristics is both just and acts as a further deterrent. By increasing sentences for only those who actually use or induce violence, the true perpetrators are punished, while non-violent co-conspirators are sentenced only for the drug portion of the conspiracy. Thus, there is a reduced incentive for conspiratorial violence to proliferate once one violent act occurs.

We strongly believe that these three mechanisms for fairer sentences in the drug arena are all essential components of a balanced mechanism for drug sentences which, if fully digested and understood by Congress, will meet with little resistance. By reducing the overall impact of quantity, by downsizing the table, by eliminating racial disparity by reducing the crack-powder cocaine ratio, and by significantly increasing the penalty for drug-related violence up to life without parole for larger scale

perpetrators, this Commission can administer just, appropriate and racially neutral punishment, which incrementally increases as conduct becomes more severe. Enacting these changes will ensure that the guidelines' ultimate goals of proportionality, uniformity, and elimination of disparity will finally be achieved for the drug-related perpetrator.

• 37. Proposed Amendment #37 - Drug Trafficking (§2D1.1)

The PAG supports Proposed Amendment #37 which would detach the equivalency used in the Guidelines from the one plant - one kilogram ration used in the statute and substitute the 100 grams per marijuana plant ratio (currently used in the Guidelines for cases involving fewer than 50 plants) for all cases.

38. Proposed Amendment #38 - PAG Endorses Synopsis: Reduce Ration Between Crack and Powder Cocaine Immediately Before Congress Acts on Minimum Mandatory Ratios.

In conjunction with downsizing the table, it is absolutely necessary to reduce the crack-powder cocaine ratio. This should be done this amendment cycle even if the Commission is unwilling to make other changes in the drug Guidelines. There is no doubt that the effect of the 100 to 1 ratio results in disparate sentences for black defendants. There exists no proven scientific basis for a 100 to 1 differential, and the best research indicates that the most addictive method of ingesting cocaine is by needle which utilizes powder. Finally, many times these enormous crack sentences do not account for the violence and firearms use that drove the political decision to create the 100 to 1 ratio in the first place. By reducing the ratio and increasing the penalty for weapons use and injury, a more selective sentencing mechanism is created which bases length of punishment on neutral criteria.

It is absolutely essential that the Commission reduce the ratio and increase the sanctions for violence now, before Congress decides on what, if any, action is required concerning the mandatory minimums and the crack-powder differential. Action now will reduce the unfair enormity of a drug table that permits a life sentence for a first offender who leads a conspiracy which distributes 1501 grams of crack over a five-year period, but allows an offender with more than nineteen criminal history points who possesses slightly more than one and one-half kilograms of powdered cocaine on one occasion to receive no more than twelve and one-half years in prison. Such a differential can never be justified and must be remedied now. Hopefully, by enacting comprehensive violence provisions now, Congress will be able to fully comprehend the guidelines penalties available for all cocaine entrepreneurs who further their enterprises with violence regardless of the type of cocaine they choose to distribute. By isolating violence as the engine which drives cocaine sentencing significantly above the mandatory minimums, the Commission can lead by example toward more rational sentencing that is properly based on neutral criteria and not on the race of the perpetrator.

RECOMMENDATION

We believe that the proper ratio between crack cocaine and powder cocaine is one to one instead of 100 to 1. It would probably also be wise to add specific offense characteristics (enhancements) for trafficking in crack cocaine. Suggested specific characteristics include:

- 1) use of a weapon during the offense;
- 2) causing bodily injury with a weapon during the offense; and
- 3) tracking the factors in §2D1.2(a) -- protected location, or involving an underage (less than 18 years old) or pregnant individual.

39.-42. Proposed Amendments #'s 39-42 - Drug Trafficking
(§2D1.1) and Offenses Involving Drugs (Chapter Two, Part D)

The PAG favors Amendment 39 and prefers using the largest single transaction to determine punishment, which would limit law enforcement manipulations which foster disparity, and would eliminate sentences based on tenuous extrapolations. If Option 2 is not endorsed by a majority of the Commissioners, we favor as our second choice the 30-day time frame [Option 1].

We also favor returning to a system of utilizing drug purity to determine punishment so we endorse Amendments 40 and 41. We also strongly endorse the technical changes proposed in Amendment 42.

43. Proposed Amendment #43 - Drug Trafficking (§2D1.1)

In light of our comments as to Proposed Amendment #33 in which we favor Approach One, Option B, we do not endorse proposed amendment #43. We seriously urge the Commission to work towards a compromise between Approach One and Two, if necessary, to effectuate needed changes in the drug Guidelines.

CONCLUSION

In total, a system of sentencing which clarifies role, increases drastically the punishment for violence, decreases but does not eliminate weight in determining sentences, and reduces the racial disparity resulting from the current crack-powder cocaine ratio are all laudable goals which can be achieved if our comprehensive compromise proposal is enacted. We have enclosed **Attachment A (pages 47-64)** to illustrate how the guidelines will appear if these proposals are enacted, and we look forward to continuing to work with each of you on this difficult task.

ATTACHMENT A

PART D - OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

\$2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

(a) Base Offense Level (Apply the greatest):

- (1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below. Provided that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role), the base offense level shall not exceed level 28.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was actually possessed by the defendant, or the defendant induced or directed another participant to actually possess a dangerous weapon, increase by 2 levels.
- (2) If the use of a dangerous weapon (including a firearm) was threatened by the defendant, or the defendant induced or directed another participant to threaten the use of a dangerous weapon, increase by 3 levels.

- (3) If a dangerous weapon (including a firearm) was actually brandished or displayed by the defendant, or the defendant induced or directed another participant to brandish or display a dangerous weapon, increase by 4 levels.
- (4) If a firearm was actually discharged by the defendant, or the defendant induced or directed another participant to actually discharge a firearm, increase by 5 levels.
- (5) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received bodily injury, increase by 2 levels. This increase should be applied in addition to any other specific offense characteristic called for in subsections 2D1.1(b)(1) through (b)(4).
- (6) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received serious bodily injury, increase by 3 levels. This increase should be applied in addition to any other specific offense characteristic called for in subsections 2D1.1(b)(1) through (b)(4).
- (7) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received permanent or life-threatening bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received permanent or life-threatening bodily injury, increase by 4 levels. This increase should be applied in addition to any other specific offense characteristic called for in subsections 2D1.1(b)(1) through (b)(4).

- (2) (8) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

DRUG QUANTITY TABLE

<u>Controlled Substances and Quantity</u>	<u>Base Offense Level</u>
(1) At least 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 30 KG of PCP, or at least 3 KG of PCP (actual); At least 30 KG of Methamphetamine, or at least 3 KG of Methamphetamine (actual), or at least 3 KG of "Ice"; At least 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 12 KG of Fentanyl; At least 3 KG of a Fentanyl Analogue; At least 30,000 KG of Marihuana; At least 6,000 KG of Hashish At least 600 KG of Hashish Oil.	Level 34
(2) At least 10 KG but less than 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of "Ice"; At least 100 G but less than 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 4 KG but less than 12 KG of Fentanyl; At least 1 KG but less than 3 KG of a Fentanyl Analogue; At least 10,000 KG but less than 30,000 KG of Marihuana;	Level 32

At least 2,000 KG but less than 6,000 KG of Hashish;
At least 200 KG but less than 600 KG of Hashish Oil.

- (3) At least 3 KG but less than 10 KG of Heroin **Level 30**
(or the equivalent amount of other Schedule I or II Opiates);
At least 15 KG but less than 50 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";
At least 30 G but less than 100 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of a Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;
At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil.
- (4) At least 1 KG but less than 3 KG of Heroin **Level 28**
(or the equivalent amount of other Schedule I or II Opiates);
At least 5 KG but less than 15 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of "Ice";
At least 10 G but less than 30 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil.
- (5) At least 300 G but less than 1 KG of Heroin **Level 26**
(or the equivalent amount of other Schedule I or II Opiates);
At least 1.5 KG but less than 5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 300 G but less than 1 KG of PCP, or at least 30 G but less than 100 G of PCP (actual);
At least 300 G but less than 1 KG of Methamphetamine, or at least 30 G but less than 100 G of Methamphetamine (actual), or at least 30 G but less than 100 G of "Ice";

- At least 3 G but less than 10 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 120 G but less than 400 G of Fentanyl;
At least 30 G but less than 100 G of a Fentanyl Analogue;
At least 300 KG but less than 1,000 KG of Marihuana;
At least 60 KG but less than 200 KG of Hashish;
At least 6 KG but less than 20 KG of Hashish Oil;
- (6) At least 100 G but less than 300 G of Heroin **Level 24**
(or the equivalent amount of other Schedule I or II Opiates);
At least 500 G but less than 1.5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 100 G but less than 300 G of PCP, or at least 10 G but less than 30 G of PCP (actual);
At least 100 G but less than 300 G of Methamphetamine, or at least 10 G but less than 30 G of Methamphetamine (actual), or at least 10 G but less than 30 G of "Ice";
At least 1 G but less than 3 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 40 G but less than 120 G of Fentanyl;
At least 10 G but less than 30 G of a Fentanyl Analogue;
At least 100 KG but less than 300 KG of Marihuana;
At least 20 KG but less than 60 KG of Hashish;
At least 2 KG but less than 6 KG of Hashish Oil;
- (7) At least 60 G but less than 100 G of Heroin **Level 22**
(or the equivalent amount of other Schedule I or II Opiates);
At least 300 G but less than 500 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 60 G but less than 100 G of PCP, or at least 6 G but less than 10 G of PCP (actual);
At least 60 G but less than 100 G of Methamphetamine, or at least 6 G but less than 10 G of Methamphetamine (actual), or at least 6 G but less than 10 G of "Ice";
At least 600 MG but less than 1 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 24 G but less than 40 G of Fentanyl;
At least 6 G but less than 10 of a Fentanyl Analogue;
At least 60 KG but less than 100 KG of Marihuana;
At least 12 KG but less than 20 KG of Hashish;
At least 1.2 KG but less than 2 KG of Hashish Oil;
- (8) At least 40 G but less than 60 G of Heroin **Level 20**
(or the equivalent amount of other Schedule I or II Opiates);
At least 200 G but less than 300 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);

At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than 6 G of Methamphetamine (actual), or at least 4 G but less than 6 G of "Ice";

At least 400 MG but less than 600 MG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 16 G but less than 24 G of Fentanyl;

At least 4 G but less than 6 G of a Fentanyl Analogue;

At least 40 KG but less than 60 KG of Marihuana;

At least 8 KG but less than 12 KG of Hashish;

At least 800 G but less than 1.2 KG of Hashish Oil;

20 KG or more Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);

40,000 or more units of anabolic steroids.

- (9) At least 20 G but less than 40 G of Heroin **Level 18**
(or the equivalent amount of other Schedule I or II Opiates);
At least 100 G but less than 200 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);

At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Methamphetamine (actual), or at least 2 G but less than 4 G of "Ice";

At least 200 MG but less than 400 MG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 8 G but less than 16 G of Fentanyl;

At least 2 G but less than 4 G of a Fentanyl Analogue;

At least 20 KG but less than 40 KG of Marihuana;

At least 5 KG but less than 8 KG of Hashish;

At least 500 G but less than 800 G of Hashish Oil;

At least 10 KG but less than 20 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);

At least 20,000 but less than 40,000 units of anabolic steroids.

- (10) At least 10 G but less than 20 G of Heroin **Level 16**
(or the equivalent amount of other Schedule I or II Opiates);
At least 50 G but less than 100 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);

At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";

At least 100 MG but less than 200 MG of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 4 G but less than 8 G of Fentanyl;
At least 1 G but less than 2 G of a Fentanyl Analogue;
At least 10 KG but less than 20 KG of Marihuana;
At least 2 KG but less than 5 KG of Hashish;
At least 200 G but less than 500 G of Hashish Oil;
At least 5 KG but less than 10 KG of Secobarbital (or the
equivalent amount of other Schedule I or II Depressants) or
Schedule III substances (except anabolic steroids);
At least 10,000 but less than 20,000 units of anabolic
steroids.

(11) At least 5 G but less than 10 G of Heroin **Level 14**
(or the equivalent amount of other Schedule I or II Opiates);
At least 25 G but less than 50 G of Cocaine
(or the equivalent amount of other Schedule I or II
Stimulants);
At least 5 G but less than 10 G of PCP, or at least 500 MG but
less than 1 G of PCP (actual);
At least 5 G but less than 10 G of Methamphetamine, or at
least 500 MG but less than 1 G of Methamphetamine (actual), or at
least 500 MG but less than 1 G of "Ice";
At least 50 MG but less than 100 MG of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 2 G but less than 4 G of Fentanyl;
At least 500 MG but less than 1 G of a Fentanyl Analogue;
At least 5 KG but less than 10 KG of Marihuana;
At least 1 KG but less than 2 KG of Hashish;
At least 100 G but less than 200 G of Hashish Oil;
At least 2.5 KG but less than 5 KG of Secobarbital (or the
equivalent amount of other Schedule I or II Depressants) or
Schedule III substances (except anabolic steroids);
At least 5,000 but less than 10,000 units of anabolic
steroids.

(12) Less than 5 G Heroin (or the equivalent amount of **Level 12**
other Schedule I or II Opiates);
Less than 25 G Cocaine (or the equivalent amount of other
Schedule I or II Stimulants);
Less than 5 G of PCP, or less than 500 MG of PCP (actual);
Less than 5 G of Methamphetamine, or less than 500 MG of
Methamphetamine (actual), or less than 500 MG of "Ice";
Less than 50 MG of LSD (or the equivalent amount of other
Schedule I or II Hallucinogens);
Less than 2 G of Fentanyl;
Less than 500 MG of a Fentanyl Analogue;
At least 2.5 KG but less than 5 KG of Marihuana;
At least 500 G but less than 1 KG of Hashish;
At least 50 G but less than 100 G of Hashish Oil;

At least 1.25 KG but less than 2.5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 2,500 but less than 5,000 units of anabolic steroids;
20 KG or more of Schedule IV substances.

(13) At least 1 KG but less than 2.5 KG of Marihuana **Level 10**
At least 200 G but less than 500 G of Hashish;
At least 20 G but less than 50 G of Hashish Oil;
At least 500 G but less than 1.25 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 1,000 but less than 2,500 units of anabolic steroids;
At least 8 KG but less than 20 KG of Schedule IV substances.

(14) At least 250 G but less than 1 KG of Marihuana; **Level 8**
At least 50 G but less than 200 G of Hashish;
At least 5 G but less than 20 G of Hashish Oil;
At least 125 G but less than 500 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 250 but less than 1,000 units of anabolic steroids;
At least 2 KG but less than 8 KG of Schedule IV substances;
20 KG or more of Schedule V substances.

(15) Less than 250 G of Marihuana; **Level 6**
Less than 50 G of Hashish;
Less than 5 G of Hashish Oil;
Less than 125 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
Less than 250 units of anabolic steroids;
Less than 2 KG of Schedule IV substances;
Less than 20 KG of Schedule V substances.

PART B - ROLE IN THE OFFENSE

Introductory Commentary

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

~~When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.~~

For §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended. When an offense has only one participant, neither §3B1.1 nor §3B1.2 will apply. In some cases, some participants may warrant an upward adjustment under §3B1.1, other participants may warrant a downward adjustment under §3B1.2, and still other participants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply to offenses committed by any number of participants.

Sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) authorize an increase or decrease in offense level for a defendant who has an aggravating or mitigating role, respectively, in the offense conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Sections 3B1.1 and 3B1.2 are designed to work in conjunction with §1B1.3, which focuses upon the acts and omissions in which the defendant participated (i.e., that the defendant committed, aided, abetted, counseled, commanded, induced, procured or willfully caused) and, in the case of a jointly undertaken criminal activity, the acts and omissions of others in furtherance of the jointly undertaken criminal activity that were reasonably foreseeable.

For example, in a controlled substance trafficking offense, the Chapter Two offense level for Defendant A, who arranged the importation of 1000 kilograms of marijuana and hired a number of other participants to assist him, is level 28. The same Chapter Two offense level applies to Defendant B, a hired hand whose only role was to assist in unloading the ship upon which the marijuana was imported; Defendant C, a hired hand whose only role was as a deckhand on that ship; and Defendant D, a hired hand whose only role was to act as a lookout for that unloading. Defendant E, who

purchased the marihuana from Defendant A and resold it, acting alone, also receives the same Chapter Two offense level. Although the quantity of marihuana involved for each of these defendants (and thus the Chapter Two offense level) is identical, courts traditionally have distinguished among such defendants in imposing sentence to take into account their relative culpabilities (based on their respective roles). Defendant A logically would be seen as having the most culpable role because he organized the importation and recruited and managed others. Defendants B, C, and D logically would be seen as having substantially less culpable roles. Defendant E, who acted alone, would receive no role adjustment. Consistent with these principles, §§3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) are designed to provide the court with the ability to make appropriate adjustments in offense levels on the basis of the defendant's role and relative culpability in the offense conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

The fact that the conduct of one participant warrants an upward adjustment for an aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating role. For example, Defendant F plans a bank robbery and hires Defendant G, who commits the robbery. Both defendants plead guilty to bank robbery, and each has a Chapter Two offense level of 24. Defendant G may be less culpable than Defendant F, who will receive an upward adjustment under §3B1.1 for employing Defendant G. Nevertheless, Defendant G does not have a minimal or minor role in the robbery because his role is not substantially less culpable than that of a defendant who committed the same robbery acting alone.

(Historical Note omitted.)

§3B1.1 Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows: (Apply the Greatest):

- (a) If the defendant was an organizer or leader of a ~~criminal activity that involved five or more participants or was otherwise extensive~~ the offense and the offense involved at least four other participants, increase by 4 levels.
- (b) If the defendant was a manager or supervisor ~~(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive~~ of at least four other participants in the offense, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor ~~in any criminal activity other than~~

described in (a) or (b) of at least one other participant in the offense, increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

In an unusual case, a person may be recruited by a criminally responsible participant for a significant role in the offense (i.e., a role that is typically held by a criminally responsible participant), but the person recruited may not be criminally responsible because the person recruited (1) is unaware that an offense is being committed, (2) has not yet reached the age of criminal responsibility, or (3) has a mental deficiency or condition that negates criminal responsibility. In such a case, an upward departure to the offense level that would have applied had such person been a criminally responsible participant may be warranted. For example, a person hired by a defendant to solicit money for a charitable organization who was unaware that the charitable organization was fraudulent, a person duped by a defendant into driving the getaway car from a bank robbery who was unaware that a robbery was being committed, or a child recruited by a defendant to assist in a theft would meet the criteria for the application of this provision.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

A "manager" or "supervisor" means a person who managed or supervised another participant, whether directly or indirectly.

- ~~3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.~~

3. In the case of a defendant who would have merited a minor or

minimal role adjustment but for the defendant's supervision of other minor- or minimal-role participants, do not apply an adjustment from §3B1.1 (Aggravating Role). For example, an increase for an aggravating role would not be appropriate for a defendant whose only function was to offload a large shipment of marihuana and who supervised other offloaders of that shipment. Instead, consider this factor in determining the appropriate reduction, if any, under §3B1.2 (Mitigating Role). For example, in the case of a defendant who would have merited a reduction for a minimal role but for his or her supervision of other minimal-role participants, a reduction for a minor, rather than minimal, role might be appropriate. In the case of a defendant who would have merited a reduction for a minor role but for his or her supervision of other minimal- or minor-role participants, no reduction for role in the offense might be appropriate.

The interaction of §§3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from §3B1.1 is applied, an adjustment from §3B1.2 may not be applied.

* * *

§3B1.2. Mitigating Role

- (a) If the defendant was a minimal participant in ~~any criminal activity~~, decrease by 4 levels.
- (b) If the defendant was a minor participant in ~~any criminal activity~~, decrease by 2 levels.

~~In cases falling between (a) and (b), decrease by 3 levels.~~

Commentary

Application Notes:

1. ~~Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.~~
2. ~~It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part~~

~~of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.~~

~~3. For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.~~

1. (A) Minimal Role. For subsection (a) to apply, the defendant must --

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have all of the characteristics listed in Application Note 2(a)-(d); and

(3) not be precluded from receiving this adjustment under Application Notes 3-5.

(B) Minor Role. For subsection (b) to apply, the defendant must --

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have most of the characteristics listed in Application Note 2(a)-(d); and

(3) not be precluded from receiving this adjustment under Application Notes 3-5.

(C) The difference between a defendant with a minimal role and a minor role is one of degree, and depends upon the presence and intensity of the types of factors described in Application Note 2(a)-(d).

(D) For the purposes of this section, the "same offense" means the offense conduct (and Chapter Two offense level) for which the defendant is accountable under §1B1.3 (Relevant Conduct). The determination of whether a defendant is substantially less culpable than a person who committed the same offense without the involvement of any other participant requires a comparative assessment. In a drug trafficking offense, for example, the role and culpability of a defendant who was hired as a lookout for a drug transaction would be compared with the role and culpability of the seller of the same quantity of the controlled substance who acted alone. Similarly, the role and culpability of a defendant who was hired to unload a shipment of marihuana would be compared with

that of an importer of the same quantity of marihuana who acted alone. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).

