**United States Sentencing Commission**
**Public Hearing on Proposed Guideline Amendments**
***March 22, 1993***

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| 1. | 9:00 a.m. | Don Bergerson<br>Barry Dumont |
| 2. | 9:15 a.m. | K.M. Hearst<br>U.S. Postal Inspection Service |
| 3. | 9:30 a.m. | Judge Vincent Broderick<br>Judge Mark Wolf<br>Judicial Conference of the United States |
| 4. | 9:45 a.m. | Thomas Guidoboni<br>David W. O'Brien |
| 5. | 10:00 a.m. | Carol Brook<br>Federal Defenders |
| 6. | 10:15 a.m. | Rabbi Moshe C. Horn<br>Aleph Institute |
| 7. | 10:30 a.m. | Donald E. Santarelli<br>Steve Salky<br>American Bar Association |
| | 10:45 a.m. | Break |
| 8. | 11:15 a.m. | Stephen R. LaCheen<br>Pennsylvania Association of Criminal Defense Lawyers |
| 9. | 11:30 a.m. | Michael P. Dolan<br>Internal Revenue Service |
| 10. | 11:45 a.m. | Alan Chaset<br>National Association of Criminal Defense Lawyers |
| 11. | 12:00 p.m. | Santina Bayerle |
| 12. | 12:15 p.m. | Eric Sterling<br>Criminal Justice Policy Foundation |
| | 12:30 p.m. | LUNCH |

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| 13. | 1:30 p.m. | Roger Pauley<br>Department of Justice |
| 14. | 1:45 p.m. | James M. Becker<br>Criminal Law Committee, Federal Bar Association |
| 15. | 2:00 p.m. | John Beresford |
| 16. | 2:15 p.m. | Gene Brown<br>Faye Flanagan<br>Douglas Thrasher<br>Denise Helou<br>Marlene Miller |
| 17. | 2:30 p.m. | Julie Stewart<br>Families Against Mandatory Minimums |
| 18. | 2:45 p.m. | Nkechi Taifa<br>American Civil Liberties Union |
| | 3:00 p.m. | Break |
| 19. | 3:15 p.m. | Michael Stepanian<br>Drug Policy Foundation |
| 20. | 3:30 p.m. | David Overlock Stewart<br>Ropes & Gray |
| 21. | 3:45 p.m. | Chuck Morley<br>The Morley Group |
| 22. | 4:00 p.m | Mary Shilton<br>International Association of Residential and Community Alternatives |
| 23. | 4:15 p.m. | John Zwerling<br>National Organization for the Reform of Marijuana Laws |
| 24. | 4:30 p.m. | Paul B. Bergman<br>New York Council of Defense Lawyers |
| 25. | 4:45 p.m. | Ed Rosenthal |

Before the

# UNITED STATES SENTENCING COMMISSION

*In re Proposed Amendments to the*
*United States Sentencing Guidelines*

## STATEMENT OF DONALD THOMAS BERGERSON

In Support of Proposed Amendment Number 50
(LSD Sentencing)

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2431 Fillmore Street
San Francisco, California, 94115
Telephone: (415) 621-8149

# UNITED STATES SENTENCING COMMISSION

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In Support of Proposed Amendment Number 50
(LSD Sentencing)

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TO: THIS HONORABLE COMMISSION and INTERESTED PARTIES:

I am Donald Thomas Bergerson. I am an attorney in San Francisco, California. I was counsel for one of the litigants in *Chapman v. United States* 500 U.S. ___, 114 L.Ed.2d 524 (1991), discussed below. This is written testimony in support of proposed amendment 50 to the Sentencing Guidelines. The proposed amendment will ameliorate the impact of language in the statute and the Guidelines which has led to unjust results in *Chapman* and in all other cases involving LSD.

In this statement, I shall outline (1) the background of the issue; (2) criticisms of the current "carrier weight based sentencing" scheme in the Guidelines; and (3) some thoughts about why modification of the Guidelines is a valid interim solution even though Congress has not yet acted to ameliorate the underlying problem.

## I
## Background

As the Commission is aware, drug offenders are generally sentenced on the basis of the weight of the "mixture or substance containing" the drug. Although some drugs are *also* penalized in

their pure form, this "mixture or substance" language was inserted into each statutory subsection specifying the quantity of drugs which trigger a given penalty.

