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VIA FEDERAL EXPRESS

March 17, 1993

Ms. Teri Goldstein
United States Sentencing Commission
Suite 3-500
One Columbus Circle N.E.
Washington, D.C. 20002

Dear Ms. Goldstein:

My name is Michael Stepanian. I have practiced criminal law in San Francisco since 1966. The majority of my cases are in federal court in California and other United States District Courts around the country.

I am a past-president of the Criminal Trial Lawyers Association of Northern California, previously a member of the Board of Directors of California Attorneys for Criminal Justice, have been Chairman of the Board of the Haight Ashbury Free Clinics for 15 years, am on the Advisory Board of the Drug Policy Foundation, and am a member of the Criminal Justice Act Panel in the Northern District of California.

I have been married for 20 years, and have two children.

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My remarks to your Commission will focus specifically on the attached material, which was prepared with the guidance of Lois Franco, Criminal Justice Consultant. I will speak generally to the Commission about my practical experiences concerning the application of the guidelines in the day-to-day practice in our federal courts.

Sincerely,

Michael Stepanian

**Re: COMMENTS ON SELECTED PARAGRAPHS FROM
THE PROPOSED CHANGES TO THE SENTENCING GUIDELINES**

Amendment Number 10 - Drug Trafficking (2D1.1): Resolves split among circuits by providing that term "mixture or substance" does not include uningestible, unmarketable portions of drug mixture

The use of the use of the uningestible or unmarketable portions of drug mixtures has concerned never resulted in guidelines calculations which have seemed just or fair. The Synopsis of the amendment seems to address the rationale for the recommended modification adequately. The severity of old law cases was determined by use of a combination of purity of the substance as determined by DEA or other lab reports, and for illicit drugs other than opiates, cocaine and marijuana, the number of dosage units which would result from that "100% equivalency" amount. While the quantity of substance which officially was considered to be the equivalent of a "dosage unit" often was different than what was commonly considered to be a "dosage unit" by the end users, there was at least some factual basis and proportionality to the severity categories. In this old calculation, the unusable or uningestible quantities were not to be used.

Probation Officers were to reflect their calculations in the sentencing reports, or lab reports were to be referred to as the factual basis for the determination of the quantity of drug involved. The present, and hopefully soon to be amended, guideline leaves too much room for unwarranted disparity, and for the imposition of sentences which too often seem to over-reach what the true severity of the offense is. The amendment proposed would seem to minimize the obvious problems with the present guideline.

I also would, for the same reasons, strongly endorse the adoption of the changes proposed in Amendments 49 and 50, as proposed by the Legislative Subcommittee of the Federal Defenders. Although the present guidelines/ Application Note 11 states that "for controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. . . ." (emphasis added), the proposed Amendment 50 would make clear that the medium or mixture substance is not to be used.

Amendment 12 - Drug Trafficking (2D1.1): clarifies quantity of controlled substances to be considered when amount is under negotiation: I would strongly endorse the modification proposed. The "puffery" involved in drug transactions to gain the attention of the buyer is a common phenomenon and unnecessarily skews the levels of sanctions upward when the defendant never intended or was not capable of producing the amounts discussed. Where there is evidence and the Court makes findings that the defendant was incapable of or otherwise did not intend to produce the quantity discussed during negotiations, it is only reasonable, and again, just, that the only the quantity of drugs which the defendant was reasonably capable of producing and/or intended to produce, comprise the scope of the offense and that the offense conduct be rated as such.

This is related also to

Amendment 13 - Drug Trafficking (2D1.1): an issue for comment addressing the calculation of the weight under negotiation I reverse sting operations: The "puffery" on both sides in these situations is legend. While one would wonder why defendants being offered something that is "too good to be true" in terms of costs for illicit substances being offered don't get smart, the reverse sting operations continue to be wildly successful. It has long been obvious that in these operations, the agents involved are very aware of what the "threshold" quantities are, and ever urge their target to buy in to larger quantities than what often was initially intended by the target (soon to be defendant). It also is not uncommon for the "deal" to result in agreements that, because the target wasn't prepared to provide larger amounts of money for the larger quantities of drugs, a staggered distribution and payment plan is "agreed" upon, to "help" the target out.

I would suggest that a reasonably equitable way to address what amounts to be a disparate handling of these cases could be to either 1) rate the offense on the basis of the amount of substance that the defendant intended to purchase when the contact was initially made, or 2) to rate the offense on the basis of how much of the substance would have been purchased, using the "going rate" as compared to the artificially low rate, for the substance in question. That would reduce the motivation for the DEA or other agents to push quantities beyond what the target intended, or would at least equalize the handling of the offender once caught. Games probably would result from this approach as well, but at least there would be some opportunity for the offense to be rated more similarly to what the rating would have been, based on the offender's intent.

Amendment 56 - Retroactivity of Amended Guideline Range (1B1.11) - adds Acceptance of Responsibility amendment to list of potential retroactive application;

also revises policy statement to allow court to reduce a sentence for amendments not on the list if consistent with the purposes of sentencing: What a wonderfully logical proposal. With all the guideline changes, not very many reduce the level of sanctions that have been imposed under previous guidelines. Where it is "consistent with the purposes of sentencing" the courts should have the prerogative and authority to take action to modify sentences which have been favorably affected by the subsequent changes. There would be precious few of these, and would serve to promote a feeling that the system is responsive in a favorable manner, rather than only adversely.