Examples:

- (1) Defendant A was hired by an unindicted participant to assist in unloading a ship carrying 1,000 kilograms of marihuana (having a Chapter Two offense level of Level 32). Defendant A had no decision-making authority, was to be paid \$2,000, had no supervisory authority over another participant, and performed only unsophisticated tasks. The appropriate comparison of relative culpability is with a defendant who, acting alone, imported the same quantity of marihuana (such a defendant would receive a Chapter Two offense level of Level 32 and no aggravating or mitigating role adjustment). On the basis of this comparison, Defendant A is a substantially less culpable participant.
 - (2) Defendant B was hired by Defendant C to commit an assault on Defendant C's former business partner. Defendant B was told when and where to find the victim alone, was instructed how to proceed, was to be paid \$3,000 to commit the offense, had no supervisory authority over another participant, and performed only unsophisticated tasks. Although Defendant B may be less culpable than Defendant C, Defendant B is not a substantially less culpable participant than a defendant who, acting alone, committed the same assault offense. Therefore, although Defendant C receives an aggravating role adjustment for employing Defendant B, Defendant B does not receive a mitigating role adjustment.
- (E) Defendants who qualify as substantially less culpable participants usually will fall into one of the following categories:
- (1) a defendant who facilitates the successful commission of an offense but is not essential to that offense (e.g., a lookout in a drug trafficking offense);
 - (2) a defendant who provides essentially manual labor that is necessary to the successful completion of an offense (e.g., a loader or unloader of contraband, or a deckhand on a ship carrying contraband); or

(3) a defendant who holds or transports contraband for the owner of the contraband (such defendants provide a buffer that reduces the likelihood of the owner being apprehended in possession of the contraband).

(F) Because the determination of whether a defendant qualifies for a mitigating (minimal or minor) role adjustment requires a comparative judgment, the Commission recognizes that it will be heavily depending upon the facts of each case.

2. The following is a list of characteristics that ordinarily are associated with a mitigating role:

(A) the defendant had no material decision-making authority or responsibility;

(B) the total compensation or benefit to the defendant was very small in comparison to the total profit typically associated with offenses of the same type and scope;

(C) the defendant did not supervise other participant(s); and

(D) the defendant performed only unsophisticated tasks.

In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity or of the activities of other participants may be indicative of a mitigating role.

3. If the defendant received an adjustment from §3B1.1 (Aggravating Role), an adjustment for a minimal or minor role is not authorized.

4. With regard to offenses involving contraband (including controlled substances, a defendant who --

(A) sold, or played a substantial part in negotiating the terms of the sale of, the contraband;

(B) had an ownership interest in any portion of the contraband;

(C) financed any aspect of the offense; or

(D) transported contraband.

shall not receive a mitigating role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the offense

that the defendant financed or transported because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant.

Thus, for example, a defendant who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity is not eligible for a mitigating role adjustment. In contrast, a defendant who sells 100 grams of cocaine, but who is held accountable under §1B1.3 for a jointly undertaken criminal activity involving five kilograms of cocaine, if otherwise qualified, may be considered for a mitigating role adjustment in respect to that jointly undertaken criminal activity, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

However, if a defendant's sale, negotiation, ownership, financing or transportation of contraband occurs under such circumstances so that the defendant is significantly less culpable than those defendants subject to subsections 4(A) through (D) above, the court may consider a downward departure.

Thus, for example, when transportation is a single episode or when conduct occurs primarily because of a familial-type relationship (father-son, boyfriend-girlfriend) between another participant and the transporter, a downward departure may be appropriate.

~~{5. A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule) shall not receive a minimal role adjustment for the quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.}~~

~~{6. A defendant who possessed a firearm or directed or induced another participant to possess a firearm in connection with the offense shall not receive a minimal role adjustment. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.}~~

475. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of

cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

86. Consistent with the overall structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

~~Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.~~

This section provides an adjustment for a defendant who has a minor or minimal role in the offense. To qualify for a minor or minimal role adjustment, the defendant must be substantially less culpable than a hypothetical defendant who committed the same offense without the involvement of any other indicted or unindicted participant. In a large scale offense that cannot readily be committed by one person, the above comparison would be made to a small number of equally culpable participants who committed the offense without additional assistance. In an offense involving importing, transporting, or storing contraband (including controlled substances), the defendant's relative culpability is to be assessed by comparison with a participant who owned the same type and quantity of contraband because, in an offense involving contraband that is committed without the involvement of any other participant, the person committing the offense will be the owner of the contraband.

* * *

~~§3B1.4. In any other case, no adjustment is made for role in the offense.~~

Commentary

~~Many offenses are committed by a single individual or by individuals of roughly equal culpability so that none of them will receive an adjustment under this Part. In addition, some participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustments.~~

44. Proposed Amendment #44 - Money Laundering

The PAG strongly supports the proposed amendments to §§ 2S1.1-2S1.2, pertaining to money laundering offenses. The amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. While the amendment constitutes a much needed reform, we believe that the underlying objective of the amendment, achieving "real offense" sentencing, could best be achieved by the PAG's proposed modifications which are referenced in the Additional Issue for Comment section of the proposed amendment.

Initially, the need for some amendment to the existing money laundering guidelines is substantial. The money laundering statutes, 18 U.S.C. §§ 1956 and 1957, are quite expansive. Indeed, the Department of Justice in its policy statement, dated October 1, 1992, recognized that the statutes are "extraordinarily broad," and that they "apply to the movement of funds derived from most serious federal crimes and a larger number of state crimes, as well." In our experience, the statutes have been applied in relatively minor fraud and other cases in which the defendant merely deposited the proceeds of illegal activity into his or her bank account. See, e.g., United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (Affirming conviction under 18 U.S.C. § 1956 where state official deposited into his personal checking account a \$3000 check representing a bribe). Furthermore, defense attorneys from around the country have informed the PAG that certain prosecutors are using the statute to prosecute state misdemeanor offenses (e.g., prostitution, gambling) as federal money laundering and, as such, exposing defendants to significant prison sentences for crimes which would have otherwise resulted in the defendants receiving probation.

Furthermore, as noted by the Money Laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Working Group recognized, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they significantly reduce the potential for actual or threatened sentence manipulation through charging practices.

Unfortunately, based on the Department of Justice's suggested revisions to the proposed amendment, it would appear that the

Department is intent on maintaining its ability to control sentencing exposure through the charging decision. The Department's proposal to increase the base offense levels in § 2S1.1(a)(2) and (3) by four levels would perpetuate a system in which defendants facing a money laundering charge would be exposed to a greater sentence despite the fact that they did little, if anything, more than commit the underlying offense. We urge the Commission to reject the Department's position because, as the Working Group noted, where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same as for the underlying offense." Id.

Indeed, in order to achieve the Commission's stated goal of "tying offense levels more closely to the underlying conduct that was the source of the illegal proceeds," we recommend that the Commission make the following modifications to the proposal:

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

Without this modification, the proposed guideline, at least in certain situations, would perpetuate the inequitable system of having the sentence based on the charging decision rather than by the defendant's actual conduct. For example, in a situation where the defendant through illegal gambling obtains \$150,000 in proceeds and deposits those proceeds in the bank, the defendant (assuming he was not running a gambling business) would be subject to a base offense level of 6, if charged under the federal gambling statutes. See U.S.S.G. § 2E3.1(a)(2). However, if that same defendant were charged with money laundering, his or her guideline level under the proposed amendment would be 15. See § 2S1.1(a)(3) (base offense level of 8 plus 7 levels based on § 2F1.1). Because the proposed amendment instructs the sentencing judge to "apply the greatest" guideline level, the defendant would receive a nine point enhancement based entirely on the charging decision.

Second, the proposed amendment would eliminate reliance on the table found in § 2S1.1(b)(2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of funds involved in a money laundering transaction. While we understand the Commission's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the

value of funds in a money laundering transaction and the loss involved from fraud is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving force behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a \$5 million dollar insurance policy. See, e.g., United States v. Smith, 13 F.3d 1421, 1428 (10th Cir. 1994) (Noting that money laundering counts should not be grouped for sentencing with wire fraud counts "because there are different victims and separate and distinct losses.")

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendment's proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate, a revised money laundering table should be employed.

Third, if the Commission nevertheless determines to incorporate the fraud table into the money laundering guidelines, then the amendment should be revised so that the base offense level in § 2S1.1(a)(3) is the same as the base offense level for fraud and deceit § 2F1.1. The PAG strongly disagrees with the suggestion in the Synopsis of Proposed Amendment that the additional two points are required because money laundering typically involves more than minimal planning. As previously noted, our experience is that most money laundering cases involve little more than the deposit of allegedly criminally derived proceeds into a bank account. Indeed, where there is actual money laundering, and not just a bank deposit, the proposed amendment includes a two point adjustment. See § 2S1.1(b)(1). If the base offense level in § 2S1.1(a)(3) is not changed to 6, then the guideline will continue to produce inequitable and irrational sentences. For example, where a defendant commits a \$1600 mail fraud and deposits the

proceeds in a savings account, the defendant could be charged with mail fraud and/or money laundering. As a mail fraud case, the defendant's base offense level is 6; but, as a money laundering case under the currently proposed amendment, the base offense level is 8.

Fourth, the proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. This obviously provides continued opportunities for sentence manipulation given that the government controls the "value of funds" involved in the transaction and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. The Ninth Circuit recently held, in the context of a drug case, that sentencing manipulation/entrapment provided the basis for a downward departure, see United States v. Stauffer, 38 F.3d 1103 (9th Cir. 1994); however, there is little uniformity among the courts on this subject.

In order to prevent such guideline manipulation in sting cases and to promote uniformity in this area of the law, we suggest that the Commission include the following statement as Application Note 6.

If a defendant is convicted in an undercover sting, pursuant to 18 U.S.C. § 1956(a)(3), and the Court finds that the government agent influenced the "value of funds" involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted.

45. Proposed Amendment #45 - Supervised Release (Chapter 5, Part D)

The PAG urges the Commission to amend the supervised release Guidelines to permit greater consideration of the individual defendant's need for supervision after imprisonment, to permit greater judicial flexibility in the imposition of supervised release and to relieve the growing burden on judicial resources devoted to supervising defendants.

The PAG favors amending §5D1.1(a) by providing for a mandatory period of supervised release only when required by statute. In all other cases, supervised release would be optional with the court.

Section 5D1.1 would read as follows:

(a) "The court shall order a term of supervised release to follow imprisonment when required by statute.

(b) The court may order a term of supervised release to follow imprisonment in any other case."

As to the term of supervised release, the PAG favors amending §5D1.2 by providing for a term of "at least one year but not more than three years" in subsection (a) and by changing §5D1.2(b) by providing for a length of supervised release of up to one year for a defendant convicted of a class C, D, or E felony or a class A misdemeanor and at least one but not more than three years for a defendant convicted of a class A or B felony. This would require the Commission to recommend to Congress that 18 U.S.C. § 3583(b) be amended to effectuate these changes in §5D1.2(b).

In other words, the PAG supports reducing the terms of supervised release across the board and making supervised release mandatory only where required by statute.

46. Proposed Amendment #46 - Implementing the Total Sentence of Imprisonment

Amendment 46 sets forth two options regarding the revision and clarification of Guidelines § 5G1.3(c). The PAG strongly supports the need for both revision and clarification of this guideline, and finds some aspects of both options which are worthy on inclusion in an amendment to the section. The PAG therefore supports passage of an amendment which incorporates aspects of both options under consideration.

The need for revision and clarification of 5G1.3(c) is compelling. As it currently reads, the Guideline is complicated, confusing, and complex. Use of 5G1.3(c) is difficult, and even more problematic to explain to the defendants whose time in prison turns on its operation. Because of its ambiguity under certain circumstances, the current Guideline may also lead to incorrect applications with the end result of sentencing disparity. Because of the inherent complexity of the issue, it is likely impossible to draft a guideline to address all potential sentencing scenarios with specificity. Nevertheless, aspects of both Option 1 and Option 2 present constructive steps toward minimizing the problem.

Both Option 1 and Option 2 of Amendment 46 use a grouping methodology (as if the offenses were federal offenses for which sentences were being imposed at the same time) to arrive at an appropriate total punishment. The PAG agrees with this general approach in those cases in which such calculations can be performed with some confidence. On the other had, the number of instances in which the prior undischarged term of imprisonment arises from a state offense which has no obvious federal analogue or a federal offense where there is insufficient information available to apply the grouping rules is likely to be large, and suggests the need for flexibility beyond the grouping approach.

Option 2 draws a distinction between cases in which the prior undischarged term of imprisonment arises from a federal guidelines sentence and those which do not. Only as to the latter category of cases is the court permitted the flexibility to depart from the grouping approach to use "any reasonable method to determine" the appropriate sentence. Although the grouping rules may apply more easily to prior undischarged terms of imprisonment arising from a guidelines sentence, it seems unlikely that this will always be true. Because the grouping methodology may not always be possible or lead to appropriate results when applied to a prior guidelines sentence, the better approach would seem to be to retain the "any reasonable method" flexibility afforded to other cases involving undischarged terms of imprisonment. In other words, the approach in Option 2 of distinguishing between prior guidelines sentences and other prior undischarged sentences may be inferior to the Option 1 approach of treating all undischarged terms of imprisonment under one category and approach.

Option 1 also includes an improved explanation of the process, a step by step guide, and better examples of how the guideline should be applied. These aspects of Option 1 appear helpful, and should be included in an amendment to 5G1.3(c).

While the clarity and greater simplicity in option 1 described above favors that option over Option 2, other aspects of option 1 may either be unnecessary or reintroduce confusion into the process. For example, Option 1 introduces the concept of "partially concurrent sentences," in which the precise sentence to be served is not clear until the occurrence of some event in the future. Although it is possible that the flexibility afforded by the possibility of such sentences may be helpful in unusual circumstances, it is difficult to picture why nearly any result could not be achieved through the use of either entirely concurrent or entirely consecutive sentences. This is particularly so if it is not considered a "departure" to impose a sentence either longer or shorter than the guidelines range to achieve an appropriate total term of imprisonment under 5G1.3. In short, it is unclear whether "partially concurrent sentences" which commence at a date to be determined in the future are needed to achieve the purposes of this guideline.

Application note 8 of Option 1 expands the application of the guideline beyond defendants who have prior undischarged terms of imprisonment to include some defendants who have been released from imprisonment. The class of such defendants, however, is quite small--only those who have completed a term of imprisonment for an offense committed after the completion of the instant offense and have completed the term of imprisonment before sentencing on the instant offense. Under these narrow circumstances, 5G1.3(b) and (c) would continue to apply even though there is no longer a prior undischarged term of imprisonment.

The difficulty with application note 8, however, is that it does not go far enough. The underlying difficulty, particularly in cases under 5G1.3(b), is that it is unfair for a defendant to be imprisoned twice for the same underlying conduct. But this unfairness is not limited to instances in which the defendant happens to still be serving time for the prior offense. Although note 8 to Option 1 addresses the unfairness of imposing a consecutive sentence simply because the defendant has been released from prison, it does so under narrow circumstances which have no apparent nexus to the underlying unfairness. That is, the preconditions set forth in note 8 are essentially irrelevant. All defendants should receive credit for prior terms of imprisonment, without regard to whether or not they have completed their sentence.

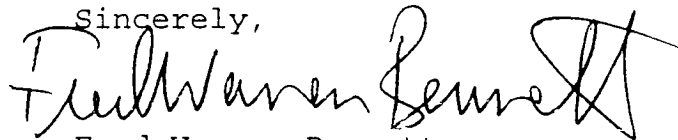
Finally, a shortcoming of both Option 1 and Option 2 is that neither addresses the question of what to do with cases falling within both 5G1.3(a) and (b). The current guideline requires

consecutive sentencing for any offense committed while serving a term of imprisonment or after sentencing but before commencement of the term of imprisonment. This is true, even if the undischarged term of imprisonment resulted from conduct fully taken into account in the determination of the offense level for the instant offense. This could lead to considerable unfairness in cases driven largely by relevant conduct. For example, a defendant who is sentenced for a drug offense which included numerous distributions over a long period of time and who then commits an additional minor distribution may receive a consecutive sentence out of all proportion to the severity of the offense. Although the appropriate aggregate sentence for offenses committed while in prison or after sentencing may often call for a completely consecutive sentence, a better approach would be to permit the same "any reasonable method" flexibility in these cases as well.

In conclusion, the PAG agrees there is a need for amendment to Guideline 5G1.3(c). An amendment incorporating certain items from each option as well as a few additional provisions would provide needed guidance in this difficult area. If the Commission does not believe that the approach we suggest (incorporating certain items from each option) is the way to proceed, we support Option 1 overall, as opposed to Option 2.

* * *
[END OF COMMENTS]

On behalf of the Practitioners' Advisory Group, thank you for allowing us to comment on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,


Fred Warren Bennett
Chairman
Practitioners' Advisory Group

cc: Commissioner Michael S. Gelacak, Vice Chairman
Commissioner A. David Mazzone, Vice Chairman
Commissioner Wayne A. Budd
Commissioner Julie E. Carnes
Commissioner Michael Goldsmith
Commissioner Deanell R. Tacha

COMMENTS ON PROPOSED SENTENCING GUIDELINE AMENDMENTS OF JANUARY 9, 1995

Amendment 35(A) §3B1.1

I commend the Commission for its efforts to clarify the language regarding the aggravating role adjustment. In particular, deletion of the term "otherwise extensive" will make the guideline more understandable and more apt to result in like sentences for like offenders.

It would also be helpful to include definitions of "organizer," "leader," "manager," and "supervisor." The present statement in Application Note 2 that a manager means a person who managed is not terribly helpful. Definitions would help to distinguish between organizers and managers/supervisors and in deciding when a person became a manager or supervisor. Very often low level participants are called upon to pass along instructions to other low level participants. It should be made clear that this does not constitute managing or supervising, if the participants are otherwise at equal levels or participation.

Also, some further explanation in Application Note 1 of what constitutes a "significant role" would be helpful. For example, what about the secretary, who unaware that it is part of a check kiting scheme, deposits checks for her boss. Can her boss, the check kiter, receive a two level increase as a manager or supervisor? On the one hand, the offense could not have been committed without the checks having been deposited, on the other this is a purely ministerial role which the defendant could easily have accomplished himself.

Amendment 35(B) --§3B1.2

I support this amendment and, again, applaud the Commission's efforts at clarifying the minor or minimal role adjustment.

I suggest including some examples in Application Note 1(E) relating to other than drug offenses.

Also, I urge the Commission to change Application Note 1(B)(2) which requires that the defendant have "most" of the characteristics listed in Note 2 A-D to be eligible for a minor role adjustment. The word "most" implies that the defendant must meet three of the four characteristics listed in Application Note 2. But, Application Note 2 also contains another potential characteristic which could be a factor, even if the defendant only met one or two of those listed in A-D. I suggest the B(2) be changed to read "ordinarily have **one or more** of the characteristics listed in Application Note 2(a)-(D);"

Amendment 39 -- §2D1.1

I support the concept of this proposed amendment which limits the time period to be used in determining the quantity of controlled substances with which a defendant was involved. I support either a 30-day time frame (option 1), or use of the largest quantity involved on any one occasion (option 2), **provided that the latter is limited to a specific period of time as well.** I suggest 30 days.

The Commission's proposed use of a 12-month or 6-month "snapshot" will not achieve the Commission's goal of reducing the impact of law enforcement decisions as to the number of "buys" made before an arrest. Further, the 30-day limit conforms with the DEA's priority classification scheme which was in effect at the time the mandatory minimum legislation was being considered. This indicates that, in their considered judgment, drug amounts during such a time frame are indicative of the defendant's overall drug involvement.

Amendment 40 -- §2D1.1

I support the use of the weight of the actual controlled substance to determine the guideline range. This will greatly reduce disparity in sentencing in drug cases.

However, I object to Note A(1) and (2) which sets forth rebuttable presumptions of 75% and 50% as the appropriate net weights. **These presumptions seem appropriate for cocaine and methamphetamine, but are too high for heroin offenses. The Parole Commission uses a figure of 50% purity with large quantities of heroin (over two kilograms) and scales it downward to 40% for 200 grams or more and 17% for less than 28.35 grams. This seems more realistic, given that street heroin is usually no more than 5-20% pure.**

Also, I suggest that the language in Application Note 1 be changed as follows:

This is the weight to be used **as a starting point** in calculation of the base offense level from the drug quantity table.

There may be many reasons why the weight found in DEA Form 7 should not be the ultimate weight to be used in the guideline calculations. (i.e. relevant conduct considerations)

Amendment 46

I support Option 1 as it is both clearer and broader, including, as it does, state as well a federal offenses. I suggest, however, that the Commission broaden the language of §5G1.3 to include offenses for which the defendant has pled or been found guilty, but not yet been sentenced.

Also, I suggest that the Commission add an application note explaining the interaction between §5G1.3 and §2J1.7, which provides a three-level enhancement if a defendant is charged with committing another offense while on release (18 U.S.C. §3147).

Submitted by:

Richard Crane
Attorney at Law
615-298-3719

028-95
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
UNITED STATES PROBATION OFFICE

JOHN R. LONG
CHIEF U.S. PROBATION OFFICER

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REPLY TO : Manassas

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

Dear Sir:

In response to the 1995 proposed amendments to the sentencing guidelines, please accept the following comments.

Issue for Comment (Issue) #1:

HIV exposure: HIV related assault could be sanctioned through 2A2.2, Aggravated Assault, and/or 2A3.1 - 3.4.

Infectious bodily fluids should be defined expressly as a dangerous weapon.

HIV-infected bodily fluid should be included in the definition of "permanent or life-threatening bodily injury".

Other infections, e.g., hepatitis, should be included in "bodily injury" or "serious bodily injury" depending on the strain.

Issue #2:

Minor Assault: Add a cross-reference to 2A2.2, Aggravated Assault, for victim under 16 with substantial bodily injury.

Issue #3:

Involuntary Manslaughter: Raise the levels to 16 and 14, respectively, thereby insuring that a person convicted of this offense goes to jail. A person who takes a life, even "involuntarily", should face a harsh penalty. We have heard

from families for years the absurdity of a drug dealer facing mandatory time while someone who takes a life could, conceivably, walk away with community confinement.

Proposed Amendment (Amend.) #4

Kidnapping: Prefer option 1, which is more in line with 1B1.2.

Issue #5:

Aggravated Sexual Abuse: Prefer no enhancement for more than one assailant. 2A3.1 is adequate with its fairly comprehensive SOCs. Other aggravating factors can be handled through departures.

Amend. #6:

Death of the Victim: Prefer option 2, which will be more efficient.