In *Chapman v. United States, supra,* 500 U.S. ___, the Supreme Court held that absorbant paper containing minute quantities of LSD constitutes a "mixture or substance containing LSD" for sentencing purposes. Most LSD trafficking involves this technique of placing LSD on paper.

*Chapman* reached its result by using a broad "dictionary" definition of the word "mixture." This approach was misleading because LSD does not, in fact, "mix" with blotter paper in any scien tific sense. *See,* Testimony in *U.S.A.* vs. *Forbes, et. al.,* (NDCA CR-91-0087-VRW (LSD is attracted to the surface of the paper by a process akin to static electricity, but does not "mix" with its fibers). More importantly for purposes of this Commission, the *Chapman* definition of "mixture" appears to vary from the Congressional intent underlying the incorporation of that word into the relevant statute. The House report accompanying the legislation states that the word was used to target dealers who adultrate drugs with 'cut' or 'filler' in order to increase the apparent volume of contraband, and thereby boost their profits[1]. While weighing the 'cut' is an appropriate technique to discourage trafficking in drugs that are sold by weight, LSD is not sold by the weight of the mixture containing it; rather, it is sold by the dose.

The absorbant paper used in LSD trafficking fills a completely different role from that played by the 'cut' in heroin or cocaine dealing. A dose of LSD is an infinitesimally small droplet of stuff, typically weighing a mere fifty *millionths* of a gram. This is too tiny a measure to be handled by either the user or the seller. To be handled, a dose of LSD must be placed onto something considerably larger than the dose, itself. In the 1960s, a variety of materials, (most commonly, tablets or sugar cubes), were used for this purpose; more recently, sheets of gelatin or paper have been employed. The typical LSD consumer is not "fooled" by the size of the tablet or paper into thinking he has bought "more" LSD merely because he has bought a bigger tablet or a heavier piece of paper. No matter how big the carrier may be, the size of the dose of LSD, and its

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1. See, H.R. Rep. 98-845 at pp. 11-12 (1986)

price[2], is unaffected[3].

## II
## The Problem

Weighing paper *does,* however, impact drastically on LSD *sentences.* Because LSD is so light, *any* carrier is far heavier than the drug. As such, weighing the carrier greatly increases the weight of the "LSD" for sentencing purposes. For example, in one of the cases considered along with *Chapman,* the LSD weighed only six tenths of a gram, while the paper weighed over a hundred grams. This is the difference between a level 22 and a level 36 sentence,--a difference of some twelve and one half years at the lowest end of each respective Guidelines range[4]. [*United States v. Marshall* 908 F.2d 1312 (7 Cir., 1990) *aff'd* sub. nom., *Chapman v. United States, supra,* 500 U.S. ___.

This yields sentences in typical LSD cases which are *hundreds* of times more severe than are sentences for other drugs. Ironically, this is the result of an apparent effort by Congress to place drug

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2. According to the National Narcotics Intelligence Consumers Commission, Report 1988: The Supply of Illicit Drugs to the United States 52 (1989), the price of LSD is as little as thirty-five cents per dose. As indicated hereafter, this means that first offender can get five years in prison for $75.00 worth of LSD if sentenced according to carrier-weight-based sentencing.

3. I recognize that arguing the difference between carrier and 'cut' may "prove too much." Arguably, LSD carriers are more integral to LSD dealing that 'cuts' are in heroin or cocaine trafficking, since the the latter drugs could, as a practical matter, still be sold even if in pure form while LSD cannot.

A distinction must be drawn between the importance of the carrier in LSD trafficking and the appropriateness of weighing the carrier in determining the LSD sentence. No doubt, money is also essential to LSD trafficking (and the value of the transaction is a good indication of its size); however, one would not think of weighing the currency involved in a dope deal, lest the kingpin who was paid in thousand dollar bills get a lesser sentence than a similar dealer who accepts payment in twenties. It can be argued that carriers are properly targeted in LSD cases because wiping them out would eliminate the traffic. But this argument can be made with regard to other paraphanalia, e.g. syringes in the heroin trade, which no one would rationally think of weighing in order to determine the quantity of the drug involved in the transaction.

4. The distortion is magnified when other carriers are used. For example, sugar cubes, another LSD carrier, weigh aproximately 2 grams apiece; as such, trafficking in a mere five doses of LSD on sugar cubes will trigger the ten year mandatory minimum for trafficking in over ten grams of LSD. 21 USC 841(b)(1)(A)(v) See, Chapman, supra, 114 L.Ed.2d at 533, fn 2.

penalties in parity with each other. For example, the basic anti-drug statute, 21 USC 841(b), imposes a five year minimum sentence for selling a mixture containing 100 grams of heroin or 500 grams of cocaine; according to the relevant authorities[5], each of these amounts corresponds to something in the neighborhood of 20,000 doses of each respective drug. For LSD, the five year minimum is triggered at 1 gram. Not surprisingly, a gram of *pure* LSD yields 20,000 doses (at 0.00005 grams per dose), putting LSD right in line with heroin and cocaine. However, when paper is factored in, these equivalencies are skewed wildly; Chapman's 1,000 doses weighed 5.7 grams[6], meaning that Chapman crossed the 1 gram threshold with less than 200 doses; Chapman's punishment was thus one hundred times greater than that which would have been meted out to a trafficker in heroin or cocaine. Nor is Chapman's a unique case; in his dissent, Justice Stevens pointed out that this problem plagues *all* LSD cases. *Chapman,* 500 U.S. at ___, 114 L.Ed.2d at 543, fn. 10, Stevens, J., dissenting.

Indeed, Chapman's case was 'unusual' only in that he trafficked in extremely *light* paper. This leads to a second troubling paradox in LSD cases; since not all paper weighs the same, bigger dealers sometimes get lesser sentences merely because they use lighter paper. The paper used by trafficker who sold under 500 doses of LSD in *United States v. Rose* 881 F.2d 386 (7 Cir., 1989) weighed .0154 grams per dose. Although Chapman trafficked in over twice the number of doses as did Rose, his anticipated Guidelines sentence (level 28) would have been *less* than that for Rose (level 30), had Rose been sentenced under the Guidelines. In other words, carrier-weight-based sentencing yields a skewed schedule of penalties amongst traffickers in identical amounts of LSD.

A third problem created by the carrier-weight-based sentencing scheme is that the gossamer weight of the LSD, itself, has virtually no impact on the ultimate sentence. As a practical matter, this means that some large dealers in pure LSD are escaping punishment altogether. To supply just one anecdote, just after I did the *Chapman* case, I handled an LSD arrest in San Francisco involving three

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grams of pure LSD. Although this fell within the five year mandatory minimum, it was deemed to be too small for prosecution in the Federal court, so the primary defendant in the case was prosecuted in state Court, where he ended up with only a probationary sentence. This defendant, who trafficked in six times the quantity of LSD that fetched the defendant a twenty year sentence in *Marshall,* was *obviously* a fairly large dealer, since three grams of crystal LSD suggests access to an actual LSD laboratory. Yet, because of carrier-weight-based sentencing, he escaped with only a minor penalty.

Carrier-weight-based sentencing produces all sorts of similarly silly results. For example, if an LSD dealer manages to dispose of his LSD, (either by selling it or destroying it prior to his arrest), he will be sentenced only for the weight of a 'typical' dose of *pure* LSD. (U.S.S.G. 2D1.1, *Commentary* 11) Carrier-weight-based sentencing affords *this* offender a massive "break" for either inserting LSD into the stream of commerce (the very thing the drug laws are supposed to prevent) or for obstructing justice.

Beyond its implications for LSD offenders, carrier-weight-based sentencing threatens to impact adversely on the deployment of enforcement resources in an era of shrinking budgets. The typical LSD dealer, particularly the modest trafficker in hundreds of doses such as Chapman, is a young person from a sheltered background who has temporarily embarked on a period of 'hippie-style' experimentation. Naive and passive, he presents an easy 'mark' for enforcement officers, and carrier-weight-based sentencing inflates the value of the small quantities seized from him. No wonder LSD arrests have increased during the period since *Chapman;* the 'value' of LSD arrests is 'subsidized' by carrier-weight-based sentencing. It is questionable that this reflects the intent of Congress; when the antidrug amendments were debated in 1986, the only reference made to LSD was a statement to the effect that its menace was *diminishing*[7]. At any rate, it is hard to defend the targeting of LSD dealers as a rational enforcement priority.