Amend. #7:

Adequacy of Criminal History Category: Not sure if the additional application notes are necessary in light of existing 4A1.3, but the addition to 4A1.3, itself, is appropriate.

Issue: The offense levels in 2A are adequate as are.

Amend. #8:

Counterfeit Bearer Obligations: Prefer option 1, which seems to ensure uniform application and is more conforming to other guidelines, e.g., 2D1.1.

Issue: Enhancement should be modeled after that in 2D1.1.

Amend. #9:

2D1.1: Prefer option 1, as 2D1.1 already contains a cross-reference if death occurs.

Issue: No additional SOCs are needed. DOJ cannot realistically expect the Commission to add a point for every conceivable (or inconceivable) sentencing factor. This is why departures were built in, as a "failsafe."

Issue #10A:

Contraband in Prison: 2P1.2 is adequate as is.

Issue #10B:

844/841 in federal prison: 844 should reference to 2P1.2; 841 should go to 2D1.2 if the defendant distributed or PWID.

Issue #11:

Protected locations: Current enhancement is adequate.

Issue: 2D1.2 is fine as is; this BOL would be used infrequently. Let the Court depart downward if this becomes a sentencing factor.

Amend. #12:

2D1.2: This amendment is appropriate in order to conform the guideline to statute, and also to eliminate the problem with LSD vis a vis 2D1.1.

Amend. #13:

Flask/Equipment: As is, this amendment is problematic. There seems to be only a hair's breadth of difference between the two. If there is to be a distinction between intent and belief, make it a clean and clear distinction. As is, this will be a nightmare to deal with in the field.

Amend. #14:

Vulnerable Victim/Civil Rights: Prefer option 2. Option one tries to squeeze too much into 3A1.1 and 2H1.1.

Amend. #15:

Firearms: Agree.

Issue: No, there should not be an enhanced OL.

Amend. #16:

Firearms: Prefer option 2; BOL of 12 appears appropriate for transferring firearm to a juvenile.

Issue #17:

Firearms: The focus should be on the most dangerous firearms.

Issue #18:

2K2.4: Prefer the second approach with the departure provision.

Issue #19:

Firearms: The OLs and definitions are adequate as are.

Amend. #20:

Prefer option 2; if a "two bit burglar" happens to take a gun or marijuana as part of a house burglary, he should not automatically face a higher OL. Give the Court the discretion depending on the circumstances of the offense.

Amend. #21:

Firearms/Explosives: Agree.

Issue #22A:

Alien Smuggling: Yes, the OLs should be increased under 2L1.1, and can be accomplished by SOC's or by cross-reference to the more serious offense, e.g., aggravated assault, manslaughter.

Issue #22B:

Reentry: Current levels are appropriate. No, three misdemeanors do not equal a felony - a person who possesses marijuana on three occasions should not face the same penalty as a person who distributes cocaine.

Amend. #22C:

Immigration: No! This change is too convoluted. Why not add a SOC of 2 points for injury caused by the defendant and cross-reference if death or sexual assault occurs? Also, there may be a problem re the injury. What if a harbored alien breaks his leg fleeing INS? Will we hold the defendant accountable for this ("if any person sustained bodily injury")?

Amend. #22D:

Immigration: No, the top of the guideline range is sufficient.

Issue #23A, Amend. #23B:

Immigration: This proposed amendment is acceptable, except for SOC's (b)(2) - (b)(4). These are overkill! Again, DOJ is trying to build in every obscure scenario into the guidelines, when the departure avenues are built in in anticipation of such cases.

Issue #24:

Terrorism: These cases would be so rare, it seems unnecessary to create another guideline. Chapter Five is adequate to cover any such cases.

Issue #25A:

Juvenile: These cases can best be handled through Chapter Five departures.

Amend. #25B:

Juvenile: This amendment is not appropriate! Prefer to give the Court the discretion to depart, particularly since the age difference may be only four years in these cases, e.g., 21 year old employing 17 year old who may be just as sophisticated or dangerous as his employer.

Issue #26A:

Street gangs: A street gang enhancement could be built into 3B1.1, Aggravating Role.

Amend. #26B:

Street gangs: Prefer to see an enhancement built into 3B1.1.

Issue #27A:

Elderly Victims: The guidelines provide adequate sanctions for crimes involving elderly victims. 2F1.1, 3A1.1, and other guidelines provide for elderly status. And, as always, the Court is given latitude to depart in particularly aggravating cases.

Amend. #27B:

Elderly Victims: This change is appropriate.

Issue #27C:

Elderly Victims: Current victim-related adjustments are adequate. Rebuttable presumption of age will carry its own set of difficulties, e.g., What if the defendant and the victim are the same or close to the same age?

Issue #28:

Career Offender: No action is necessary; 5G1.1 addresses this adequately.

Amend. #29:

Safety Valve: 5C1.2 is okay as is, but may need some clarification down the road; e.g., If a defendant receives an enhancement per 3C1.2, can he still qualify for 5C1.2? (this was a hotline question last fall); If a police officer shoots a codefendant, is the defendant held accountable for this injury, and, thus, precluded from 5C1.2?

Amend. #30:

Restitution: Agree.

Amend. #31A:

Supervised Release: Agree.

Amend. #31B:

Supervised Release: Agree, but clarify if this exception applies to 3565(b) only and not 3583 - this will undoubtedly be raised in the field.

Amend. #32:

App. A/ Guideline Titles: Agree.

Amend. #33:

2D1.1: Prefer option A, which appears to most closely conform to legislative intent. This is still a lot of time to serve!

Amend. #34:

2D1.1: Definitely agree where the defendant qualifies for a minimal role; not so sure where the defendant is a minor participant. Minor participants, in some cases, still handle a lot of drugs.

Issue: No! This is too convoluted and would be much too cumbersome in the field.

Amend. #35A:

Role: Agree, but the language may be problematic. It could be argued that less must be done to qualify for a 4 point enhancement, which is driven by number of participants, than for a 3 point enhancement, which is driven by number of participants supervised.

Amend. #35B:

Role: Thank goodness we finally get rid of 3B1.4 and the 3 point intermediate enhancement at 3B1.2! Notes 1(A)(1) and 1(B)(1) are confusing and notes (1)(D) and the examples don't provide much relief. Please make these more clear. Note 4 is also a difficult read. Regarding the last paragraph of the notes, please stay away from hypotheticals. This amendment is somewhat confusing - please simplify.

Amend. #36:

2D1.1: 2D1.1 and 2D1.11 are fine as are. The Court can depart or cross-reference as needed. However, the rebuttable presumption regarding firearms is appropriate. Regarding 3B1.1, prefer option 2.

Issue: This is much too convoluted! Again, why try to build in every possible set of circumstances, when a more generic enhancement, combined with a departure if warranted, serves the purpose more efficiently.

Amend. #37:

2D1.1: Agree, this seems like a more realistic approach.

Issue #38:

Powder/crack: Yes, the ratio should be reduced, but not sure by how much.

Amend. #39:

2D1.1: No, this skews reality. Someone who sells 1 kilo a week for a year is a 52 kilo dealer, not a 4 kilo dealer (if 30 day standard is used).

Amend. #40:

2D1.1/purity: The table is adequate as is. The Commission may want to include threshold levels in the commentary as an issue for departure, e.g., anything below 15% or above 85% purity.

Amend. #41:

2D1.1/pills: This amendment appears to create more equity in assessing offense level.

Amend. #42:

Re hash/hashish oil: Agree.
Re marijuana and moisture content: Agree.
Re khat, LAAM, d/l-meth: Agree.
Re weapon: Agree with rebuttable presumption.
Re negotiated amount: Agree unless actual weight is higher or defendant was not capable of producing.
Re reasonable foreseeability: Agree.
Re 50% lab capacity: Agree.
Re PWID and personal use: Prefer the second approach with the rebuttable presumption that all amounts are for sale. Otherwise, not only will defendants be encouraged to be loose with the truth, but prosecutors may also feel open to manipulate facts, particularly if a larger scale dealer pleads guilty and cooperates.

Re protected location: What is "no increased risk"?
Re 2D1.8: Agree.

Amend. #43:

2D1.1: Prefer neither option. Prefer the simplicity of the present 2D1.1. Why complicate the matter?

Amend. #44:

Consolidation of 2S1.1, 2S1.2: Agree, this would make life easier in the field.

Issue: Yes, this table seems more reflective of real money laundering offenses. Prefer the approach that applies the highest base offense level. Also agree that if a government agent manipulates transactions in order to increase guidelines, a downward departure may be warranted.

Issue #45:

Supervised Release: No. A term of supervised release after a defendant has served a year in prison is appropriate. Also, the Court has the option to terminate supervision after one year. Further, if restitution is to be made a mandatory condition of supervision, the field will need the time on supervision to enforce this condition, particularly where payments are necessarily small because of payment capacity.

Amend. #46:

5G: Prefer option 2. This option is much more practical and will be much more attractive to the Courts. "Partially concurrent" would be difficult to implement between the Courts and BOP.

Thank you for the opportunity to comment on these issues and proposed amendments. It means a lot to us in "the trenches" that our input was requested.

Sincerely,


Carla G. Coopwood
Senior U.S. Probation Officer

CGC/lwk

cc: John R. Long, CUSPO
Alexandria, Virginia

A PROPOSAL TO HAVE FEDERAL SENTENCING GUIDELINES ADJUSTED
BY LOWERING BASE OFFENSE LEVELS
(THIS PROPOSAL IS TARGETED AT AMENDMENT #44)

SUBMITTED TO :
UNITED STATES SENTENCING COMMISSION

SUBMITTED BY:
THEODORA GARZA
CONCERNED AMERICAN and
STUDENT AT THE UNIVERSITY OF TEXAS
IN SAN ANTONIO, TEXAS
FEB.15th,1995

SUMMARY

The present existence of mandatory minimum sentences imposed by Congress in 1987 for even the smallest federal drug violations has failed to reduce crime during its practice in federal courts. These mandatory sentences have kept **non-violent offenders** in prison for more time than violent criminals convicted of other offenses. Federal Judges are no longer allowed to use their discretion when passing sentences on to convicted offenders, and these minimums group all of the accused into one group where individual circumstances are not allowed to be taken into consideration. It is unjust for **legitimate business people**, such as car dealers or realtors to sell a car or a home to a person who unbeknownst to them is a drug dealer, and for the car dealer or realtor to later be prosecuted for money laundering, and consequently stand convicted on a drug offense. The American Business Sector are not trained D.E.A. agents. They are Americans who tried to follow in the path of the American Dream, and tried to run their business to the best of their knowledge. It is extremely **unconstitutional** to force such people to serve lengthy jail terms. It is a waste of taxpayer's money, and a waste of these people's lives. Additionally, the law has been poorly drafted, and while these mandatory minimum sentences are excellent political tools, they are **unconstitutional** and have failed to reduce drug crimes.

The United States Sentencing Commission should work to bring about changes in a failed system. The Commission should make recommendations to Congress for necessary revisions on federal sentencing guidelines to restore judicial discretion as well as fairness and sanity. The nation needs a more rational, pragmatic approach. It is simply not right for all accused persons to be thrown into one single category, where they must all face the same harsh sentences. Distinctions have to be made between non-violent offenders who were not directly involved in the drug business in any way, and offenders who have a history of violence. Base offense levels need to be lowered in order to avoid the imposition of an automatic lengthy jail term where individual circumstances were not taken into consideration.

PROBLEMS WITH THE CURRENT SENTENCING GUIDELINES

There are several factors that cause the current sentences to be **unfair, unconstitutional, race biased, expensive, and a failure in general**. Prisons have become **grossly overcrowded** and violent criminals are being released in order to make room for those labeled as drug offenders.

1. The present mandatory sentences don't make distinctions for non-violent drug offenders. Small time offenders (**gofers and mules**), and **offenders such as money launderers**, some of whom have **never even seen drugs in their lives**, must face the same **harsh sentencing** as big ringleaders, and sometimes harsher sentences. Many of the people who stand convicted of money laundering were not involved in the selling of drugs in any way. They had no culpable intent. They simply sold an item to a person who later on was convicted of being a drug dealer. Many times these drug dealers are facing long sentences, and in turn decide to produce a "story" for prosecutors whereupon they inform the prosecutor of a business person who was willing to sell them an item without exposing them as being involved in illegal activity. The **true criminals are granted reduced sentences**, and legitimate, hard working business people's lives are ripped apart, and they must face the horrible reality of their inhumane sentences. **Prosecutors are cutting deals** with high-level traffickers, even those that are **animalistic thugs**. These violent thugs are used to testify against the "ignorant" car-dealers, or realtors, or accountants, and on and on. The word ignorant is used here to again emphasize that these business people were unaware that they were selling an item or providing a service to a drug dealer. Until these people stand convicted of such a

crime, it is not public knowledge that they are indeed drug dealers, and again, **business people are not trained Drug Enforcement Agents**. Surely it was never the intention of Congress to allow for such things to go on in the American Judicial System.

2. Prisons are extremely overcrowded (with the wrong people).

Federal prisons are **full of first time, non-violent drug offenders**. The federal inmate population has risen from 24,000 in 1980 to 76,815 today. Without changes it will top 116,000 in 1999. Some states, under court orders to ease prison overcrowding, are **routinely releasing violent criminals early to make room for drug offenders**. There is no statutory requirement that murderers and rapists be kept in prison, but there is a requirement that drug offenders, (money launderers, etc.), be kept in. **Violent, threat imposing criminals are released into our streets to make room for non-violent minor league drug offenders**. Perhaps that is why the newspapers reek of stories such as the one involving Polly Klaas, **a child who was murdered by a violent offender who had been released. Was he released in order to make room for a money launderer?** The very idea of such things going on in my beloved country are scary indeed! **These mandatory minimums have created a lousy legal system that should not exist in America!**

3. The cost of maintaining prisoners is overwhelming.

American taxpayers pay **\$4.5 million a day to incarcerate federal prisoners**, and according to the Justice Department's estimates, **another \$100 million a week will be needed to build enough prisons just to hold mandatory minimum inmates**. Americans are tired of having to pay so much in taxes. Obviously, the maintaining and building of prisons to **house non-violent inmates is a great contributor to the tax burden**. Perhaps if the whole country were to become well informed with these circumstances, and be allowed to vote on this issue, they would vote to **release those non-violent people** who have had **draconian sentences** imposed upon them. Would an American Citizen be content with the fact that he or she was paying such a vast amount in taxes to **incarcerate someone such as a non-violent, clean record female realtor? Or a non-violent, clean record car dealer who sold a suburban to someone who he had no idea was a drug dealer?** And the examples go on and on and on. Is it right for taxpayers to be so unnecessarily burdened financially? And is it right for undeserving Americans to be denied the right to life, liberty, and the pursuit of happiness with the imposing of such **harsh, draconian sentences?**

4. Mandatory minimum sentences have packed prisons, but have not brought about any reduction in crime

Many of the nation's federal judges and members of the American Bar Association have concluded that the **mandatory minimums have been a failure**. Mandatory minimums have to be adjusted. **Distinctions must be made! Base offense levels should start out differently for different individuals**. Each accused person's history should be examined and taken into account. **A first time offender should not have to automatically start out with a five or ten year sentence**. The imposing of such a sentence is extremely harsh, to say the least. **What a waste of life!** Many of the people facing such sentences and currently serving such sentences are kind, giving intelligent people who have contributed much to society. **Why must they be torn from their families for such a lengthy period of time?** Why can't they be **allowed to contribute to society through community service?** Allow for them to contribute to society and not detract from it through all the taxes Americans must pay due to their incarceration. Each case that comes before a federal judge should be examined **individually**, with all existing circumstances being allowed to be taken into consideration.

PROPOSAL

The United States Sentencing Commission should request that Congress **immediately** adjust federal sentencing guidelines. **Base offense levels need to be adjusted** : they **need to be lowered**. Again, they need to start out differently for different individuals. This **amendment must be retro-active** so that those who needlessly suffer with their imposed **draconian sentences** may again grasp some sort of hope that their nightmare of an ordeal might soon come to an end, and so that families can be united.

JUSTIFICATION

As American Citizens, we are promised **life, liberty** and the **pursuit of happiness**. Certain laws that have existed in our country have removed some of these promises. For instance, we should remember that we had laws that agreed with slavery. **Slavery was accepted and condoned because recorded laws stated that it was legal**. The law was wrong then, and it is wrong now with the imposition of mandatory minimum sentences. Government and law are supposed to exist for the people, for the betterment of society, and not for the purpose of being unconstitutional. **It is time for this injustice to end**. Too many good, decent human beings are being ripped from their families, and **every family member painfully suffers needlessly**. Injustice is not what America is about. Incarcerating non-violent fathers, mothers, sisters and brothers for long, pain staking sentences is not bettering society. Children of all ages need their mothers and fathers. Having a father or mother figure in a young person's life is detrimental.

The evidence shows that the mandatory laws have drastically failed. All that these laws have created are situations in which prisons have surpassed their holding capacities, and taxpayers have unnecessarily spent millions.

I personally witnessed the **rape of justice** when dealing with federal sentences through the conviction of my father and brother. They were both accused of money laundering. A violent drug dealer was arrested, and was facing twenty to twenty five years in jail for various crimes. Through his high priced attorney, he decided to plead guilty and realized that he could have his sentence drastically reduced if he produced a "story" for the prosecutors. The drug dealer had bought several vehicles from my father's dealership, and my brother was the salesman in the transactions. At the time of his purchases, **it was not a known fact that he was in fact a drug dealer**. His brother was the County Clerk in my father's town, and had served on the school board for many years. They both represented to the townspeople that they had a legitimate horse racing business from which they derived a substantial income. They raced their horses at various racetracks, and had a business account at the local bank. (**Our attorneys, more interested in their fees than in their clients**, did not bother to mention this important fact to the jurors.) This drug dealer told the prosecutors that my family knew he was a drug dealer, and that they were very accommodating to him when selling him the vehicles. Our attorneys also failed to mention to the jury that each time a vehicle was sold to this person, a check for the cost of the vehicle had to immediately be written out to GMAC since all of the vehicles on the lot were simply lent to the dealership on a consignment basis. There is not much profit in the sale of new vehicles. My father's dealership made about two or three hundred dollars (or less) each time a vehicle was sold to this person. The jury was kept under the impression that each time a vehicle was bought by this person, the full amount went

straight into my father's and brother's pockets. **No amount of money in the world could compensate for this nightmare that we all now currently live in.**

The outcome of the trial was that the **violent** drug dealer, a cold-blooded thug, (as we learned through the trial as his crimes were exposed), **got his sentence reduced to a measly three years**, due to his "honesty and cooperation", and my father and brother were damned with almost seven.

My **brother** is a hard working **non-violent young man** who simply did his job and sold cars for a commission. He never even handled any of the money at the dealership, yet he stands convicted of being a money launderer. The commissions he earned will never add up to the cost of many years of his life and freedom.

My father is probably **one of the last living altruists**. He was a **Volunteer Fireman** in his community, as well as a **Boy Scout Troop leader to many fine men**. He has **never** been involved with drugs, and would probably not even know what they look like, yet he stands convicted on a drug offense. This fifty-three year old man who continuously served his community throughout his life, must now waste it in a prison. The prosecutor, a woman who asks for leniency where thugs are concerned, stared at him throughout the trial as if he were a mass murderer. **It broke my heart, but not quite my hope. I still possess some sort of hope** that justice can come into our lives, and the lives of others like us, **who needlessly suffer**.

That is the purpose of this letter: to try and make my hopes a reality.

CONCLUSION

By adjusting federal sentencing laws, and **lowering base offense levels**, constitutional rights can be restored, and accused Americans won't have to face **inhumane, barbaric** sentences where they are incarcerated for **inanelly mandated periods of time**. Improved laws will make for a better society. Human compassion must come into focus, and non-violent human beings who made a mistake, or who were found guilty by an uncaring, uninformed jury, should have their lengthy sentences reduced so that they can bring to an end their unbearable nightmares.

ATTN: Public Information: Crack Mrs. Lisa Brown
3825 NE 11th
Portland, OR 97212

Dear US Sentencing Commission,

My name is Lisa Brown, I am a 32yr old wife of a crack cocaine defendant sentenced to 17½ years for 9 grams Crack Cocaine. This is ridiculous and unconstitutional, true enough Selling or Using any drug is legally wrong. But, why does the young black man get more time for selling Crack Cocaine than the white man who sells Powder Cocaine to the black man. It is all the same, one is powder and the other is rock form. My children will be ages 17yrs of age, 15 yrs, and 25yrs when there father is released. By then it is too late to be apart of raising his children, my husband is needed to support his family financially and spiritually. Since his incarceration in FCI Sheridan I am on Welfare, and on the verge of being homeless with 3 kids and nowhere to go. These defendants who are non-violent first time offenders are needed at home to support their families, it is far cheaper to have them on the Electronic monitor and make them get employment, than to take up unnecessary jail space, that could be used for violent criminals and Child Pedifiles. Please Change these guidelines and make them Retrospective. Make these guidelines fit the Crime. Thank You Lisa Brown

January 1995

US Sentencing Commission
One Columbus Circle NE
Suite 2-500 South Lobby
Washington, DC 20002-8002

ATTENTION: Public Comment

REGARDING: Sentencing Amendment - Marijuana

Since it has come to my attention that the Sentencing Commission is accepting public comment in regards to changing the Sentencing Guidelines for marijuana, I feel compelled to provide you with my concerns.

Public opinion is not that anti-marijuana. Marijuana was mistakenly made a Schedule 1 Narcotic. Given this erroneous classification, marijuana was "Lumped In" with far more dangerous hard drugs. Now we sentence so severe as to be borderline cruel and unusual punishment. Myself, like many other Americans have a greater fear of gun violence than some pot grower.