In short, LSD sentencing is a mess. No one believes that LSD is a more dangerous drug than heroin or cocaine. Yet LSD sentences are roughly a hundred times greater than those assessed for more dangerous drugs, and vary wildly amongst LSD offenders, themselves on the basis of a wholly aleatory factor.

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7. See, 132 Cong. Rec. S14270 (9/30/1986; Sen. Harkin).

## III
## What This Commission Should Do,--and Why

I realize that however compelling the foregoing arguments may be, this Commission may be hesitant to act. Congress has, after all, thus far not amended the sentencing statute in response to *Chapman*, and a primary purpose of the Guidelines is to implement the statute. For reasons as follow, however, I believe that such concerns are misplaced.

First, nothing in this Commission's charter compels it to amplify Congress' mistake and continue to base punishment to the weight of LSD carriers. While this Commission is not empowered to enact remedial legislation, it can use its Guidelines-shaping power to ameliorate palpable injustices within the bounds of the existing mandatory minimum penalties provided by statute.

Second, by doing nothing, the Commission will in fact countenence a dismantling of sentencing uniformity in LSD cases *anyway*. It is an open secret that only a fraction of LSD sentences are Guidelines-sentences; a large remainder (which may, for all I know, constitute the majority) are mandatory minimum sentences imposed by judges who think carrier-weight-based sentencing to be foolish and Draconian. This perverts and undermines the basic principal of determinate sentencing. One first offender may get twenty years under the Guidelines for 10,000 doses, while another, in front of a different judge, may get a mandatory minimum half as long; I have no question that were the respective defendants to change judges, they would change penalties. I suppose that this happens, to a degree, with many types of crimes. But I suspect that it is a particularly troubling artifact in LSD cases, not only because the sentences in *both* types of cases are disproportionately long, but because sentence-selection is so nakedly tied to the judge's agreement or disagreement with the substantive law,--which *surely* was the one factor we hoped to eliminate with the passage of determinate sentencing.

Third, this Commission is vested with broad duties beyond merely constructing a sentencing table based on mandatory minima. Specifically, this Commission is charged with insuring that penal resources are efficiently allocated. 28 USC 994(c)(1)-(7). I have suggested *ante* that carrier-weight-based sentencing inefficiently focuses scarce enforcement resources on making fairly modest LSD seizures. This Commission is clearly empowered to eliminate such waste.

Finally, action by this Commission in the absence of previous Congressional action would have the salutory impact of *inspiring* such Congressional action. The Supreme Court has recognized that this is an "expert body," [*Mistretta v. United States* 488 U.S. 361, 379

(1989)], endowed with "significant discretion to determine which crimes have been punished ... too severely." *Id.*, at 377. This Commission is chartered with a host of duties ancillary to the exercise of this discretion, including revising inappropriate Guidelines, [28 USC section 994(o)]; recommending changes in statutory penalties, [28 USC section 994(r)]; issuing policy statements aimed at implementing its perception of the intent of Congress in passing criminal legislation, [28 USC section 994(a)]; and assisting the Federal judiciary in meeting its sentencing responsibilities, [28 USC section 995(a)(22)]. In light of these multiple founts of authority, this Commission should not hesitate to declare that LSD is punished disproportionately. If Congress disagrees, it will override the instant amendment to the Guideline. If it *agrees*, however, this Commission can credit itself with goading Congress towards a long overdue reform.

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I cannot close without making a personal comment. The reason I became involved in the *Chapman* case is that it arose out of a Seventh Circuit case involving my wife's brother. *United States v. Marshall, supra*, 908 F.2d 1312.

Stanley Marshall was a National Merit finalist and High School debate star who lost his bearings when his mother died unexpectedly. For years, he lived aimlessly. He tried LSD during this period, and I guess he liked it. Sometime in 1988, he was arrested for a first felony offense of having sold a few thousand dollars worth of LSD over several months.

Stanley was not a kingpin. He sold the LSD because he was homeless and his girlfriend was pregnant. Despite this, he got the sort of sentence traditionally reserved for a dealer like Manuel Noriega.

I was glad that Stanley was sentenced to prison. Prison sobered him and restored his mind. He learned to get up in the morning and eat regularly. He took a job, and he tells me he likes to work. Even so, I felt Stanley was ready to go home after two years; he had recovered sufficiently to get a *real* job and start a family. But he can't go home. He must still serve at least twelve more years of his twenty year sentence.

I need not tell the Commission how sad this is, not only for Stanley, but for the daughter he will never get to raise, and for my wife, and my children who love their uncle with his playful wit and foolish smile. Obviously, I miss him too.

If one of you can think of a reason why Stanley should serve twelve more years, please tell me. But I hope it is more compelling

than that he stored his drugs on a quantity of paper only a little heavier than the pamphlet you are now holding in your hands.

*Respectfully Submitted:*

DONALD THOMAS BERGERSON
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San Francisco, California, 94115
Telephone: (415) 621-8149

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Third, this Commission is vested with broad duties beyond merely constructing a sentencing table based on mandatory minima. Specifically, this Commission is charged with insuring that penal resources are efficiently allocated. 28 USC 994(c)(1)-(7). I have suggested *ante* that carrier-weight-based sentencing inefficiently focuses scarce enforcement resources on making fairly modest LSD seizures. This Commission is clearly empowered to eliminate such waste.

Finally, action by this Commission in the absence of previous Congressional action would have the salutory impact of *inspiring* such Congressional action. The Supreme Court has recognized that this is an "expert body," [*Mistretta v. United States* 488 U.S. 361, 379

(1989)], endowed with "significant discretion to determine which crimes have been punished ... too severely." *Id.*, at 377. This Commission is chartered with a host of duties ancillary to the exercise of this discretion, including revising inappropriate Guidelines, [28 USC section 994(o)]; recommending changes in statutory penalties, [28 USC section 994(r)]; issuing policy statements aimed at implementing its perception of the intent of Congress in passing criminal legislation, [28 USC section 994(a)]; and assisting the Federal judiciary in meeting its sentencing responsibilities, [28 USC section 995(a)(22)]. In light of these multiple founts of authority, this Commission should not hesitate to declare that LSD is punished disproportionately. If Congress disagrees, it will override the instant amendment to the Guideline. If it *agrees*, however, this Commission can credit itself with goading Congress towards a long overdue reform.

--oo00oo--

I cannot close without making a personal comment. The reason I became involved in the *Chapman* case is that it arose out of a Seventh Circuit case involving my wife's brother. *United States v. Marshall, supra*, 908 F.2d 1312.

Stanley Marshall was a National Merit finalist and High School debate star who lost his bearings when his mother died unexpectedly. For years, he lived aimlessly. He tried LSD during this period, and I guess he liked it. Sometime in 1988, he was arrested for a first felony offense of having sold a few thousand dollars worth of LSD over several months.

Stanley was not a kingpin. He sold the LSD because he was homeless and his girlfriend was pregnant. Despite this, he got the sort of sentence traditionally reserved for a dealer like Manuel Noriega.

I was glad that Stanley was sentenced to prison. Prison sobered him and restored his mind. He learned to get up in the morning and eat regularly. He took a job, and he tells me he likes to work. Even so, I felt Stanley was ready to go home after two years; he had recovered sufficiently to get a *real* job and start a family. But he can't go home. He must still serve at least twelve more years of his twenty year sentence.

I need not tell the Commission how sad this is, not only for Stanley, but for the daughter he will never get to raise, and for my wife, and my children who love their uncle with his playful wit and foolish smile. Obviously, I miss him too.

If one of you can think of a reason why Stanley should serve twelve more years, please tell me. But I hope it is more compelling

than that he stored his drugs on a quantity of paper only a little heavier than the pamphlet you are now holding in your hands.

*Respectfully Submitted:*

DONALD THOMAS BERGERSON
2431 Fillmore Street
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Telephone: (415) 621-8149

# WRITTEN TESTIMONY OF K. M. HEARST

## DEPUTY CHIEF INSPECTOR

## UNITED STATES POSTAL INSPECTION SERVICE

## BEFORE THE

## UNITED STATES SENTENCING COMMISSION

## MARCH 22, 1993

I AM K. M. HEARST, DEPUTY CHIEF INSPECTOR FOR CRIMINAL INVESTIGATIONS, UNITED STATES POSTAL INSPECTION SERVICE. I AM JOINED BY H. J. BAUMAN, COUNSEL.