The current guidelines of a kilogram per plant in cases involving 50 or more plants is absurd. It is intolerable to ascribe this unrealistic weight to each plant, when 1 to 49 plants are ascribed a weight of 100 grams. It doesn't take a Rhodes Scholar to see the inconsistency. I would suggest a more sensible weight per plant somewhere in the 50 to 100 gram range. This should be uniformly applied regardless of the number of plants. This would just make sense. If sentencing is done by weight, it should be a reasonable approximation of weight, not the exorbitant weights currently used for sentencing.

I would also like to suggest in the true spirit of undoing a past wrong, that the proposed new guidelines be made retroactive.

Thank you for an opportunity to express my feelings.

Sincerely,

Darcelle Johns
11710 N.E. Sacramento
Portland, OR 97220

032-95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
611 Broad Street, Suite 237
LAKE CHARLES, LOUISIANA 70601

JAMES T. TRIMBLE, JR.
U.S. DISTRICT JUDGE

TELEPHONE (318) 437-3884
FAX (318) 437-3899

March 2, 1995

U. S. Sentencing Commission
Attn: Public Comment
Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C. 20002

Dear Ladies and Gentlemen of the Commission:

I enclose herewith a letter that I wrote to you on December 17, 1992 which is self-explanatory. In response to that letter, I received a telephone call from one of the Commission employees who advised that in 1993 there would be some review by the Commission of sentencing guidelines related to the taking of property. He did not indicate whether the Commission was considering increasing or decreasing the sentences for property-related offenses.

I write you again because I am faced with the prospect of sentencing a woman who systematically, over a period of several years, stole money from her mother's employers who were close personal friends. In addition, she embezzled from accounts which the employers had set up in the names of their children. The resultant loss to the employers, the children, and banks involved amounts to in excess of \$133,000.

For the above heinous conduct, I, under your guidelines, am authorized to sentence this individual to a total of 18 months imprisonment. She cannot make restitution.

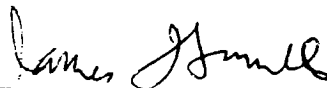
Again, I ask your venerable group, how can you seriously contend that crime does not pay when someone can take another person's property to the tune of over \$133,000 and face a maximum of 18 months imprisonment?

Since writing you in 1992, I have had a number of other cases where I have almost written again. One involved the sentencing of a bank employee who defrauded an elderly widow, a customer of the bank, of \$187,000, virtually all of her life's savings. With the proceeds, he purchased himself a new car and built a swimming pool in his backyard, among other things. Under your guidelines, which I was constrained to follow, he was sent to prison for 27 months, the maximum.

When the sentencing guidelines were instituted, I regarded them in a much more positive light than many of my fellow judges. I saw the merit in having some uniformity in sentences. Overall, I do not have any serious complaints with the guidelines, except in the area of property losses. I do not feel that the Commission considers the victim in the slightest in devising guidelines in these cases. I cannot imagine that there is one member of the Commission who would feel that 18 months would be an adequate sentence if someone stole \$133,000 of his or her hard-earned cash with no prospect of having it repaid. That is what we are facing in the case that causes me to write today.

Please "get real" when it comes to guidelines involving the taking of people's property.

Yours very truly,



JAMES T. TRIMBLE, JR.

JTTjr/rh

December 17, 1992

U. S. Sentencing Commission
Attn: Public Comment
Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C. 20002

Dear Ladies and Gentlemen of the Commission:

This letter is sent in the hope that it will influence you to substantially raise the offense level of crimes involving theft of property, which in some cases carry a tremendous victim impact, so that we as judges can mete out meaningful punishment to theft offenders. What prompted this letter is the fact that within less than two weeks, I will have sentenced six defendants who entered guilty pleas to car theft and one who entered a plea of guilty to mail fraud.

I simply do not have time to outline all of these cases for you, but will give you illustrative samples. In one case, the defendant, along with his cousin, stole a new GMC Suburban valued at some \$24,000. He was assigned one criminal history point for having been found guilty of possession of marijuana in 1988 and in 1985 he was found guilty of unlawful possession of a handgun, for which he was assigned no criminal history points. Under the guidelines, he has an offense level of 12 and a criminal history category of I, for which he can be imprisoned for from 6 to 12 months. In my mind, the idea that someone can get away with stealing \$24,000 of another man's property and be exposed to only 12 months incarceration (none of these people are able to pay a fine, costs of incarceration, etc.) totally belies the adage that crime does not pay. Such a lenient sentence, I feel, is a virtual invitation for repetition of what I consider a very serious crime. We have come a long way, perhaps too far, since the days when a man could be hanged for theft of a horse. This defendant's cousin, with two prior DWI convictions, can be sentenced to a maximum of 14 months under the guidelines. The other vehicle thefts were limited to correspondingly insubstantial sentences.

The mail fraud case involved an individual with no prior convictions who, using the mail service, as an employee of an insurance adjusting agency, defrauded an insurer of over \$150,000. His offense level of 14 and criminal history category of I provides a guideline range of imprisonment from 15 to 21 months. The fraud that he perpetrated against the insurance company client of the

[215]

firm caused the owner of the firm to be personally liable for repayment of the funds stolen by the employee. Twenty-one months, even in state facilities where there are fewer "amenities" than in our federal accommodations, does not begin to be adequate to deter a criminal mind - which we are dealing with in all of these cases - from its nefarious purpose.

I might add that I spoke to an attorney friend of mine who does not work in the criminal law field, but who has a most compassionate disposition, about the first case discussed above. Without revealing the statutory limit of 10 years or the guideline range of 6 to 12 months, I asked him what type of sentence he felt would be appropriate in such a case. His response, after reflecting several minutes, was that he felt that imprisonment for 3 to 5 years would be justified. I fully agree with him.

This letter is, purely and simply, a plea that the Sentencing Commission reconsider the guideline ranges in all offenses involving loss of property by the victim with a view to substantially increasing the ranges.

Thank you very kindly for your consideration.

Sincerely,

JAMES T. TRIMBLE, JR.

JTTjr/rh



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF NATIONAL DRUG CONTROL POLICY
Washington, D.C. 20500

033-95

The Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8022

Dear Mr. Chairman:

I write in response to amendments proposed to the drug offense guidelines issued in January 1995 by the United States Sentencing Commission.

The Office of National Drug Control Policy (ONDCP) was established by Congress in 1988 to develop counternarcotics policy for the President. The recently released 1995 *National Drug Control Strategy* identifies the President's priorities for addressing this Nation's continuing drug problem. The 1995 Strategy also develops plans for reducing illegal drug use, drug trafficking and availability, crime, and violence. The accomplishment of this goal depends upon an aggressive and coordinated law enforcement effort as well as certainty and appropriateness of punishment for all drug offenders.

I find that the proposed amendments to the drug offense guidelines are generally consistent with the Administration's goal of ensuring swiftness and certainty of punishment. The Commission is to be lauded for its attempt to solve the problems of fairness and proportionality with changed guidelines.

As I indicated in my January 19, 1995, letter to you regarding the U.S. Sentencing Commission's *Special Report to the Congress: Cocaine and Federal Sentencing Policy* on powder and crack cocaine, the differential between the impact on "low end" users and traffickers versus "high end" users and kingpins, and the enormous impact on the African American community is of great concern to ONDCP. It is clear to me that the impact of crack cocaine in primarily poor, urban, African American neighborhoods has been devastating; and it is also clear that African-Americans have been disproportionately affected by the sentencing for powder and crack cocaine.

[217]

The Honorable Richard P. Conaboy
Page Two

One of the goals of sentencing policy in general should be to eliminate race-based differentials in sentencing. However, as the Commission's report demonstrates, the research does not clearly support elimination of the sentencing differential for powder versus crack cocaine. In fact, the greater availability of crack cocaine, the greater degree of addictiveness of crack cocaine, the impact on many inner city communities, and the greater systemic violence which surrounds the crack trade indicate that some differential may be warranted.

As your research shows, African Americans accounted for 88.3 percent of federal crack cocaine distribution convictions in 1993, compared to 7 percent for Hispanics, and 4.1 percent for whites. Those individuals convicted of selling crack are overwhelmingly the low-level street dealers; yet they receive longer sentences than many individuals convicted of higher-level sales of powder cocaine.

I strongly believe that swift and certain punishment is key to an effective criminal justice policy. However, the Commission's data indicate that the present sentencing process disproportionately affects one segment of the population. Recently, a Federal appeals court in California upheld the dismissal of crack cocaine trafficking charges against five African Americans after they made a "colorable" showing of selective prosecution because a study revealed that all the defendants in 24 crack trafficking cases concluded by the Los Angeles Federal public defender's office in 1991 had been black.

I agree with your recommendation, "that Congress's objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on the current Federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio," and that the "current sentencing scheme, therefore, should be amended to account for and punish more fully and appropriately for the dangers associated with both crack and powder cocaine."

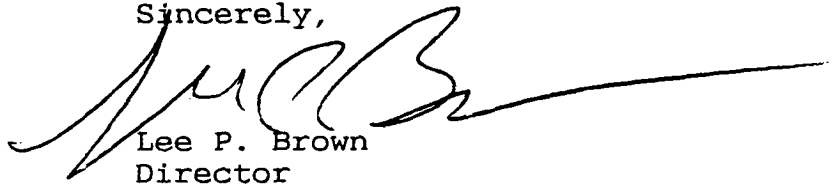
I feel that it is imperative upon the Sentencing Commission to recommend a way to account for both forms of this dangerous drug in sentencing in a fair and equitable manner. For example, further examination should be given to the level of violence and other external results of these illegal transactions in relation to the severity of the sentence. A change in the primary focus from quantity of drugs to offender characteristics, including but

The Honorable Richard P. Conaboy
Page Three

not limited to, use and possession of weapons, related violence, defendant culpability, and role within the trafficking structure might then make it possible to severely punish the violent act and "high end" dealers regardless of whether they are trafficking in powder or crack.

Thank you for the opportunity to contribute to this important debate.

Sincerely,

A handwritten signature in dark ink, appearing to be 'L. P. Brown', with a long horizontal flourish extending to the right.

Lee P. Brown
Director

United States District Court
Eastern District of Michigan
Detroit 48226

034-95

Julian Abele Cook, Jr.
Chief Judge

February 28, 1995

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

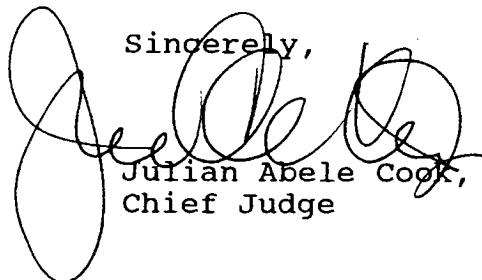
RE: Proposed Guideline Amendments
for 1995

Dear Commissioners:

The attached comments are being submitted on behalf of the Judges of the United States District Court for the Eastern District of Michigan. Each year, since the inception of the sentencing guidelines, this Bench has accepted the invitation of the United States Sentencing Commission to offer comment on those issues in the proposed amendments which we feel will effect the sentencing practices of the Judges in this District.

If there are any questions regarding any of the comments submitted, please feel free to contact me.

Sincerely,



Julian Abele Cook, Jr.
Chief Judge

RECOMMENDATION

6. Option 1 is preferred, which amends the statutory index to reference guidelines in Chapter Two when death results from the underlying offense. This reference will only apply if it is found beyond a reasonable doubt that death resulted from the offense. A preponderance of the evidence standard is far too low for such serious penalties as death or life imprisonment.

RECOMMENDATION

8. Because firearms are rarely utilized in crimes of forgery or counterfeiting, discretion should be left to the court to decide if an upward departure is warranted. There should be no specific offense characteristic for firearm possession. Option 2 is preferable.

RECOMMENDATION

9. Option 2 would be preferred since it creates more options for the court to choose, based on the actual conduct of the defendant.

RECOMMENDATION

11. A two level enhancement already exists at section 2D1.2 for distribution of controlled substances involving a protected location or an underage or pregnant individual. This enhancement appears sufficient.

The guideline should not be amended to provide a lower offense level if the protected location is selected by law enforcement or its agents. Instead, there should be a provision for a downward departure in an amount selected by the court.

RECOMMENDATION

15. The probation department sees no good reason to amend section 2K2.1 to provide for an enhancement for a conviction under 18 U.S.C. s 922(v). Application note 16 now recommends an upward departure if the offense involved multiple military-style assault rifles. The commission could add to that note their approval of departures for semi-automatic weapons, if the court believes a higher sentence is warranted.

RECOMMENDATION

19. The current offense levels for firearm violations appear adequate. No good reason has been advanced as to why they should be increased.

It is recommended that the definitions and counting of prior convictions for crimes of violence and drug trafficking be the same as those used in Career Offender. There would be disparities if the narrower definition in 18 U.S.C. § 924(e) was used. That is, if one state imposes a ten year maximum for the same conduct that in another jurisdiction carries a five year maximum, the Career Offender definition would count both; the 924(e) definition would not. Furthermore, there seems no reason to extend the definition of a crime of violence to comport with the 924(e) definition.

• **RECOMMENDATION**

25(A). The option preferred is to create a departure policy statement in Chapter Five, in order to leave more discretion with the court. However, should the Commission see fit to provide a Chapter Three adjustment, a two level enhancement would be sufficient.

RECOMMENDATION

26(A). Since the sentencing court will have to decide if the new statutory sentencing enhancement applies to each defendant when it is alleged that he or she is a member of a "criminal street gang", it should be left to the court to determine the extent of the enhancement. It is preferable that this be accomplished by the creation of a departure policy statement.

RECOMMENDATION

27(A). Since there seems to be no particular information to suggest that the current guidelines do not provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim, the applicable guidelines should not be changed.

27(B). If a defendant has previously been convicted for a crime of violence against an elderly victim, his enhanced punishment would be best determined through a provision recommending an upward departure.

RECOMMENDATION

28. Since § 5G1.1 already provides instructions regarding mandatory statutory penalties, there is no good reason to replace the current career offender provisions. At the most, an application note referring to 18 U.S.C. § 3559 would suffice.

RECOMMENDATION

29. The current § 5C1.2 appears to be working well, and should not now be altered. If there is any information suggesting that there is a problem, then it should be continued as a temporary amendment.

AMENDMENTS RELATING TO DRUG OFFENSE GUIDELINES

APPROACH 1

This approach, which includes proposed amendments 33 through 42, is not recommended because of the extreme changes involved, and without supporting information, such as the Commission's report to Congress on the 100 to 1 ratio between cocaine and cocaine base. Additionally, there have been some recent amendments promulgated which may ameliorate the problems with the drug guidelines, but they haven't been in effect long enough to measure their effectiveness.

Notwithstanding the above, some of the proposed amendments do beg comments, if only for future consideration by the Commission. It should be kept in mind, however, that these comments are generally based only on perceived concerns of some probation officers.

RECOMMENDATION

33. There seems to be no good reason put forward by the Sentencing Commission why the guideline ranges should necessarily include any mandatory minimum sentence. The Sentencing Commission was charged by Congress to independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of Title 18, United States Code. If the Commission's studies show that a person with no criminal history, who is convicted of distributing 1 kilogram of heroin, should receive a sentence of between 70 and 87 months, then the guideline range should reflect that. U.S.S.G. § 5G1.1 would, of course, supersede the initial range, stating that any statutorily required minimum sentence must be imposed.

Having stated the above, it is recommended that if one option is to be chosen, Option C would be favored. This option would provide a guideline range of 70 to 87 months for the defendant described above, after adjusting for a four level role increase and a three level decrease for acceptance of responsibility. It would produce a sentence, however, of 120 months due to the statutorily required minimum sentence.

RECOMMENDATION

34. Because of several areas of concern, such as the application of substantial assistance departures for high level dealers, the impact of drug quantity should be limited for those defendants qualifying for a mitigating role adjustment. An offense level of no more than 28 should apply to those qualifying defendants.

RECOMMENDATION

37. Since there seems to be no good reason to use a one plant to one kilogram ratio, and there seems to be considerable reason to use 100 grams per plant, no matter how many plants are involved, detaching the one kilogram equivalent for one marijuana plant in cases of over 50 plants is desirable.

RECOMMENDATION

38. We have been very concerned about the use of the 100 to 1 ratio for cocaine to cocaine base. It is believed that the ratio should be changed, however a new ratio could not be decided upon without at least first reviewing the Commission's report to Congress.

RECOMMENDATION

40. There have been no significant problems noted with not using purity. U.S.S.G. § 2D1.1, comment. (n.9), which now provides for an upward departure for unusually high purity, is sufficient and allows the court to retain some discretion. It would be suggested that application note 9 be amended to reflect the appropriateness of a downward departure in those cases where the purity is unusually low.

RECOMMENDATION

APPROACH 2

Approach 2 is also not recommended. Although at first glance this approach appeared desirable, further study revealed what seems to be gross problems.

43. Under either option, no matter what base offense level is chosen, a defendant with a large amount of drugs will generally have the same or slightly higher guideline range than he would under the current drug guidelines. However, a defendant with a small amount of drugs will have a significantly higher guideline range, for no apparent good reason.

For example, compare defendant A who was involved in a conspiracy extending over six months, with defendant B who was arrested after one sale to an undercover agent. Further suppose that defendant A had five grams of cocaine base over the period of the conspiracy, and defendant B had five grams of cocaine powder on the one occasion; a base offense level of 26 applies to both; both are in Criminal History Category I; and both receive a three level adjustment for acceptance of responsibility.

Defendant A, under the current guidelines, would have a range of 46 to 57 months, but a statutorily required minimum sentence of 60 months. Under option 1 he would have a range of 57 to 71 months (60 to 71 months because of the statutorily required minimum sentence). Option 2 would result in the same range as under the current guidelines.

Defendant B, for whom no statutorily required minimum sentence applies, would have a range of 6 to 12 months under the current guidelines. The use of either option however, would result in a range of 46 to 57 months.

RECOMMENDATION

46. This proposed amendment to § 5G1.3 does not simplify application of this guideline, nor does it appear to sufficiently increase the court's discretion. It remains complicated, confusing and difficult to understand. The Commission should simplify § 5G1.3(c), the most problematic section, by stating that the sentencing court may impose the sentence for the instant offense to run concurrently or consecutively.

035-95

STATEMENT
OF
ALEXA P. FREEMAN
YALE LAW SCHOOL J.S.D. CANDIDATE

BEFORE THE
UNITED STATES SENTENCING COMMISSION

CONCERNING
PROPOSALS TO AMEND CIVIL RIGHTS GUIDELINES

PRESENTED
MARCH 14, 1995
WASHINGTON D.C.

My name is Alexa Freeman. I am a graduate law student working on a Doctor of Science of Law degree at the Yale Law School. Before embarking on this degree, I practiced law for 10 years, most recently at the National Prison Project of the American Civil Liberties Union. My work at the National Prison Project gave me a great deal of familiarity with sentencing issues. While at Yale, I have been evaluating the impact of the federal sentencing guidelines on the sentencing of civil rights crimes. The staff at the Sentencing Commission have been extremely helpful to me in providing needed information in this endeavor. I am grateful for all the assistance I have received. I mention this because I do not want my comments to be construed as a criticism of the staff here. Rather, my comments go toward the Commission's public information policies.

In my research, I have attempted both a quantitative and qualitative analysis of the sentences police and other law enforcement officers receive when they are convicted of the civil rights crime of use of excessive force. These cases are prosecuted under 18 U.S.C. §242 which makes it a crime to interfere with civil rights under color of law. When public officials act in concert with each other or with private persons, they may also be charged under 18 U.S.C. §241 which outlaws conspiracy to interfere with civil rights. Under the current guideline scheme, these crimes are sentenced under guideline §§2H1.1 (§241) and 2H1.4 (§242).

[241]

These guidelines are extremely important. Although the number of cases is relatively small compared to other federal crimes, civil rights violations are significant beyond their numbers. As evidenced by the Rodney King case, civil rights crimes can carry enormous symbolic weight. Sentencing decisions by courts communicate to the public how our society views civil rights. Sentences that are too lenient send a message that civil rights crimes are not taken seriously. On the other hand, if the guidelines are too stringent, courts might depart, thus undermining the important purposes of sentencing reform of achieving fairness and rationality.

For these reasons, I would hope that the Sentencing Commission would welcome educated comment on proposals which affect these civil rights guidelines. But unfortunately, due to the Commission's public information policies, I have been unable to obtain the data necessary to make as thorough an analysis as possible of sentences given in law enforcement excessive force cases.

To some extent, the lack of adequate data is the result of a small civil rights data base to begin with. This is particularly true for data on pre-guideline sentencing practices for these cases because no agency was responsible for compiling this information. However, it should be possible for members of the public to obtain information derived from public court records on post-guideline sentencing practices from the Sentencing Commission. Under the Sentencing Reform Act the courts are

required to submit sentencing data to the Commission, and the Commission is charged with the tasks of collecting, analyzing and disseminating sentencing information. Yet the only data sources available to the public are the relatively general information provided in the Commission's Annual Reports or the raw data that the Commission sends to Ann Arbor, Michigan in a data base format that only computer experts can make use of.

For example, the Commission does not provide basic data about all of the sentences imposed since the guidelines took effect in cases of law enforcement brutality. Nor does it supply a breakdown of relevant factors in each case so sentenced, such the underlying conduct, whether the victim died, the number of counts, and sentencing departures. These facts easily could be provided to the public without disclosing confidential information from pre-sentence reports. Thus, one purpose for commenting here today is to make a plea that the data analyses that expert Commission staff conduct of public information be made available to the public. I am told that one obstacle to disclosure is an agreement that was made between the Commission and the Federal Judicial Conference. To the extent that this agreement is the reason why the public is not given access to basic case information and staff research, I urge you to revisit this aspect of the agreement.

In addition, the information that the public was provided in the notice in the Federal Register for today's hearing on the proposed amendments to the civil rights guidelines was inadequate

[243]

to evaluate whether the amendments are a good idea. I assume that Commission staff have done extensive statistical and qualitative analyses of civil rights sentences and that this staff research is the basis upon which the proposed amendments have been made. However, this information is not available to the public. We must then resort to educated guesses as to why the Commission is considering this change.