I WANT TO THANK THE COMMISSION FOR THE OPPORTUNITY TO TESTIFY ON SEVERAL ISSUES OF INTEREST FOR THE POSTAL SERVICE. THE POSTAL SERVICE SUBMITTED FOUR AMENDMENTS TO THE COMMISSION. OUR FORMAL WRITTEN COMMENTS ON THESE PROPOSALS HAVE PREVIOUSLY BEEN SUBMITTED AND I WILL BRIEFLY SUMMARIZE THOSE COMMENTS.

WE ASK THE COMMISSION TO CONSIDER THE UNIQUE CHARACTER OF UNITED STATES MAIL AS THE CARRIER OF THE NATIONS CORRESPONDENCE, AND THE EFFECT OF MAIL THEFT CRIMES ON THE PUBLIC, AS IT CONSIDERS THESE PROPOSED AMENDMENTS. WE HAVE SEEN A CONTINUING INCREASE IN THE OVERALL VOLUME THEFTS OF MAIL. FOR EXAMPLE, MAIL THEFTS INCREASED OVER FIFTEEN PERCENT LAST YEAR. MORE SIGNIFICANTLY, VOLUME THEFT ATTACKS ATTRIBUTED TO POSTAL VEHICLE BREAK-INS, LETTER CARRIER CARTS/SATCHELS, AND MAIL STORAGE BOXES HAVE INCREASED SIXTY-ONE PERCENT WHEN COMPARED TO THE SAME PERIOD LAST YEAR. IN THESE CRIMES, NUMEROUS PIECES OF MAIL ARE TAKEN IN ONE CRIMINAL ACT, AND THE SAFETY OF POSTAL LETTER CARRIERS IS JEOPARDIZED. WHEN THEFT OF MAIL OCCURS, NOT ONLY ARE THE

CITIZENS WHO SEND OR RECEIVE MAIL VICTIMIZED, BUT ALSO THE POSTAL SERVICE, BECAUSE IT IS AN ATTACK ON AN ESSENTIAL GOVERNMENTAL SERVICE PROVIDED TO AMERICAN CITIZENS.

THE UNITED STATES MAIL HAS HISTORICALLY BEEN THE CARRIER OF THE "PUBLIC'S PAPERS." DUE TO THE EXPECTATION OF PERSONAL PRIVACY AMERICAN CITIZENS HAVE IN THEIR CORRESPONDENCE ENTRUSTED TO THE CARE AND CUSTODY OF THE POSTAL SERVICE, MAIL IN OUR CUSTODY, UNLIKE DOCUMENTS IN THE POSSESSION OF A COMMON CARRIER, IS PROTECTED BY THE FOURTH AMENDMENT.

TWO OF THE FOUR GUIDELINE AMENDMENTS ARE IN THE AREA OF MAIL THEFT. THE FIRST AMENDMENT WOULD INCREASE THE LEVEL FOR MAIL THEFT TWO LEVELS, IN ADDITION TO LEVELS ADDED FOR THE DOLLAR LOSS. WE BELIEVE THIS INCREASE IN THE LEVEL MORE PROPERLY REFLECTS THE HARM CAUSED BY THE MAIL THEFT IN GENERAL.

OUR SECOND AMENDMENT DEALS WITH THE RELATED ISSUE OF SCHEMES TO STEAL LARGE QUANTITIES OF MAIL. OUR EXPERIENCE HAS SHOWN THAT THESE CRIMES ARE OFTEN COMMITTED BY ORGANIZED CRIME ORGANIZATIONS OR GANGS. LARGE VOLUMES OF MAIL ARE STOLEN IN

ORDER TO INSURE THE THIEVES OBTAIN MAIL WHICH CONTAINS ITEMS OF VALUE, SUCH AS CREDIT CARDS AND WELFARE OR SOCIAL SECURITY CHECKS WHICH ARE THEN FRAUDULENTLY NEGOTIATED OR USED. WHILE MANY MAIL THEFT CRIMES ARE OFTEN CRIMES OF OPPORTUNITY, THESE OFFENSES, WHICH ARE THE PRODUCT OF PLANNING AND SURVEILLANCE BY CRIMINALS, ARE EVEN MORE SERIOUS AND DISRUPTIVE. THEY IMPACT THE ECONOMIC WELL BEING OF NUMEROUS VICTIMS AND CAUSE A MAJOR DISRUPTION TO OUR POSTAL SYSTEM. IN THIS REGARD, WE HAVE PROPOSED A NEW GUIDELINE WHICH WOULD SIGNIFICANTLY INCREASE THE OFFENSE LEVEL FOR SCHEMES INVOLVING THE THEFT OF MULTIPLE PIECES OF MAIL.