The practice of not sharing with the public the basis for the Commission's proposed action goes back to the initial enactment of the guidelines. For example, I have tried to determine why the first Commission enacted the civil rights guidelines that it did. I reviewed all the minutes of Commission meetings since the Commission was first appointed, went through old testimony stored in boxes in the basement, read all the Commission's reports, talked with current and former staff, and interviewed former Commissioners. Despite these efforts, the Commission's decision-making process at that time remains largely a mystery to me due to an insufficient record.

Similarly, the information that is made public does not reveal the basis for the Commission's current proposal to amend the civil rights guidelines. As a result, even though I am a student of civil rights sentencing and would like to be able to offer insights on the proposal before you, I am unable to provide you with substantive comments because there is not an adequate information base available to the public.

I urge that the Commission make its research available to the public and allow us to learn not simply what you are doing, but also why you are doing it. By taking this step, the Commission will benefit from more informed commentary on its actions.

Thank you for the opportunity to testify today.

[245]

036-95

NAPAS

National Association of Protection & Advocacy Systems

Executive Committee

President
Sarah Wiggins-Mitchell
New Jersey
(609) 292-9742

Vice President
Zena Naiditch
Illinois
(312) 341-0022

Secretary
Duncan Wyeth
Michigan
(517) 373-8193

Treasurer
James Jackson
New Mexico
(505) 256-3100

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

ATTN: Public Comments

RE: Proposed Guideline Amendments for Sexual Offenses Involving
Intentional Transmission of HIV

To the Commission:

Regional Officers

Region I
Jim Comstock-Galagan (TX)
James Jackson (NM)
Minareta Thompson (AS)

Region II
Julie Bluhm (FL)
Ann Marshall (AL)
Donald Lindsey (VI)

Region III
Judy Chamberlin (MA)
Donna Woodfin (NH)
Sarah Wiggins-Mitchell (NJ)

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Mary Reger (KS)
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Cynthia Schloss (MO)

Region V
Duncan Wyeth (MI)
Cathy Meadows (IL)
Zena Naiditch (IL)

At-Large

Stoney Polman (MI)
Hikmah Gardiner (PA)
Harry Sarkisian (AZ)

Executive Director

Curtis L. Decker, J.D.

This letter is in response to the Commission's request for public comment under the question of sentencing guideline amendments for persons convicted of offenses involving intentional transmission of Human Immunodeficiency Virus (HIV) through sexual contact.

The National Association of Protection and Advocacy Systems (NAPAS) welcomes this opportunity to comment on the Commission's guideline formulations process. NAPAS is national organization representing federal funded programs that provided professional legal and advocacy services to people with disabilities, including HIV.

For the reasons set forth here, NAPAS opposes the promulgation of a sentencing guideline specifically addressing intentional transmission of HIV infection. Consistent with this view, we believe that the Commission should not amend the guideline definitions of "dangerous weapon," "serious bodily injury" and "permanent or life-threatening bodily injury."

Because of the public health implications of this issue, we stress that in considering the promulgation of a sentencing guideline that is specifically premised on the defendant's disease status (here, HIV infection) the Commission should consider two related issues: First, the Commission should determine whether a new guideline is required to address a sentencing problem that has arisen and which cannot be resolved under existing, general sentencing principles. Second, the Commission should determine whether such a guideline is consistent with public health efforts to control the spread of the disease.

900 Second Street, NE, Suite 211 Washington, DC 20002 (202) 408-9514

FAX: (202) 408-9520 TDD: (202) 408-9521

Electronic Mail: HN4537@handsnet.org

[246]

Neither of these requirements can be satisfied here.

There does not appear to be any current or historical sentencing problem that needs to be addressed by a new, HIV-specific guideline. In fact, with the exception of one reported case in 1988, the prosecution of persons with HIV infection for intentional transmission offenses in the federal courts appears to be, at best, a rarity. There may be several reasons for this apparent lack of cases, not least of them being the reluctance of federal prosecutors to undertake what has traditionally been a responsibility of state and local public health and law enforcement officials. In reality, the federal offenses that might conceivably be appropriate for application of an HIV guideline are very limited. These are primarily the sexual abuse offenses, 18 U.S.C. § 2241-2242. Additionally, the homicide offenses, 18 U.S.C. § 1111-1112, and assault offenses, 18 U.S.C. § 111-112, might possibly apply, although it is not at all that clear under what circumstances HIV transmission might be charged as a crime under these statutes. Accordingly, we take no position on that question.

Assuming that the Commission limits its consideration of this issue to the parameters of the congressional directive, the actual offense behavior is very limited. Congress specified two elements that must be involved in the offense: first, the defendant's knowledge of his or her own HIV status and, second, an intent to transmit HIV through sexual activities.

Congressional concern is thus with a very limited class of cases in which sexual contact is undertaken with the purpose of transmitting HIV. Significantly, the congressional directive does not address offenses in which the defendant is aware of his or her HIV status but acts with reckless disregard or indifference regarding the risk of transmission. Obviously, if Congress was concerned with cases in which the defendant acted with recklessness or indifference about the risk of transmission of HIV, Congress would not have included the phrase "with intent to transmit HIV" in its directive to the Commission.

Given the very limited number of federal crimes in which an HIV-specific guideline would potentially apply, and given the even more narrow offense behavior defined by Congress, an HIV-specific guideline cannot be justified. There is no basis for concluding that current sentencing standards are inadequate and in need of amendment to address this issue. On the contrary, the current guidelines identify grounds for an upward sentence departure as a result of aggravating circumstances, § 5K2.0, and specifically take into account significant physical and

psychological injury, § 5K2.2-3. Although we are not aware of any case in involving HIV transmission in which these guidelines have been applied, they have the advantage of assessing the actual harm that has resulted from the defendant's actions as opposed to imposing an enhancement that is based solely on the defendant's medical status.

The Commission should also consider whether there is any wisdom in increasing incarceration of persons with a life-threatening illness. No one could seriously argue that the current guideline standards, especially given the potential for aggravating circumstance enhancement, will result in sentences that are too lenient. Although many persons with HIV infection continue to live for a significant period of years without symptoms of AIDS, depending on the status of the defendant's health at the time of sentencing, it is statistically likely that in many such cases a sentence imposed under current standards will exceed the

length of the defendant's life.

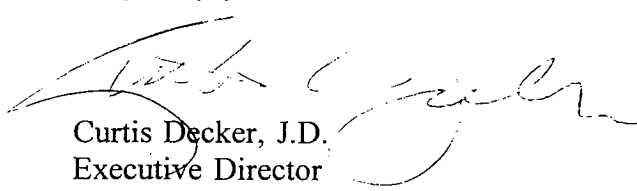
Finally, we turn to the public health implications of this issue. Historically, attempts to address public health issues by criminal sanctions have been unsuccessful, as was made clear in the case of attempting to use criminal laws to address the problem of sexually transmitted disease earlier in this century. With regard to the AIDS epidemic, current public health policy does not support any criminal law intervention. Most significantly, the National Commission on AIDS, which has issued a series of reports and recommendations, has not at any time recommended that criminal sanctions be utilized in any way to respond to the AIDS epidemic. Additionally, the U.S. Public Health Service, Centers for Disease Control and Prevention, has continued to emphasize the need for voluntary, confidential HIV testing, as well as follow-up treatment for those infected. The CDC, like the National Commission on AIDS, does not recommend that criminal laws be utilized to respond to the epidemic. An attempt to use an individual's HIV status as a basis for sentence enhancement would necessarily involve law enforcement intrusion into the defendant's relationship with his or her health care provider and could result in disclosure of otherwise confidential HIV-related information regarding the defendant's HIV status. Such cases weaken public confidence in the confidentiality protections and provide disincentives for persons at risk HIV infection to seek testing and treatment. Even if these guidelines were not applied in an actual case, the fact that the Commission had promulgated an explicit HIV sentence enhancement guideline would further the perception that HIV status itself had been criminalized, again providing a disincentive to persons who would otherwise seek testing and treatment for HIV disease.

In regard to the Commission's solicitation of comments on amending the definitions of "dangerous weapon," "serious bodily injury" and "permanent or life-threatening bodily injury," for the reasons set forth above, there is no need for such a revision. Moreover, such amendments pose additional problems. First, it is not clear in what circumstances such amendments would apply. Congressional concern has been with sexual activities posing a risk of transmission, while amendments to these definitions might apply in cases involving non-sexual assaultive behavior, such as those involving spitting, biting, or similar behavior. Such cases involve circumstances concerning which the degree of risk of HIV transmission cannot be generalized. Additionally, to add HIV, but not other infectious diseases to the definitions, would pose the risk that persons with HIV would be sentenced on an enhanced basis, but persons with other life-threatening infectious illness (for example, hepatitis B virus or multi-drug resistant tuberculosis) would not face an equivalent sentencing standard. In order to ensure sentencing fairness, the Commission would need to undertake a review of infectious diseases, their potential for mortality or other harm, or other conditions before attempting to amend the definitions. Additionally, the Commission would need to specify the circumstances that give rise to the risk of HIV transmission. Thus, although it is HIV itself that might be deemed a "dangerous weapon," HIV is not present in isolation when it is transmitted; it exists in one or more human body fluids. Transmission of HIV occurs only under specific instances of exposure, most typically involving blood to blood contact. Unless the Commission amends the definitions to specify what fluids may transmit HIV and under what circumstances (e.g. duration of exposure, degree of contact to an open wound as opposed to intact skin, specific body fluid involved), a general definitional amendment would not in any way assist the courts in identifying cases in which to impose an enhancement.

Needless to say, any attempt to develop such specific standards would involve a scientific undertaking that is beyond the Commission's expertise. Furthermore, the resulting guideline would single out HIV status, as opposed to any other infectious disease status, that could result in harm to a crime victim.

In conclusion, NAPAS urges the Commission not to enhance the sentences or introduce HIV-specific amendments to existing standards. We have had roughly fourteen years of experience with AIDS epidemic, and there is nothing to suggest that a change in sentencing is now warranted in response to it. We also believe that an HIV specific standard will do little to advance legitimate law enforcement objective, but instead will further stigmatize persons with HIV infection who are already subjected to a widespread discrimination and unfair treatment in our society. The Commission would indeed be wise to avoid addressing a public health issue that is more properly left to public health officials.

Very truly yours,



Curtis Decker, J.D.
Executive Director

037-95



COMMITTEE ASSIGNMENTS:

Insurance, Chairman
Corrections
Environmental Protection, Conservation
and Water Resources
Finance
Forestry
Labor
Public Health and Welfare

SENATOR MARGARET "WOOTSIE" TATE

47th District
Hancock-Harrison-Pearl River-Stone Counties
P. O. Drawer 490, Picayune 39466

Retired

March 15, 1995

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

Dear Sirs:

Enclosed please find comments to be considered in establishing new guidelines for sentencing federal offenders.

The comments enclosed have come to me through the diligent efforts of many of my past constituents. I have taken the time to study your proposals which are most progressive and timely.

I served on the Mississippi Legislative "Corrections" committee for four years and have a solid background and a good understanding of many of our problems.

I would certainly hope that these comments are timely and could prove useful to you.

Margaret Wootsie Tate
Sincerely yours,

Margaret "Wootsie" Tate
Senator - Retired

Years in office - eight
Retired Jan. 1 1992

[250]

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

Dear Sirs,

The proposals for this years amendments are long, and at times difficult to interpret. The complexity of such an undertaking is daunting to say the least. Because of the length and depth of the proposals comments will be somewhat limited; to attempt to address each individual proposal is too great a challenge for the average individual.

Before making specific comments it is noted that the Commission has attempted to place a greater emphasis on crimes involving violence and mitigate the impact of drug quantity. This is a step in the right direction. The Commission should be applauded for the courage to take this common sense step. These improvements need to be made on a retroactive basis in order to allow mistakes of the past to be corrected for individuals who have been previously affected.

Some specific comments as to proposals need to be expressed. It will be commented on by page number and proposal number where possible.

1. Page 2432, proposed amendment for 4A1.3 is quite good. There should be an upward departure for sexual offenses especially those in which force is used. Previous offenses in this area need to be considered heavily as this is a crime which affects individuals for years to come. The Commission does need to examine the wording on page 2433 because it appears possible to greatly enhance the sentence of someone with a prior controlled substance offense as if it were a crime of sexual violence. If that is the intention then further thought is required. Violent sexual offenses need to receive the attention of the Sentencing Commission because of the impact they have upon individuals, and society as a whole. To equate this behavior with controlled substance offenses is simply incorrect.

2. The Commission invites comments on the offense levels under 2P1.2 involving simple possession of controlled substances in a correctional setting. Most possessions in such a setting are minor in scope to begin with, an enhancement of 2 points would seem sufficient: if any enhancement is necessary at all. Correctional settings have a variety of administrative sanctions already available, which should be adequate.

[251]

3. Page 2434 seeks comments concerning the potential of amending the guidelines for offenses committed in a protected location if the location is selected by law enforcement. This is a good idea which should be expanded even further. To allow individuals who are supposed to enforce laws to create crimes seems a paradox at best. Nobody should be exposed to harsher punishment due to the manipulation of law enforcement officials.

4. Page 2435 provides an amendment which would give a three point downward departure where "the defendant.. (had no) actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance." It is difficult that our system of justice would allow any prosecution of an individual who had no actual knowledge of a crime being committed. To charge individuals for a "reasonable cause to believe" should have no place in our society.

5. Page 2436 is more the type of amendment we should be having to supplement existing law. Under 3A1.1 to exploit an individual who is vulnerable do to age or diminished capacity should result in an upward departure. To prey on the weak is repulsive.

6. Page 2438 Issue for Comment #17 is overly broad. There are a sufficient number of enhancements for the USE of weapons as is. To keep adding categories for specific weapons is overcounting. Semiautomatic weapons could range from assault weapons to small hand guns. This needs rethinking. The potential for abuse in this issue is considerable. As written it could enhance an individual who has a small hand gun in his home while in possession of a controlled substance for personal use. Please utilize all the other enhancements for use of a weapon rather then create a category which is as all encompassing as this.

7. Page 2439 invites comment on counting prior crimes of violence and drug offenses. The Commission should attempt to separate the two categories as they represent two very different forms of behavior.

8. Page 2441 under section 2L1.1(b) the Commission has addressed correctly the concept of aggravating the guidelines in relationship to the degree of injury inflicted. This is a good beginning to address the impact that violent crime has on an individual, and society.

9. Page 2441 Issue for Comment Section 130009. To provide a 7 point upward departure under 2L2.1 for fraudulent issue of passports used to facilitate a drug offense is far too severe. The guidelines provide ample punishment for either crime. This allows the potential abuse of alleging drug involvement without meeting the burden of proof necessary to substantiate a drug charge.

10. Page 2442 and 2443 Issue 27(A) the Commission invites comment concerning the punishment for crimes of violence against the elderly. While we are all concerned about this particularly vicious type of offense the Commission has addressed this situation in previous amendments by adding guideline points for crimes against vulnerable individuals, and providing upward departures based on the degree of injury incurred. The only way to address this issue otherwise is to return discretion to judges who can evaluate individual cases.

11. Page 2443 invites comment on the "safety valve" provision. There needs to be a mechanism to allow a rational approach to treat minimally involved individuals in a manner which does not destroy their lives. Compression of the quantities used in the guidelines assists in this task, and is welcome. However a method to depart from minimum/mandatory sentences in case of minimal participation is also essential.

12. Page 2445 begins the debate on Drug Offense Guidelines. It is encouraging to know that the Commission is realistic about having previously "assigned too much weight in constructing its initial guidelines." Correction of this, and other factors, affecting sentencing are overdue.

There are such a multitude of proposals that to comment on each one individually would lengthen this reply excessively. That being the case comments will be limited to the most salient issue(s) for which comment is solicited.

Beginning on page 2446 the proposed revision for the guideline tables are welcome. Option C would seem to provide acceptable punishment levels, especially when role adjustments are included. The idea holding minimal participants to level 28 regardless of the quantity involved is excellent. This, in addition to a role departure downward is the proper approach to dealing with a multiplicity of individuals. It should be further that in an operation there can only be one overall leader/organizer. This has been a most abused area of the PSIR. If comment on levels are solicited for minimal participants it would be respectfully suggested that a level below 28 would be deemed proper. Minimal or Minor participants are simply that, and should not be subjected to severe punishment when they have no role in the determination of quantity.

In the Additional Issue for Comment on page 2447 it is suggested that the ceiling level for Minimal/Minor participants be separated by drug type. This is an excellent idea, however, there should be additional thought given as to which drugs should be separated out as less detrimental. Drugs which have no known, or very limited, hazard potential should not be grouped with the others. This would specifically be Marihuana. Minimal/Minor participants in an operation involving this substance should be considered for a low base offense level: perhaps level 20 prior to adjustments.

The examples given as to who deserves an adjustment are so broad as to allow anyone to be a manager. If the PSIR author decides to enhance everyone then role adjustment is non-existent. There needs to be a common sense standard applied here. There can only be one overall leader in an operation. This conforms not only to Military dogma, but to a reasonable view of how organizations are structured. When a determination of who is a manager becomes subjective it will not be applied in a rational manner. As a counter example if two individuals are transporting a substance in a car and one mentions to the other "slow down there is a curve on the road ahead", is this individual a manager? By applying the standard on page 2448 he is, because: "a manager is a person who managed or supervised another participant, whether directly or indirectly." This area is far too broad and needs attention to more reasonably reflect who is a true manager. Additionally the burden to determine a mitigating role should not be borne by the defendant, it should be incumbent upon the Government to prove an aggravating role, but not for a defendant to prove a mitigating one. The burden of proof must rest solely with the Government.

The amendments begin to return to more appropriate role when defining adjustments for firearms in the commission of a drug felony. There does need to be more clarification in this area however. On page 2450 it is stated that "If a dangerous weapon is found in the same location as the controlled substance... possession of the weapon facilitated, or was otherwise related to commission of the offense." This leaves open the potential for someone with a small amount of substance in their home to receive an upward departure by virtue of having a hunting rifle in their home. Increases in the offense level must be better defined to include the actual discharge or display of a weapon in a threatening manner. There are already proposals to enhance the guidelines if there is some bodily harm caused, this should be the ultimate standard. To provide an increase for simple possession of a weapon in a home setting would only foster disrespect for the guidelines.

Proposal 37 on page 2451 is excellent. This brings the realities of cultivation into focus. The proposal is well thought out and realistic, as well as a welcome change in an area which was quite inequitable.

Proposal 38 is a similar item. The present ratio of 100 to 1 is so disproportionate as to require a drastic revision. The chemical similarities between Cocaine and Cocaine Base are such that they should be treated as equivalent. If, however, the Commission wishes to create a higher offense level for this specialize form of Cocaine a 2 to 1 ratio would seem appropriate. This represents a degree of punishment which is twice as harsh as for the Hydrochloride form. Any punishment which is double the normal penalty is ample to provide deterrence. This is an area of priority which should be addressed.

Page 2452 considers options for the consideration as to amount of controlled substance involved in an offense. This is an area of concern because there is so much room for abuse. Perhaps the best option which is proposed is to use the greatest amount of substance for any single transaction. A single transaction will normally be a good indicator of an individual's ability to produce. While it figures that someone who can produce 100 units of a substance could also produce 10 units it does not indicate that a person who produces 10 units at a time is capable of producing 100 units at any one time. Single transaction quantity is many times the maximum capacity an individual is capable of producing. The Commission should also contemplate how to determine amount when the only indication of quantity is the unsupported word of someone who hopes to benefit from his testimony. The potential for abuse there is self evident. Far too many individuals have suffered from inaccurate and sometimes outright false statements concerning the quantity of substances from individuals who stood to benefit from such statements. Hopefully this issue will be addressed before long.

Page 2453 continues to address the difficult problem of determining quantity in controlled substances. The Commission has made an attempt to address the issue of diluted substances in a manner which is beneficial to all parties. There still remains the same difficulty of determining purity of theoretical substances, that is substances which exist only in the mind of an individual attempting to better his position at the expense of another. Perhaps the Commission should consider a ceiling on such theoretical substances.

Page 2454 requests input on how to compare methamphetamine to other substances. Being as how it is a stimulant perhaps it should be rated the same as cocaine. The Commission should solicit input from Medical Experts and then submit proposals for comment.

Page 2456 again visits the idea of weapons possession enhancement. This can be too easily used against individuals who simply have (legal) possession of a weapon in their homes at time of arrest. There needs to be clear distinction between the USE of a weapon, or it's brandishment, as opposed to simple possession.

Page 2457 poses two interesting questions. How to find the offense level in a theoretical production, and how to calculate the amount of personal possession vs distribution amount. In the first question the amount should be calculated by the MOST limiting factor. No matter how much of a precursor chemical that you have you can only produce as much substance as the LEAST available chemical will allow. For the second question option 3 which gives a downward departure from the total for personal use would seem reasonable.

Page 2458 returns once again to the weapons in association with another crime. Once again there must be mechanism to exclude individuals who merely had a weapon in their home at the time of arrest, or similar circumstances. The distinction between use of a weapon and proximity to one must be addressed.

Page 2459 addresses another approach to reducing the impact of drug quantities. The overall intent is heading in the right direction, but some of the specifics need further thought. When grouping drugs according to their potential for harm Marijuana needs to be placed with the least harmful substances; not with methamphetamine, PCP et.al. What the proposals for enhancement do to weapons is correct in general, especially in assigning points based on actual harm caused in the commission of another act. This second proposal adds too many departures in the upward direction to be as effective as proposal number 1. This proposal also creates penalties for individuals who use their skills to further an enterprise, this has the potential to go too far. Once again it also goes too far in assigning the term leader organize. In reality there is one true leader/organizer, everyone subordinate to this individual does not deserve the upward departure that comes with the title. While page 2461 tries to mitigate the application of manager and supervisor there still is far too much discretion given to the author of the PSIR to determine the upward departure for role assessment.

Page 2462 goes even further in penalizing an individual for use of their skills by either adding 2 points to the offense level, or by raising the offense level to 26 if it is lower. This could make a dramatic, and unwarranted increase to what would otherwise be a substantially lower offense level.

SUMMARY

This year's proposals have more positive steps than previous year's proposals. The proposals make an effort to address issues which concern everyone, and in many areas do an effective job of such. The Commission does need to remain vigilant to insure that its good intentions are not perverted by individuals who have been issued too much leeway by guideline changes. This is especially true in the determination of leader/organizer, and manager/supervisor. Most of us believe that an organization is run essentially by one individual, not a majority of the participants. The Commission has attempted to address concerns which we all have relating to violence in our society, and to preying on the less able in our population. For these changes sincere congratulations are due. The proposals to mitigate the impact of quantity in the area of controlled substances is also welcome. Attention should be focused primarily on violent behavior which affects all. Under the proposals for reducing the impact of quantity involved in controlled substances the first proposal seems more reasonable.

The task assigned to the Commission is not an easy one, yet it has been approached in a cogent fashion in general. We all look forward to further refinement in the future and appreciate your efforts this year..

United States Court of Appeals
For The First Circuit

038-95

CHAMBERS OF
MICHAEL BOUDIN
U.S. CIRCUIT JUDGE

J. W. McCORMACK POST OFFICE
AND COURTHOUSE
BOSTON, MA 02109
617-223-4431

April 18, 1995

Mr. Michael Courlander
Public Information Officer
U.S. Sentencing Commission
One Columbus Circle, NE
Washington, D. C. 20002-8002

Dear Mr. Courlander:

I am writing to call to the Commission's attention a problem recently encountered by this court, and by other circuits, that may warrant consideration by the Commission and possible revision or clarification of the Guidelines.

The problem, illustrated by the attached opinions in Fontana (this circuit) and Shorteeth (the Tenth Circuit), involves the use against the defendant at sentencing of information revealed by the defendant in the course of cooperating with the government in order to obtain a downward departure. Although a guideline section (§ 1B1.8(a)) deals generally with this problem, these two cases suggest that a defendant could sometimes come away with the impression that information may not be used against the defendant--even though a strictly literal reading of the guideline and plea agreement arguably permit that information to be used.

This problem obviously involves a tension among conflicting policies, including the facilitation of disclosures to the authorities, fairness to defendants, an understandable concern by the government that it not be mouse trapped, and a certain imbalance in familiarity as between prosecutors and many defendants. There is probably no simple solution, but the two cases that are attached suggest that the present guideline language may not be adequate to provide guidance in this situation and may not be the optimal resolution of this difficult problem.

Sincerely,



Michael Boudin

MB:SEH
Enclosures 2

Boudin, J.

United States Court of Appeals
For the First Circuit

No. 94-1989

UNITED STATES OF AMERICA,

Appellee,

v.

N. JOHN FONTANA, II,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Torruella, Chief Judge,

Aldrich, Senior Circuit Judge,

and Cyr, Circuit Judge.

James L. Sultan with whom Rankin and Sultan was on brief for appellant.

Jean L. Ryan, Assistant United States Attorney, with whom Paul M. Gagnon, United States Attorney, was on brief for appellee.

March 28, 1995

ALDRICH, Senior Circuit Judge. Appellant, N. John Fontana, is one of a number of persons charged under 18 U.S.C. §§ 471, 473 and 474 with the manufacture, possession and delivery of counterfeit United States currency. Fontana waived indictment and pled guilty pursuant to a plea agreement. He appeals from his sentence.

Following execution of the plea agreement, Fontana cooperated fully with federal authorities. At sentencing, the government did not object to his requesting a three-level downward adjustment for prompt acceptance of responsibility, and it filed a motion for a four-level downward departure for his substantial assistance in further uncovering the scheme, pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 5K1.1. The court granted these motions, and they are not before us. However, the government recommended a three-level enhancement for a managerial or supervisory role under U.S.S.G. § 3B1.1(b), and the court, in sentencing defendant, agreed. Fontana timely challenges the enhancement as a violation of U.S.S.G. § 1B1.8, that he alleges protects him from the use of information he provided pursuant to his plea agreement.

We review a district court's legal interpretation of the sentencing guidelines de novo, United States v. Ovalle-Marquez, 36 F.3d 212, 221 (1st Cir. 1994), and its fact-bound determinations of defendant's role in the offense for clear

error. Id. at 225; United States v. Jadusingh, 12 F.3d 1162, 1169 (1st Cir. 1994).

The sentencing guidelines mandate a three level upward adjustment if the government demonstrates that (1) the defendant was a supervisor or manager, and (2) the criminal scheme involved five or more persons, or was otherwise extensive. Ovalle-Marquez, 36 F.3d at 225. See U.S.S.G. § 3B1.1(b). Neither "supervisor" nor "manager" is defined under § 3B1.1, but it is sufficient that a defendant recruited, instructed or supervised at least one other person. United States v. Rodriguez Alvarado, 985 F.2d 15, 20 (1st Cir. 1993). The court's so finding here was clearly warranted. Fontana does not dispute that he recruited and directly supervised a Mr. Aquire. The issue is whether the participation of Aquire, and Fontana's supervision of him, was properly available to the district court to consider in calculating his sentence.

In his plea agreement, Fontana promised to cooperate in all government investigations and prosecutions of others involved in the counterfeiting operation. In turn, the government made three specific promises:

In exchange for his plea and cooperation, the Government agrees: (1) that it will not object to an appropriate reduction for acceptance of responsibility . . . ; (2) that it will file a Motion pursuant to U.S.S.G. § 5K1.1 on the defendant's behalf at the time of sentencing if the defendant provides substantial assistance in the investigation and prosecution of others. . . . ; (3) that it is not aware

of more than 1.5 million dollars in counterfeit U.S. currency in the instant case and that under U.S.S.G. § 1B1.8 if the defendant provides information which leads to the discovery of more, it will not be used against him to determine his adjusted offense level.

Defendant challenges the three-level enhancement on the ground, inter alia, that the court could not find five participants as "counters." Since the court agreed that it could not count Fontana's wife, it must have considered Aquire in order to meet 3B1.1(b)'s requirements. (The government contended that there were five who had not been disclosed, but, on the record, it is mistaken.) The court, accordingly, in order to find five, may have interpreted the plea agreement as not standing in the way because of Fontana's identifications. In any event, without comment, it found five.

We think this interpretation accords with the plain reading of the agreement. Examination shows no promise by the government not to use information about the involvement of other individuals except where such information led to the discovery of more than the \$1.5 million counterfeit of which it was already aware. (None was.) A single, limited, promise manifestly cannot be construed into a general one across the board. Plaintiff was promised a willingness to recommend downward reductions for acceptance of responsibility and for cooperation, but the only upward exemption (item 3), was that if his disclosures led to finding more counterfeit currency

than the government already knew of, they should not be used against him in calculating his offense level.

Section 1B1.8(a) of the guidelines provides:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

(Emphasis supplied). U.S.S.G. § 1B1.8(a). We do not read from this a promise relating to the disclosure of any participant, unless it led to the discovery of more counterfeit currency. Evidently the court may have felt the same.

We have, however, a singular situation. Not only did Fontana read his agreement as excluding for all purposes individuals disclosed by him, but the government agreed. This calls for consideration. While in its terms the agreement does not support Fontana, plea agreements, involving possible misapprehension by defendants under stress, may invite equitable adjustments at the district court's discretion. Cf. United States v. Kinsey, 917 F.2d 181 (5th Cir. 1990); United States v. Wilder, 15 F.3d 1292, 1296-97 (5th Cir. 1994); United States v. Fields, 766 F.2d 1161, 1168 (7th Cir. 1985). We particularly believe discretion should be considered here because at sentencing, defendant's position with respect to

Aquire was agreed to by the government. We cannot deal adequately with this on this record. In view of its silence we cannot tell whether the court chose, equitably, to adopt defendant's interpretation of the agreement and found, erroneously, that there were five or more independent participants, or whether it read the agreement as written in spite of the government's acquiescence, which it was free to do. The sentence is vacated, and the case remanded to the district court for further proceedings consistent with this opinion.

So ordered.

§10 emphasize that issues of nonconformity to contract specifications are handled in the Code section dealing with installment contracts. UCC § 2-610, Official Comment 1. The issue, as properly stated under section 2-612(3), is whether a "nonconformity or default with respect to one more installments substantially impairs the value of the whole contract" so as to constitute a breach of the whole contract. Official Comments to section 2-612(3) expressly state that this subsection "is designed to further the continuance of the contract" and that "[w]hether the nonconformity in any given installment justifies cancellation as to the future depends, not whether such nonconformity indicates intent or likelihood that the future deliveries will also be defective, but whether the nonconformity substantially impairs the value of the whole contract." UCC 2-612, Official Comment 6. In Phase II, the district court found that "[s]ellers tried to meet the contract specifications on every id of coal shipped to Purchaser and never owingly shipped deficient coal." It further found that sellers' occasional failure to meet the contract specifications "did not e to the level of substantially impairing a value of the contract." The district court then concluded that sellers had not eached or repudiated the coal contract, r had sellers breached any warranties, it might be applicable to the contract. Purchaser has failed to show that the strict court was clearly erroneous in finding that there was no substantial impairment of the value of the coal contract. Purchaser presented no new evidence to e district court after remand that would cessitate a finding of breach on the part sellers. Accordingly, the district court's ruling on the coal quality issues must be affirmed. See, e.g., *Automated Controls, c. v. MTC Enterprises, Inc.*, 599 F.2d 288, 9 (8th Cir.1979).

VII. Antitrust Claim

(7) Sellers filed a motion for summary judgment with respect to purchaser's antitrust claim. The district court correctly id that the principle of res judicata accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past

barred purchaser's attempt to try the claim now because "based on the stipulation of the parties ... the Missouri Court was to determine all the mutual liabilities of the parties and all issues which arose or could have been brought prior to the date of the order." District Court Order, at 6.

Purchaser could have raised its antitrust claim at the time the district court reviewed the enforceability and validity of the 1979 amendment. An examination of the antitrust claim shows that purchaser attacks the twenty-five percent termination clause as being unduly restrictive of competition among coal suppliers. The purpose of the clause and the mutual benefit of long-term coal contracts were referenced and discussed by the district court in its opinion. Nothing that occurred subsequent to the rendition of that judgment changed the fact that purchaser was required to secure a price twenty-five percent lower than sellers' price in order to take sellers out of the coal contract. Purchaser had a full opportunity to litigate its antitrust claim in the earlier case. Therefore, we affirm the district court's grant of summary judgment in favor of sellers.

VIII. Overpayment of Depreciation Credit

Purchaser, in its brief, states that it does not dispute sellers' claim for the overpayment of depreciation credit. The sellers' requested adjustment of \$4,592.00 was apparently overlooked by the district court. We therefore remand with directions for the district court to adjust its judgment by \$4,592.00 and enter an appropriate order for payment of the depreciation credit.

AFFIRMED as to all but the overpayment of the depreciation credit. RE-MANDED to make the necessary adjustment.



installments or demands performance as to future installments.

Editor's Note: The opinion of the United States Court of Appeals, Tenth Circuit, in *Oakley v. City of Longmont*, published in the advance sheet at this citation, 887 F.2d 249-253, was withdrawn from bound volume and republished as amended at 890 F.2d 1128.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Lorrie Ann SHORTEETH, a/k/a Gloria Jackson, Defendant-Appellant.
No. 88-2853.

United States Court of Appeals,
Tenth Circuit.
Oct. 10, 1989.

Defendant was convicted in the United States District Court for the Western Dis-

[265]

trict of Oklahoma, Layla R. Phillips, J., pursuant to her guilty plea, of one count of possession with intent to distribute 55 grams of cocaine, and she appealed her sentence. The Court of Appeals, Logan, Circuit Judge, held that information that defendant disclosed in course of cooperation with Government pursuant to plea agreement could not be considered in determining applicable guidelines range.

Vacated and remanded.

1. Criminal Law §91043(3)

Defendant's failure to specifically raise guidelines objection in challenging district court's considering information defendant provided pursuant to plea agreement in determining applicable sentence range did not amount to waiver of objection on appeal, particularly in view of question existing at time regarding constitutionality of guidelines. Fed. Rules Cr. Proc. Rule 52(b), 18 U.S.C.A.; U.S.S.G. § 1B1.8, 18 U.S.C.A. App.

2. Criminal Law §986.2(1)

District court could not use information that defendant disclosed in course of cooperating with Government pursuant to plea agreement in determining applicable sentence range for defendant under guidelines, where agreement did not specifically mention district court's ability to consider that information during sentencing. U.S.S.G. § 1B1.8, 1B1.8 comment (n. 1), 18 U.S.C.A. App.

Dino E. Viera of Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Okl., for defendant-appellant.

*The Honorable J. Smith Henley, Senior United States Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

1. The plea agreement provided:

"This assurance that your client will not be subject to additional federal criminal prosecution for crimes committed in this judicial district is being given to ensure that the Government and the public will receive the full benefit of the knowledge and information in your client's possession and her complete, candid and truthful testimony...."

James F. Robinson, Asst. U.S. Atty. (William S. Price, U.S. Atty., with him on the brief), Oklahoma City, Okl., for plaintiff-appellee.

Before LOGAN, HENLEY* and ANDERSON, Circuit Judges.

LOGAN, Circuit Judge.

Defendant Lorrie Ann Shortteeth appeals from the sentence entered on her plea of guilty pursuant to a plea agreement with the government. Defendant contends that the district court erred in determining her sentence in that it considered information that she disclosed in the course of cooperation with the government. The case presents an important issue of first impression under the Federal Sentencing Guidelines.

The relevant facts are undisputed. Defendant was indicted on August 2, 1968, on five counts of conspiracy and possession with intent to distribute cocaine, and possession and use of firearms. Defendant subsequently entered into a written plea agreement with the government whereby she agreed to plead guilty to one count, possession with intent to distribute fifty-five grams of cocaine in violation of 21 U.S.C. § 841(a)(1). She also agreed to cooperate fully in investigation and prosecution of other individuals. In return, the government agreed to dismiss the remaining counts; to advise the district court, in connection with defendant's sentencing, of the extent of her cooperation; and to institute no prosecutions against her for information she might reveal through her cooperation.¹ In addition, the plea agreement specifically provided that the agreement did not encompass sentencing.²

1 R.Supp. Tab 13, Pl. ex. 6 at 11 (emphasis in original).

2. The plea agreement provided that "the Government at the time of sentencing will make known to the trial court the nature and extent of your client's cooperation. There are no agreements whatsoever regarding what sentence your client will or should receive. Sentencing will remain in the sole discretion of the trial court." 1 R.Supp. Tab 13, Pl. ex. 6 at 10 (emphasis in original).

U.S. v. SHORTEETH

Cite: 887 F.2d 253 (10th Cir. 1989)

On September 12, 1968, defendant entered her guilty plea as agreed. In the course of her debriefings defendant told federal agents that she had transported six ounces of cocaine from Los Angeles to Oklahoma City. Defendant's probation officer also learned of this matter and mentioned it in defendant's presentence report. Defendant's counsel, by letter, objected to use of any information defendant disclosed in debriefings in computing the applicable guideline range for defendant's sentence. The probation officer's response was that the information was not used in computing the guideline range.

The Federal Sentencing Guidelines contain a sentencing table in which applicable sentence ranges are established by combinations of various offense levels and criminal history categories. United States Sentencing Commission, *Guidelines Manual* ch. 5, pt. A, at 5.2 [hereinafter *Guidelines*]. The offense level used to establish the appropriate sentence range is determined by adjusting an offense-specific base offense level. See *id.* § 1B1.1. For drug-related offenses, the primary determinant of the base offense level is the quantity of drugs involved in the offense. *Id.* § 2D1.1.(a)(3). In determining the quantity of drugs for computing the base offense level, *Guidelines* §§ 1B1.3(a)(2) & 3D1.2(d) require consideration of "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Based upon these guidelines and defendant's prior admission to agents, the district court, over defense counsel's objection, aggregated the fifty-five grams of cocaine from defendant's conviction with the six ounces of cocaine disclosed during debriefing in arriving at the appropriate base offense level for defendant's sentence. The six ounces of cocaine increased the offense level by four levels, an ultimate increase in sentence range from fifteen to twenty-one months to twenty-seven to thirty-three months. The court sentenced defendant to twenty-seven months imprisonment.

On appeal, defendant argues that *Guidelines* § 1B1.8 prohibited the district court from using information she provided pursuant to plea agreement in determining the applicable sentence range. We agree.

I

[1] We must first address the government's contention that defendant waived her opportunity to raise her *Guidelines* § 1B1.8 objection by failing to raise it in the district court. See Fed.R.Crim.P. 52(b). Failure to properly object to breach of a plea agreement at a sentencing hearing ordinarily does not waive the objection. *United States v. Moscalaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989); *Paraiso v. United States*, 689 F.2d 28, 30 (2d Cir. 1982), *cert. denied*, 459 U.S. 1116, 103 S.Ct. 752, 74 L.Ed.2d 970 (1983). A *Guidelines* § 1B1.8 objection is closely analogous. Here, defense counsel did not specifically mention the *Guidelines*, but he did object to the district court's consideration of the six ounces of cocaine on the ground that it would violate the plea agreement. Defense counsel also was obviously surprised by the district judge's raising the issue when the probation officer had represented that the six ounces had not been used in computing the applicable sentence range. There is no indication in the record that either the district judge or counsel was aware of *Guidelines* § 1B1.8. Under the circumstances, we cannot say that failure to specifically raise a *Guidelines* objection amounts to waiver of the objection on appeal. This is especially so considering that the constitutionality of the *Guidelines* was in serious question at the time.

II

[2] Before promulgation of the *Guidelines*, there was considerable doubt about the ability of parties, through plea agreements, to restrict the information available to the district court for sentencing determinations. See *Moscalaidis*, 868 F.2d at 1362; *United States v. Crisp*, 817 F.2d 256, 259 (4th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164, 98 L.Ed.2d 118 (1987); *United States v. Reckmeier*, 786 F.2d 1216, 1223-24 (4th Cir.), *cert. denied*, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986).

United States v. Cook, 668 F.2d 317, 320 & n. 4 (7th Cir.1982); *United States v. Block*, 660 F.2d 1086, 1091-92 & n. 6-9 (5th Cir. 1981), *cert. denied*, 456 U.S. 907, 102 S.Ct. 1753, 72 L.Ed.2d 164 (1982); 18 U.S.C. § 3661 (no limitation may be placed on information a court may consider in imposing sentence); ABA Standards for Criminal Justice § 3-6.2 (1980) (prosecutor must disclose all information relevant to sentencing). But *Guidelines* § 1B1.8(a) affirmatively prohibits the sentencing court from considering certain information:

"Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement."

(emphasis added). The commentary to this section describes a situation very similar to the instant case:

"Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement."

Id. Application Note 1.

Resolution of this case requires us to determine whether the plea agreement provided that information defendant revealed would not be "used against" her and whether the agreement provided that such information could be "used in determining the applicable guideline range." Therefore, we must interpret the meaning of both the terms of the plea agreement and the words of *Guidelines* § 1B1.8. Because the facts are undisputed, our review will be *de novo*. See *Moscakladis*, 868 F.2d at 1360 (whether government conduct violates

plea agreement is question of law); 18 U.S.C. § 3742(e)(2), (f)(1) (court of appeals determines whether guidelines were applied correctly).

In this circuit, construction of a plea agreement requires determining what the defendant reasonably understood when she entered her plea. *United States v. Pogue*, 865 F.2d 226, 227 (10th Cir.1989); *United States v. Stemm*, 841 F.2d 636, 638 (10th Cir.1988); *United States v. Greenwood*, 812 F.2d 632, 635 (10th Cir.1987). We will not allow the government to resort to a rigidly literal construction of the language of the plea agreement. *Pogue*, 865 F.2d at 227; *Greenwood*, 812 F.2d at 635, and we "cannot condone the Government accomplishing through indirect means what it promised not to do directly." *Stemm*, 847 F.2d at 638 n. 1.

With these principles in mind, we believe that the government's agreement that "no separate federal prosecutions will be instituted against [defendant] ... for conduct and acts committed by her related to information she provides the Government during ... debriefings," 1 R.Supp. Tab 13, Pl. ex. 6 at 11, is clearly encompassed within *Guidelines* § 1B1.8(a)'s coverage of agreements "that self-incriminating information ... will not be used against the defendant." The more difficult question in this case is whether the plea agreement provided for use of such information "in determining the applicable guideline range" within the meaning of *Guidelines* § 1B1.8(a) in view of the plea agreement's statement that there were "no agreements" concerning what sentence she would receive. See *ante* note 2.

Other cases have considered the effect an agreement not to base a prosecution on or otherwise use information provided by a cooperating defendant has on use of that information in sentencing. Although an agreement not to provide information to the court in connection with sentencing may have been improper before the *Guidelines*, it was questionable whether the government could properly violate such an agreement. See *Reckmeyer*, 786 F.2d at 1223-24; *Cook*, 668 F.2d at 320. Cases

that allowed the government to disclose debriefing information at sentencing frequently involved plea agreements with express provisions allowing the government to do so. See *Crisp*, 817 F.2d at 258 (Government "will inform the sentencing judge ... [of] all ... information in its possession relevant to the sentence."); *Reckmeyer*, 786 F.2d at 1223 n. 7 ("It is a part of this agreement that the Government reserves its right to fully allocate at the time of sentencing."). Needless to say, the plea agreement in this case is not that explicit.³ Nevertheless, we believe the language and spirit of *Guidelines* § 1B1.8 require the agreement to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so. This is the most reasonable construction of the "except to the extent" language of § 1B1.8 and the commentary. It also would seem to promote the purposes of plea agreements requiring defendants' cooperation with law enforcement authorities.

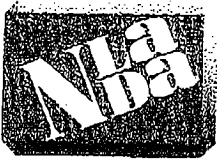
One of § 1B1.8's most important advantages is that federal prosecutors can now

assure potential informants that their statements will in no way be used against them. This advantage will be undercut if we allow ambush by broadly worded disclosures. Government prosecutors are more likely to be aware of § 1B1.8's language than some defense lawyers, and prosecutors who want to have the court consider incriminating information revealed by defendants under cooperation agreements can bargain for such a provision. The full disclosure approach we require here will ensure defendants are not unfairly surprised by sentencing determinations and will allow both the defendant and the government to bargain with full information.

Accordingly, the sentence imposed below is VACATED and the case REMANDED for further sentencing proceedings consistent with this opinion.



3. The language at issue was apparently designed to insure the agreement does not violate a local rule prohibiting plea agreements as to a particular sentence. W.D.Okla.R. 41(B) provides: "[T]his Court will not receive ... an agreement



039-95

**NATIONAL
LEGAL AID &
DEFENDER
ASSOCIATION**

April 10, 1995

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

Dear Chairman Conaboy:

This commentary is submitted for the limited purpose of commenting on certain issues presented in the Commission's Special Report on Cocaine and Federal Sentencing Policy, including the crack/powder cocaine ratio issue presented in proposed guideline amendment no. 38.

The National Legal Aid and Defender Association commends the Commission's detailed critique of the 100-to-1 sentencing ratio contained in title 21. We are concerned not only about the broad issue of unwarranted sentencing disparity for these two varieties of the same drug, but also about the disparate racial impact, with the burden of the longer crack sentences falling overwhelmingly and vastly disproportionately on low income African American cocaine offenders. Since the weight of all evidence is clearly that the two drugs act pharmacologically the same, we support the setting of a 1-to-1 ratio in the guidelines, with any additional harms such as distribution-related violence or crack houses reflected on a case-by-case basis through adjustments or departures.

We wish to highlight two related issues. One is the effect of changes in crack sentencing on other drugs. The Commission has asked for comment on whether any changes in the crack guidelines should apply to drug offenses generally or only to cocaine offenses. And the emerging debate in Congress has raised a similar question, with conservatives arguing that whatever disparities exist between crack and powder sentencing should be addressed not by lowering the punishment for crack but by raising the punishment for powder (as has been specifically proposed by Rep. McCollum in House Judiciary Committee markup of crime legislation). Since everything the Commission does to bring rationality to the crack/powder sentencing ratio is subject to this type of congressional response, we believe that the Commission should indeed address the effect on other drugs, including specifically

[268]

United States Sentencing Commission
April 10, 1995
Page 2

evaluating the consequences of raising all other drug punishments to proportionately match the severity of current crack quantity trigger levels.

The Commission's role as the watchdog of unwarranted sentencing disparity will require it to identify all other drugs which are as dangerous as crack cocaine and should be treated no less severely. This the Commission may already have considered, in suggesting in the discussion of current proposed amendment no. 43 that: "Most would agree that heroin, cocaine, and cocaine base pose the greatest degree of harm."¹ The question then becomes: what might be the consequences of establishing a mandatory minimum sentence of five years (or two years, as Rep. McCollum once suggested) for simple possession of five grams of powder cocaine or heroin, plus the ripple effect on distribution offenses, in terms of prison populations, costs, and burdens for the courts, corrections, prosecution, indigent defense and other components of the criminal justice system? We note that the latest figures from the National Institute on Drug Abuse indicate that there are more than three times as many frequent users of powder cocaine than crack (among high school seniors, 0.8% reported crack use within the past month, compared with 2.8% for powder and 0.3% for heroin, plus 1.5% for other opiates). In light of both Congress' and the Commission's interest in maintaining systemwide sentencing proportionality, the effect of commensurate increases in punishment for other serious drugs must also be evaluated, such as PCP, LSD and crystal methamphetamine (0.7%, 2.6% and 0.7% monthly use by high school seniors, respectively, according to the NIDA study).

Since the current Congress is so emphatically inclined to take the course of raising, rather than lowering any punishments (witness the pending cutbacks in even the very limited mandatory minimum "safety valve" contained in last year's crime bill), we believe it would be irresponsible not to assume this outcome in the crack debate, and develop impact assessments thereon.

The other related issue on which we wish to comment is the death penalty. Little attention appears to have focused on the fact that the ratio between powder and crack cocaine drives one of the death penalties enacted in the 1994 crime legislation. Under new 18 U.S.C. §3591(b)(1), the death penalty is established

¹ We strongly support the thrust of option 1 under amendment no. 43, abandoning drug quantity as the measure of offense seriousness for offenses subject to inflexible mandatory minimums, and relying instead on more accurate indicators of seriousness and violence, including use of a weapon, injury and role in the offense.

United States Sentencing Commission
April 10, 1995
Page 3

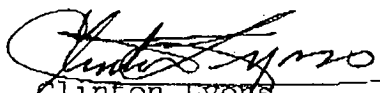
for certain large drug distribution offenses even though no death results. The penalty is directly tied to drug quantity, incorporating precisely the same 100-to-1 ratio for crack and powder cocaine where the defendant played a managerial role in a continuing criminal enterprise. The quantity necessary to trigger a death penalty for crack is three kilograms of any substance containing a detectable amount of cocaine base; if the drug is in powder form, three hundred kilograms would have to be involved. [The quantities triggering the death penalty for other drugs also starkly demonstrate the arbitrariness of the congressionally mandated quantity levels: 60 kilograms of heroin, 6 kilograms of PCP or methamphetamine, 60,000 kilograms of marijuana or 600 grams of LSD.]

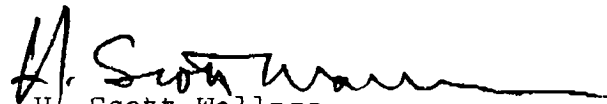
The stakes are far higher than even the Sentencing Commission's excellent report indicates. And harking back to our earlier point, we urge the attention of both the Commission and Congress to the consequences of raising other drugs to match the harshness of crack sentences. What would be the consequences of reducing the drugs-without-homicide death penalty to a 3 kilogram threshold for powder cocaine, or to 600 grams for heroin (assuming a continuation of the current powder cocaine/heroin ratio), with proportional decreases in the quantities for other drugs? How many cases would thus qualify for the death penalty? What sentences are these defendants currently receiving? How would this affect proportionality for other federal offenses? What other sentence increases would be dictated to maintain proportionality? What implications does this type of sentence inflation have for the pursuit of proportionality and the criminal law's deterrent power (e.g., to deter a mid-level drug enterprise manager from increasing the volume or the violence of his criminal conduct)?

Our fundamental point is that it would be a grave mistake to view the crack/powder differential, and the Commission's resolution of it, in isolation. We strongly urge that the Commission's proposed resolution of the issue include a careful discussion of significant potential alternative resolutions.

The Commission's kind consideration of our comments is greatly appreciated.

Sincerely,


Clinton Lyons
Executive Director


H. Scott Wallace
Special Counsel

040- 95

PUBLIC COMMENT OF
THE AMERICAN CIVIL LIBERTIES UNION
and the
COMMITTEE AGAINST THE DISCRIMINATORY CRACK LAW
on
PROPOSED AMENDMENTS TO SENTENCING GUIDELINES
derived from the
COMMISSION'S SPECIAL REPORT TO CONGRESS:
COCAINE AND FEDERAL SENTENCING POLICY

APRIL 10, 1995

submitted by
Nkechi Taifa
legislative counsel, ACLU

The American Civil Liberties Union (ACLU) is a nonpartisan organization of over 275,000 members nationwide dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at the core of our mission, we have a particular interest in ensuring that equal protection of the law and freedom from disproportionate punishment are upheld wherever threatened.

The ACLU is a founding member of the Committee Against the Discriminatory Crack Law, which is a non-partisan coalition of over 20 criminal justice, civil and human rights, and religious organizations, who have joined together to educate the public and Congress about the unwarranted disparity in cocaine law sentencing.

In addition to the ACLU, other member organizations of the Committee Against the Discriminatory Crack Law include the Americans for Democratic Action, Center for the Study of Harassment of African Americans, Criminal Justice Policy Foundation, Drug Policy Foundation, Families Against Discriminative Crack Law, Families Against Mandatory Minimums, General Board of Church and Society of the United Methodist Church, National Association for the Advancement of Colored People, National Association of Black Social Workers, National Association of Criminal Defense Lawyers, National Black Caucus of State Legislators, National Black Police Association, National Committee Against Repressive Legislation, National Conference of Black Lawyers, National Legal Aid and Defender Association, National Islamic Political Foundation, National Lawyers' Guild, National Rainbow Coalition, National Urban

League, The Sentencing Project, Southern Christian Leadership Conference, and the Special Committee on Racism and the Drug War.

The American Civil Liberties Union and the Committee Against the Discriminatory Crack Law hereby adopt the "Statement of Federal Public and Community Defenders on Proposed Amendments to Sentencing Guidelines published March 15, 1995" submitted to this Commission on April 10, 1995. For ease of reference a copy of that statement is attached.

###

FEDERAL PUBLIC DEFENDER
Western District of Washington

041-95

Thomas W. Hillier, II
Federal Public Defender

April 10, 1995

The Honorable Richard P. Conaboy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

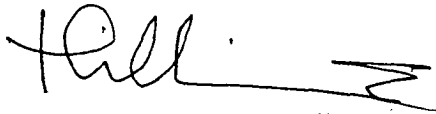
Dear Judge Conaboy:

Enclosed are materials submitted on behalf of Federal Public and Community Defenders in response to your call for public comment on several additional proposed amendments to the Sentencing Guidelines.

As always, we appreciate the opportunity to provide input to the Sentencing Commission and trust you will give serious consideration to our comments before moving forward on the important proposals presently before the Commission.

Thank you for your consideration.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender
Western District of Washington,
on behalf of the Federal Public
and Community Defenders

TWH:rmm

Enc.

Statement

of

Federal Public and Community Defenders

on

**Proposed Amendments to Sentencing Guidelines
published March 15, 1995**

April 10, 1995

Amendment 1
(Crack Cocaine)

Amendment 1 seeks comment on how to incorporate in the guidelines the recommendations of the Commission's report on federal sentencing of cocaine offenses. This amendment asks whether to amend the guidelines by adding specific offense characteristics to § 2D1.1 "to enhance sentences for violence and other harms associated with some crack and powder cocaine offenses as well as some other drug offenses." The amendment also asks for comment "on the usefulness of adding or amending commentary and policy statements regarding possible departures to take account of the increased harms associated with some cocaine offenses." In addition, the amendment asks whether any amendments designed to address violence and other harms of cocaine offenses should also apply to other drug offenses. If any new enhancements are added, the amendment asks whether other changes in the drug guidelines are necessary. Finally, the amendment asks whether "any of these changes" should be retroactive and "how might this process be accomplished."

The Commission has "firmly conclude[d] that it cannot recommend a ratio differential as great as the current 100 - 1 quantity ratio."¹ The Commission further notes that "[a] review of the relatively sparse empirical evidence available concerning those factors Congress considered in distinguishing crack from

¹U.S. Sentencing Com'n, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 196 (Feb. 1995).

powder cocaine leads to mixed conclusions and few clear answers."² As we have stated previously, we believe that the appropriate ratio between crack cocaine and powder cocaine is one-to-one. This is best accomplished by deleting all references to cocaine base in the drug quantity table. In light of the paucity of evidence to support the penalty structure and the resulting disparate racial impact, failing to act to equalize the ratio becomes an endorsement of racial discrimination in sentencing.

Other than revising the drug quantity table, we do not believe that any other amendments are necessary to reflect the findings of the Commission's report on cocaine sentencing. Although the report states that "a policymaker could infer that crack cocaine poses greater harms to society than does powder cocaine,"³ and that "crack cocaine poses somewhat greater harm to society," the report lacks objective data to support this conclusion. For example, while the report assumes that crack cocaine offenses result in more ancillary violence, the report also states that "pulling apart the systemic crime associated with crack cocaine versus powder cocaine is difficult if not impossible."⁴ And, while the marketing of crack may make the drug more accessible to lower income people, "[t]he Commission found virtually no research that compared the respective association of crack and powder cocaine with

²Id. at 195.

³Id.

⁴Id. at 95.

economically driven crime."⁵

In addition, it is difficult to comment on any proposed enhancements to the drug guidelines without knowing just what those enhancements are. Although this amendment seeks comment on whether to amend the guidelines to add specific offense characteristics to account for "violence and other harms" associated with drug offenses, the amendment fails to present a concrete proposal upon which to comment. The amendment lists some examples, including use of a firearm, victim injury, crack houses, "violence and other harms," yet it is unclear whether the Commission is considering including all or some of these factors and how these enhancements would be implemented and relate to each other.⁶ Further, most of the perceived additional harms associated with crack cocaine offenses, such as illegal use of a firearm, violence, and distribution in a protected location are already punishable as separate offenses or statutory enhancements.⁷ There is no reason

⁵Id. at 186.

⁶If the Commission intends to add specific offense characteristics or departure language to account for those factors that the Commission believes distinguish crack offenses from other drug offenses, then we believe that those enhancements should be limited to sentences for crack offenses.

⁷We understand that there are some perceived harms that are not covered by statute, but these perceptions are unsupported by objective data. For instance, the Commission's report asserts that crack cocaine is more psychologically addictive and that "crack smokers are more likely to engage in bingeing," yet the report contains no objective data to substantiate this assertion. In addition, without comparing the addictiveness of crack cocaine with that of drugs other than cocaine, we believe that it would be unreasonable to use the perceived addictive quality of crack as a justification for an increased penalty.

to render the statutes irrelevant by creating enhancements. The suggested methodology creates the additional temptation for the government to bypass charging under the statute and thereby avoid proving either an offense or statutory enhancement beyond a reasonable doubt.

Finally, we urge the Commission to act this amendment cycle and to make the revisions retroactive. The Commission's report makes clear that the 100 to 1 ratio is unwarranted. Those defendants who have been sentenced pursuant to the ratio are being treated unfairly. If the Commission acts to remedy the disparity inherent in the current crack cocaine penalty scheme, fairness requires that any such changes be made retroactive.

Amendment 2
(Simple Possession of Crack Cocaine)

Amendment 2 seeks comment on whether to amend § 2D2.1 for offenses involving simple possession of crack cocaine. We believe that § 2D2.1 should be revised to provide for a base offense level of six if the offense involved crack cocaine. In addition, we support the deletion of the cross-reference in § 2D2.1(b) which requires the application of § 2D1.1 if the defendant is convicted of simple possession of more than five grams of a mixture or substance containing cocaine base. The disproportional treatment of simple possession of the crack form of cocaine is perhaps the most glaring indication of the unfairness of the crack cocaine penalties.

As pointed out in the report, "the crack simple possession penalties have created sentencing anomalies and unwarranted

disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act."⁸ Further, the dramatically increased penalty for simple possession of more than five grams of crack cocaine allows a drug trafficker to be sentenced less severely than a drug possessor.⁹ There is no data to support the presumption in the sentencing scheme that possession of more than five grams of crack is necessarily inconsistent with possession for personal use.¹⁰

The Commission's report states that "because powder cocaine can be converted easily into smaller doses of crack that can be sold more cheaply and in potent quantities, crack is more readily available to a larger segment of the population, particularly women, children, and the economically disadvantaged."¹¹ Thus, the increased penalty for simple possession of five or more grams of crack cocaine falls heavily on "the most vulnerable members of society: the poor and the young"¹² who presumably are less likely

⁸Id. at 198.

⁹For instance, a first-time defendant who sells 5.5 grams of heroin to an undercover officer faces a guideline range of 15 to 21 months, while a first-time defendant who possesses 5.5 grams of crack for personal use is subject to a five-year mandatory minimum and a guideline range of 63 to 78 months.

¹⁰The Commission's report states that "the unique approach to emphasizing severe punishment of those who possess crack for personal consumption is at odds with the prevailing, treatment-oriented approach prescribed by Congress for other drug user/possessors." Id. at 198.

¹¹Id. at xiv.

¹²Id. at 195.

to possess cocaine in its more expensive powder form.

Further, these harsh penalties for simple possession are falling disproportionately on black defendants. According to the report, the mean sentence for crack cocaine possession offenses from October 1, 1992 through September 30, 1993 was 30.6 months, while the mean sentence for powder cocaine possession offenses was 3.2 months.¹³ The overwhelming percentage of defendants sentenced for simple possession of crack cocaine was black. As stated in the report, 84.5 percent of crack defendants were black, 10.3 percent were caucasian, and 5.2 percent were hispanic.¹⁴ For simple possession of powder cocaine, 73.8 percent of the defendants received probation, and of those defendants, 58 percent of were caucasian, 26.7 percent were black, and 15 percent were hispanic.¹⁵ The disparate impact of these penalties on black defendants is unjustifiable and unfair and is inconsistent with the principles that underlie our system of justice.

Amendment 3
(Offenses Involving Underage or Pregnant Individuals)

Amendment 3 seeks comment on whether to amend § 2D1.1 by adding enhancements for distribution in a protected location or to certain individuals. We oppose this amendment.

This amendment would further convert the present guideline system into a real offense sentencing system in a piece-meal

¹³Id. at 154.

¹⁴Id. at 156.

¹⁵Id. at 154-56.

manner. The Commission's attempted to draft a real offense guideline system and found that such a system was impractical and "risked return to wide disparity in sentencing practice."¹⁶ We believe that enhancements for distributing near a protected location, employing underage individuals, or distributing to underage or pregnant persons are appropriately covered under § 2D1.2 when there is a conviction under 21 U.S.C. §§ 859, 860 or 861. If the defendant's conduct involves a protected location or an underage or pregnant individual, the government can charge a violation of the applicable statute. Adding enhancements to § 2D1.1 renders these statutory provisions irrelevant and permits the government to avoid meeting its burden of proof required for a conviction by simply waiting until sentencing to assert that the defendant's offense involved a protected location or an underage or pregnant individual. There has been no data to support the need to incorporate these enhancements as specific offense characteristics instead of requiring a conviction.

The proposed amendment poses application problems as well. For instance, would the enhancement for distributing near a protected location apply if law enforcement chose the protected location? Would it apply if one of fifty sales occurred in a protected location? To avoid creating disparity, we believe that these enhancements should apply only when there is a conviction under one of the corresponding statutes.

¹⁶U.S.S.G. Ch. 1, Pt. A(4)(a), at 5.

Amendment 4
(Guideline Promulgation Authority)

Amendment 4 would revise the background commentary of § 4B1.1 to state that in promulgating the career offender guideline as directed by 28 U.S.C. § 994(h), the Commission exercised its authority under 28 U.S.C. § 994(a)-(f) and (o)-(p). Amendment 4 also invites comment on whether to amend Chapter I, Part A "to state that in its promulgation of specific guidelines, the Commission intends in all cases to rely on its general authority under 28 U.S.C. § 994(a) as well as any other more specific grant of statutory authority." We oppose this amendment.

The career offender mandate is like a mandatory minimum in that it introduces an element of inflexibility inconsistent with a guideline system. The Commission's policy should be to mitigate the impact of such a provision and to construe the mandate in 28 U.S.C. § 994(h) narrowly.

In addition, we oppose the proposed amendment to Chapter I, Part A. We believe that the Commission should determine on an amendment-by-amendment basis the scope of authority that the Commission is exercising.

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042-95

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April 5, 1995

Michael Courlander
U.S. Sentencing Commission
One Columbus Circle, N.E.
Ste 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments

Dear Mr. Courlander:

With regard to the Commission's request for public comment, where retroactivity is concerned and with powder cocaine in particular, it is our opinion that any change in the applicable base offense level ought to be available to those previously sentenced. This is in keeping with the legislative history of the Crime Control Act, P.L. 98-473, where, when the Commission reduces the recommended term of imprisonment for a particular category of offense, adjusting existing sentences is appropriate except where there is more than a minor downward adjustment, or where there is a class of persons affected, as opposed to isolated instances. Implementation by mathematical calculation by the Bureau of Prisons would likely effectively prevent any undue burden on the courts. In those instances where qualifying characteristics would warrant the exercise of judicial discretion (e.g. where an inmates pre-sentence report is silent as to minor or minimal role or some other similar factor not objectively ascertainable from the PSR), provision for such could be made by particular reference thereto in §1B1.10.

Thank you for your consideration of this matter.

Very truly yours,
OMNI LAW CHARTERED

By:

JANA V. JAY
Attorney at Law

JVJjf

[284]

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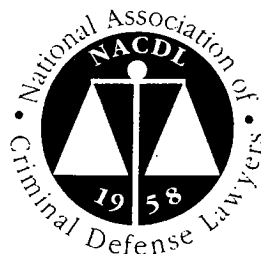
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WRITTEN, PUBLIC COMMENTS FOR THE RECORD
REGARDING THE UNITED STATES SENTENCING COMMISSION'S
FEBRUARY 1995 REPORT TO CONGRESS,
AND FUTURE CONGRESSIONAL RECOMMENDATIONS,
ON THE CURRENT 100-1 FEDERAL SENTENCING DISPARITY
BETWEEN "CRACK" AND POWDER COCAINE OFFENSES

By Gerald H. Goldstein, for
the National Association of Criminal Defense Lawyers

APRIL 10, 1995

.....
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[285]

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I want to thank the Commission for the opportunity to submit for the record the following public comment on the Commission's February 1995 special report to Congress regarding the current 100-1 "crack" versus powder cocaine sentencing disparity, and the Commission's intention to submit to Congress recommendations on May 1, 1995 -- for case-specific, guidelines adjustment-oriented models for modification of the federal sentencing policy as it relates to cocaine offenses.

I.

NACDL Applauds the Commission's Work and Urges Commission Action in Full Accordance With the Report's Comprehensive Research

The members of NACDL, front-line defenders of the People's rights and liberties, have long recognized and pushed for reform of the irrational and unfair federal requirements that impose a mandatory minimum sentence of at least five years for the first-time possession of more than five grams of cocaine "base" ("crack"), while imposing a minimum sentence of probation for the possession of the same quantity of cocaine hydrochloride (powder cocaine). The mandatory sentence for possession of 50 grams of crack is ten years. While for this same penalty, a defendant would need to be convicted of possessing 100 times as much powder cocaine. A defendant with no prior convictions who is found guilty in federal court of possessing 70 grams of powder cocaine with the intent to sell it faces between 21 and 27 months in prison. Meanwhile, a like conviction involving the same amount of crack cocaine would qualify for a sentence more than five times as long -- between 10 and 12 1/2 years. From both the market-value and the potential punishment perspectives, powder cocaine, and not crack, is in fact the more profitable drug.¹

As the report states: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), created the basic framework of mandatory minimum penalties that currently apply to federal drug offenses. This Act establishes two tiers of mandatory prison terms for those convicted as first-time drug distributors -- a five year and a ten-year minimum sentence. Under the terms of the statute, the different minimums are triggered depending on the quantity and

¹ See, e.g., Table 19 in *Special Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission 173 [herein the February 1995 report or the report] ("Street-Level Value of Drug Quantity By Drug Type and Base Offense Level") (reflecting, for example, that in order for one to reach a quantity-oriented, "base offense level" for sentencing purposes of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, \$230 worth of crack; likewise, to reach the highest base offense level, "38," one must be convicted of either \$16,050,000 worth of powder cocaine, or else \$172,500 worth of crack).

the type of drug involved. This 1986 Act gave birth to the federal criminal law sentencing distinction between cocaine "base" and other forms of the same drug. The quantity thresholds triggering the penalties create the 100-1, crack versus powder cocaine sentencing ratio.

As the report also well notes: the 1986 Act "was expedited through Congress. As a result, its passage left behind a limited legislative record."² While many individual members delivered floor statements about the Act, Congress dispensed with most of the typical legislative process, including committee hearings. And no committee produced the standard committee report on the legislation reflecting actual *analysis* of the Act's provisions.³ The legislative history thus does not include any discussion of the Act's 100-1 crack versus powder cocaine quantity-based sentencing disparity.⁴

But we do know this:

The sentencing provisions of the Act were initiated in August 1986, following the July 4th congressional recess during which public concern and media coverage of cocaine peaked as a result of the June 1986 death of NCAA basketball star Len Bias.⁵

A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's case was cited 11 times[] in connection with crack.⁶

Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack

² *Id.* at 116.

³ See *id.* at 116-117. See also, e.g., 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process.").

⁴ February 1995 report, *supra* note 1, at 117.

⁵ *Id.*

⁶ *Id.* at 123 (citing transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress).

cocaine overdose death of NCAA basketball star Len Bias" [] was instrumental in the development of the federal crack cocaine laws. During 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.⁷

Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.⁸

And still, for almost a decade now, this irrational and unfair system of cocaine sentencing disparity -- child of hysteria and haste -- has existed without comprehensive examination. There have been many victims of this system over the years. And they have been among the most vulnerable, at-risk members of our society: the poor, the young and the minority.

NACDL accordingly applauds the Commission for its February 1995 report's comprehensive research, and for the report's unequivocal conclusion that the current 100-1 sentencing ratio between crack and powder cocaine offenses is too high, irrational and unfair. Further, though, NACDL respectfully urges the Commission to act in accordance with the facts canvassed in the report. While NACDL commends the Commission for the studied research reflected in the February 1995 report, NACDL submits that the Commission should immediately follow the data referenced in the February 1995 report to the data's full, logical conclusion: there is no rational justification for any sentencing disparity between powder and crack cocaine; racism and unfounded suspicion should be removed from the federal sentencing law; the sentencing guidelines' (and statutory) ratio between powder and crack cocaine should be 1-1, with all cocaine offenses being subject to the same penalties as those now in effect for powder cocaine.

⁷ *Id.* (citing testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993).

⁸ *Id.*

II.

There Is No Rational Basis for Any Disparity Between Crack and Powder Cocaine

Although several courts have generously deferred to the congressional cocaine sentencing conclusion -- i.e., assuming that Congress *must* have had some reason for its creation of the crack versus powder cocaine sentencing disparity -- the research and analysis of the Commission's report shows that any assumed congressional "rationale" must be regarded as simply unfounded, and erroneous. The abbreviated, murky legislative history does not provide a consistently cited "rationale" for the crack versus powder cocaine penalty structure.⁹ But, as the Commission's report rightly points out, to the extent Congress can be viewed as having perhaps thought about support for its statutory conclusion to create a 100-1 crack versus powder cocaine sentencing disparity, it's conclusion rests upon mere "assumptions": assumed qualities of addictiveness; speculative correlations to other, serious crimes; conjured special psychological effects of this newly discovered bogey-man called crack; fears of heightened risks to youths; and the supposedly peculiar "purity and potency," market incentives, and ease of movement qualities of crack.¹⁰

A.

Regarding "Pure and Potent," and Ease of Movement and Administration Assumptions

Yet, as the Commission's report clarifies: the mood altering ingredient in both powder and crack is the same -- cocaine. "Pure and potent" cocaine powder can be *easily* moved and administered, and it can be easily transformed into crack by combining the powder with baking soda and heat.

The difference in effect between the two varieties of cocaine lies in the way the drug is *ingested*. Cocaine powder is generally sniffed or snorted through the nostrils or dissolved in water and administered intravenously, whereas crack is usually smoked in a pipe. The onset of drug effects is slowest for swallowing and sniffing, and fastest for smoking and injection. Intravenous injection deposits drugs directly into the user's bloodstream, for fast transmission to the user's brain.

⁹ See *id.* at. 121.

¹⁰ See generally *id.* at 118.

B.

Regarding Medical and Addiction Assumptions

Of course, the use of drugs, including all forms of cocaine, impacts upon the public health of the United States.¹¹ But speculation and Congress-inspiring sports celebrity deaths aside,¹² according to *emergency medical experts*: there is no objective scientific data to support the oft-cited assumption that crack is more addictive or dangerous than the powder cocaine from which it is derived. In fact, studies disclose that the most frequent route of administration for cocaine-related deaths is through *injected*, water-dissolved, powder cocaine -- not by the smoking of crack.¹³ Crack cannot be injected.

Likewise, the injection of cocaine powder -- and not the smoking of its derivative, crack -- increases the social threat of infections (including HIV and hepatitis).

And as the Commission report also notes, although the national estimate of (crack and powder) cocaine-exposed infants according to some studies is notable at between two to three percent, cocaine is actually used less frequently during pregnancy than are all sorts of other drugs, both "licit" and "illicit."¹⁴

¹¹ Still, as the report points out, studies by organizations including the Drug Abuse Warning Network (DAWN) and the Rand Foundation reflect that the casual use of cocaine has *decreased* since 1988; and that fewer Americans are now using cocaine than in the 1980's. *Id.* at 46-47. In fact, in terms of drug-based causes of hospital emergency room visits, cocaine ranks behind *alcohol*. *Id.* at 41.

¹² In addition to the assumed crack-related death of the Boston Celtics's first-round basketball draft pick, Len Bias, Congress was moved by the drug-related death of Cleveland Browns football player Don Rogers. "Recalling [these deaths], members of Congress [supporting the proposed 1986 Act] repeatedly described the dimensions of the drug problem in such dramatic terms as 'epidemic.'" *Id.* at 121.

¹³ See, e.g., *id.* at 44-45. But it is also important to recognize, as the Commission has in its report, that "[a]mong cocaine-related deaths, concurrent use with *alcohol* was the most deadly combination." *Id.* at 45 (emphasis added).

¹⁴ See, e.g., *id.* at 52 (citing *inter alia* D. Gomby & P. Shiono, *Estimating the Number of Substance-Exposed Infants*, *The Future of Children* 22 (Spring 1991)). As the report has well-recognized: fetal alcohol syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in the United States than fetal cocaine syndrome (whether caused by crack or powder -- there is no way to

Regarding Assumptions About "Special Psychological Effects"

Certainly, when cocaine use becomes uncontrolled, an individual's links to the social and economic world disintegrate. As the report reflects, some studies even find that physical, psychological, and behavioral changes in an individual can begin soon after the person begins to use cocaine. But there is nothing peculiarly pernicious about crack cocaine.

When users of cocaine, powder or crack, become dependent upon the drug, their family and social lives typically disintegrate. And the most "at risk" users -- the unemployed -- frequently are asked, or forced, to leave their family or friendship units. For example, as the report notes: in a study of voluntary inpatients in a hospital unit, 18.7 percent of the 245 study participants disclosed that they had been asked or forced to leave their social units; and of these individuals, more than half (51.1%) became homeless.¹⁵ Research shows that those who are drug abusers and become homeless will likely abuse alcohol and other drugs. And homeless shelters in New York City, for example, have reported that the current most frequently abused drug among the shelter residents is cocaine -- but again, both crack and powder.¹⁶ Yet, as the Commission's report suggests, it seems as likely that cocaine abuse is a reflection of sociological and psychological illness as it is likely that (as some members of Congress might be seen to have assumed in 1986) such use causes such illness.

Further, the report's discussion of psychopharmacological-driven crime data is telling. For example, alcohol-related homicides are considered to be psychopharmacological-driven at a considerably more significant rate than any other drug -- including cocaine (of either the powder or crack variety).¹⁷ And at least one influential study concludes that "to date, there has been no systematic research linking crack cocaine use with increased

distinguish the particular variety of the drug used by the effects on the infant); and a much more significant percentage of newborns in this country are reported to suffer from fetal tobacco-exposure or fetal marijuana-exposure, than from fetal cocaine syndrome. *Id.*

¹⁵ *Id.*, at 58 (citing B. Wallace, *Crack Addition: Treatment and Recovery Issues*, Contemporary Drug Problems 74 (Spring 1990)).

¹⁶ *Id.* at 58-59 (citing W. Breakey & P. Fischer, *Homelessness: The Extent of the Problem*, Journal of Social Issues 40 (1990)).

¹⁷ See e.g., *id.* at 98-99 (citing P. Goldstein, *Drugs and Violent Crime, Pathways to Criminal Violence*, table 2, 665 (Neil A. Weiner et al., eds. 1989)).

[psychopharmacological driven] violence."¹⁸

D.

Regarding Market-Value Assumptions

As stated above, the market-value assumption about crack cannot withstand analysis. The report recognizes this:

Individuals at the top of the drug distribution chain make considerably more money than others [lower down] in the organization. [] DEA data for 1992 indicate domestic wholesalers can purchase a kilogram of powder cocaine from Columbian sources for \$950-\$1,235. Powder cocaine from other source countries such as Bolivia and Peru generally is more expensive, typically selling for \$1,200-\$2,500 and \$2,500-\$4,000 a kilogram, respectively. * * * [A] kilogram of powder cocaine can be sold wholesale, after dilution, for \$11,000-\$42,000, and can be marketed, after further dilution, in gram quantities for \$17,000-\$173,000. These figures, not considering distribution expenses, produce profits of \$16,000-\$171,000 per kilogram of powder cocaine.¹⁹

And yet, the 100-1 sentencing disparity between crack and powder cocaine results in market-oriented sentencing irrationality: for example, in order for one to reach the quantity-oriented base offense level of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, a mere \$230 worth of crack.²⁰

¹⁸ J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson *Drugs and Crime* (1990)), quoted in *id.* at 99.

¹⁹ The report, *supra* note 1, at 87 (citing *inter alia*, United States Department of Justice, *Drug Enforcement Administration, Source to the Street: Mid-1993 Prices for: Cannabis, Cocaine, Heroin* 6 (Sept. 1993)).

²⁰ See Table 19, *id.* at 173.

E.

*Regarding Assumptions About Correlations to
Other, Serious Offenses*

The report notes that at least one major study has concluded that it is the frequency with which one sells a cocaine product, and not the selling of cocaine in its *smokeable form*, that seems to best explain any violence associated with cocaine distribution.²¹ Several researchers agree: "[T]he primary association between [crack] cocaine and violence is systemic. It is violence associated with the black market and distribution."²² And as also noted in the February 1995 report, studies reflect that systemic violence of this sort is found in analyses of powder cocaine, and presumably other illicit drug markets as well.²³

F.

Regarding Assumptions About Other Heightened Risks

Already-existing guideline enhancements sufficiently account for any additional harm that may actually be found associated with cocaine offenses. Federal sentencing guidelines account for the involvement of firearms, or other dangerous weapons; serious bodily injury, or death; the use or employment of juveniles; leadership roles played by one in the commission of an offense; prior criminal histories; and other aggravating factors. Additional, sweeping, "built-in" sentencing enhancements reflecting crack cocaine's *presumed*, peculiar, always-aggravating qualities are unnecessary, unfair, and -- in the creation of irrational, increased incarceration time -- economically inefficient in their undue cost of tax dollars, as well.

For example, with regard to the issue of youth, especially youth gang related activity: as the report reflects, noted researchers have concluded that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."²⁴ And as the report reflects, other

²¹ See the report, *supra* note 1, at 95 (quoting K. Chin & J. Fagan, *Violence as Regulation and Social Control in the Distribution of Crack*, in M. de la Rosa, B. Gropper, and E. Lambert (eds.), *Drugs and Violence: Causes, Correlates and Consequences* 36 (1990)).

²² United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993).

²³ See, e.g., February report, *supra* note 1, at 97-98.

²⁴ Testimony of Dr. J.H. Slotnick before the United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993), at 70, *quoted in id.* at 104. See also E. Walsh, "Chicago Street Gang

researchers have drawn like conclusions about the various, complex, non-crack-oriented social factors underlying gang and inner-city cultural violence -- such as "the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns" ²⁵ Indeed, as the Commission's report points out: researchers tend to agree that from a historical perspective, crack cocaine is not unique. For example, as Professor Paul J. Goldstein testified before the Commission, the national homicide rate has "changed very little over the last 25 years." Indeed, in 1992, the homicide rate was lower than in 1980, when systemic violence arising out of the newly developing powder cocaine market was about at its peak, and lower than in 1933 -- at the end of *alcohol prohibition*. ²⁶

G.

Recap Regarding Assumptions

Although some courts have generously deferred to Congress with regard to the 100-1 sentencing disparity between crack and powder cocaine -- i.e., assuming that Congress must have had some "reasons" for creating this disparity -- the Commission's report shows that any such assumed "rationales" are but flawed, erroneous assumptions. In short, the 100-1 crack versus powder cocaine sentencing disparity is shown by the Commission's report to be irrational, unwarranted, unfair, and economically inefficient -- when assessed under the very terms assumed to have been assumed by Congress.

III.

Race Matters

Certainly given the irrational 100-1 cocaine sentencing policy, the racial ramifications of this sentencing policy invoke strong questions about our Nation's constitutional conceptions of equal protection, fundamental fairness and the People's right to be free from illogical, excessively disproportionate punishment.

Study Shows Fearful Toll of Powerful Weapons," Wash. Post A 4 (Nov. 29, 1993) (citing study conducted by Carolyn Rebecca Black and Richard Black, which concluded that gang turf battles in many areas were more likely to lead to homicides than were drug trafficking disputes).

²⁵ Statement of Steven Belenko in J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson, *Drugs and Crime* (1990), at 27, quoted in February 1995 report, *supra* note 1, at 105.

²⁶ February report, *supra* note 1, at 108 (citing J. Inciardi & A. Pottieger, *Crack-Cocaine Use and Street Crime*, *Journal of Drug Issues* (1994), at 65).

The evidence does reflect that crack cocaine is significantly different from powder cocaine in one respect: crack sentences are almost exclusively meted out to African-Americans, while most powder cocaine sentencees are Caucasian-Americans (the latter group being also the predominant group in Congress, in the federal Judiciary, and in the upper economic echelons of the populace generally).

Indeed, as this Commission knows and has recognized in its report, of all the defendants sentenced for crack cocaine offenses in the federal system, approximately 90% are African-American. In 1992, for example, 92.6% were African-American; and all of the persons sentenced in the federal system for simple possession of crack cocaine were African-American.

Certainly, in the light of the sentencing policy irrationality reflected in the report and referenced above, such "statistics" raise grave concerns about the grossly negative impact of this 100-1 policy on African-Americans -- given our society's supposedly equal, constitutional democracy. These African-Americans are subject to serving long mandatory minimum sentences for simple possession of small amounts of crack cocaine, while those typically Caucasian first time offenders convicted of possession of a much greater quantity of cocaine powder are subject to minimal sentences (even probation).

IV.

Sentencing Irrationality and Socio-Economic Inefficiency

NACDL points out that the irrational, unfair sentencing disparity between crack and powder cocaine offenses carries serious macro-economic costs in addition to the costs such a policy extracts from individual sentencees and, in turn, from our Nation's fundamental conceptions of justice. Increased mandatory minimums of the irrational sort existing under the current system of cocaine sentencing take substantial amounts of taxpayer dollars to fund; dollars that could be more usefully and rationally applied, e.g., to the future of this country -- to education or national debt interest payments.

V.

NACDL Urges the Commission to Recommend Retroactive Application of a 1-1 Crack/Powder Cocaine Sentencing Ratio

The current cocaine sentencing system has been allowed to exist for too long, at great costs to individual lives and great cost to taxpayers. NACDL encourages the Commission to recommend to Congress a 1-1 ratio between crack and powder cocaine sentences. Further, NACDL strongly urges the Commission to recommend that this change be given immediate, retroactive effect.

It is not the fault of the victims of this flawed and racist eight-year old policy -- those sentenced under the crack 100-1 automatic enhancement policy -- that this policy came into existence and was allowed to exist for a significant period of time. They should be peculiarly and irrationally punished under this pernicious regime no longer. They should not be forced to continue the unreasonable forfeiture of their lives to this clearly flawed system of cocaine sentencing. The similarly situated should be similarly situated. This is a priceless fundamental value.

Further, though, the taxpayers deserve retroactive relief. They should be given the monetary relief associated with a retroactively applicable implementation of a more equitable, efficient cocaine sentencing policy. Indeed, any institutional costs associated with such retroactive application of a 1-1 cocaine sentencing ratio are obviously and substantially less than the costs associated with the continued subsidized irrationality of incarcerating those convicted of crack offenses, who should by all rights be serving but the sentence they would have received had they been but convicted of a powder cocaine offense. At the very least, such sanity and fairness would make room for the incarceration for the truly violent offenders among us, and perhaps even save us all the tax costs of a new prison or two.

VI.

Conclusion of NACDL Comments

Again, NACDL applauds the comprehensive research reflected in the Commission's report, and is grateful to the Commission for this opportunity to offer comments about the report and the Commission's forthcoming recommendations to Congress on cocaine sentencing policy. NACDL respectfully encourages the Commission to follow through on the implications of its study -- to recommend to Congress an immediate and retroactively applicable establishment of a fair and rational, 1-1 cocaine sentencing ratio, with all cocaine offenses being subject to the same penalties as those in effect for powder cocaine.

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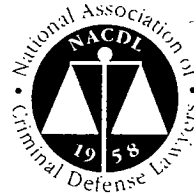
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NACDL is a specialized bar association representing the nation's criminal defense lawyers. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. The 36-year old association is devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
PROBATION AND PRETRIAL SERVICES OFFICE

044-95

NORMAN E. MUGLESTON, Chief
U.S. Probation/Pretrial Services Officer



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REPLY REQUESTED TO

- ANCHORAGE
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April 12, 1995

Phyllis Newton, Director
U.S. Sentencing Commission
Federal Judiciary Building
Washington, DC 20002-8002

RE: Proposal for Amendments to the Guidelines

Dear Ms. Newton:

I have attached a memorandum from Mary Frances Barnes, Sr. U.S. Probation Officer in our district, which summarizes our proposals for amendment on a few areas of the guidelines.

Please call me if you have any questions.

Sincerely,

Norman E. Mugleston
Chief U.S. Probation/Pretrial Services Officer

Enclosure

NEM:vhi

MEMORANDUM

DATE: March 31, 1995

REPLY TO: Mary Frances Barnes *MB*
ATTN OF: Sr. U.S.P.O.

SUBJECT: **Proposals for amendments to the guidelines**

TO: Norman Mugleston
C.U.S.P.O.

I have reviewed the guidelines and queried both the investigative and supervision units for their input. There are only a few areas suggested for improvement and clarification.

- As always the drug guideline U.S.S.G. § 2D1.1 is at issue. One "camp" would like to see the guidelines calculated on the type not quantity of drugs. One "camp" would like to see other specific characteristics and not quantity alone considered in setting the offense level.
- Regarding the Restraint of Victim guideline, U.S.S.G. § 3A1.3, we find this guideline too narrow.

First issue: the guideline does not define **victim**. Can a co-conspirator also be a victim? The Sentencing Commission was consulted and stated that in the absence of an explicit statement in the guidelines, the Court would have to make the decision. As far as I know this issue has come up before Singleton twice and he has ruled that a co-conspirator can be a victim and applied the enhancement. The last case involved the Jay Vought case and the defendant is currently appealing the enhancement.

Second issue: the term "**physically restrained**" is too narrow. U.S.S.G. § 3A1.3 relies on the definition of physical restraint at U.S.S.G. 1B1.1, comment.(n.1(i)), which describes a forcible restraint such as being tied, bound, or locked up. We would like to see the definition expanded to include physical restraint by use of force or the threatened use of force. We found case law that supported the enhancement when the victim was restrained at knife point and gun point. Judge Singleton has twice ruled for the enhancement when it included restraint by use or threatened use of force. Example: Jay Vought forced a victim (and co-defendant) into a vehicle at gun point, took her for a long car ride and threatened to kill her if she did not continue to sell drugs for him. The definition could include language such as physically restrained is when someone believes they are not free to leave because of the presence of a firearm or some other weapon or the threatened use of such.