THIS LEADS TO OUR NEXT AMENDMENT ISSUE WHICH IS OF SPECIAL IMPORTANCE -- THE PUBLIC TRUST GUIDELINE -- AS APPLIED TO EMPLOYEES OF THE POSTAL SERVICE. AS YOU ARE AWARE, THERE ARE TWO PROPOSED AMENDMENTS ON THIS GUIDELINE PENDING BEFORE THE COMMISSION. OUR PROPOSAL WOULD PLACE LANGUAGE IN THE GUIDELINE COMMENTARY WHICH WOULD CLARIFY THAT A POSTAL EMPLOYEE, BY VIRTUE OF THE SPECIAL FIDUCIARY POSITION WITH THE AMERICAN PEOPLE AND THEIR CORRESPONDENCE, SHOULD BE SUBJECT TO THE ENHANCEMENT PROVIDED IN THE GUIDELINE. IT IS OUR STRONG FEELING THAT THE FEDERAL CRIMINAL STATUTES

APPLICABLE EXCLUSIVELY TO OFFICERS AND EMPLOYEES OF THE POSTAL SERVICE, WHICH HAVE BEEN IN PLACE FOR OVER ONE HUNDRED YEARS, DISTINGUISH THEIR POSITION FROM THAT OF THE ORDINARY BANK TELLER. FOR THESE REASONS, WE STRONGLY OPPOSE A MORE RESTRICTIVE INTERPRETATION OF THE PUBLIC TRUST GUIDELINE AND URGE THE COMMISSION TO ADOPT OUR PROPOSED AMENDMENT. WE WOULD CLARIFY IN THE COMMENTARY THAT THE GUIDELINE EXPLICITLY APPLIES TO POSTAL EMPLOYEES WHO ABUSE THEIR POSITION TO STEAL MAIL, POSTAL SERVICE PROPERTY, OR EMBEZZLE POSTAL SERVICE FUNDS.

IN REGARD TO OUR FOURTH AND FINAL GUIDELINE AMENDMENT, WE ASK THE COMMISSION TO SET AS ONE OF ITS PRIORITIES FOR THE NEXT AMENDMENT CYCLE, A STUDY OF MULTIPLE VICTIM CRIMES AND THE FORMULATION OF A NEW GUIDELINE. THE POSTAL INSPECTION SERVICE, AS AN ADVOCATE OF VICTIMS' RIGHTS, BELIEVES THE NUMBER OF PEOPLE AFFECTED BY A CRIME IS AN IMPORTANT ELEMENT IN MEASURING THE CRIME'S OVERALL HARM TO SOCIETY. IT IS OUR POSITION THAT THE GUIDELINES SHOULD INCLUDE THIS AS A FACTOR IN THE SENTENCE COMPUTATION.

AS A FINAL MATTER, WE FEEL NO CHANGE IS NECESSARY TO THE MONEY LAUNDERING GUIDELINES. CLEARLY, THE LEGISLATIVE INTENT WAS TO CREATE A SEPARATE CRIME WITH A MORE SERIOUS PENALTY FOR MONEY LAUNDERING OFFENSES, DISTINCT FROM THE SPECIFIED UNLAWFUL ACTIVITIES. FOR THESE REASONS, WE SUPPORT THE POSITION OF THE DEPARTMENT OF JUSTICE ON THIS ISSUE. WE URGE THE COMMISSION TO MAINTAIN THE SEPARATE AND HIGHER OFFENSE LEVEL FOR MONEY LAUNDERING OFFENSES.

I WANT TO THANK THE COMMISSION FOR THIS TIME, AND WILL NOW ENTERTAIN ANY QUESTION CONCERNING OUR COMMENTS.

# Epidemic of Mail Truck Robberies Sweeps Southland

■ **Crime:** Gangs of thieves targeting welfare and Social Security checks are growing more brazen. Officials say the problem began spreading after the riots.

By PATRICE APODACA
TIMES STAFF WRITER

Gangs of thieves seeking government checks and credit cards are causing an epidemic-like increase in the theft of mail from postal trucks while carriers walk their rounds, according to federal authorities.

The problem began escalating in South-Central Los Angeles after last spring's riots. It has spread across Southern California, authorities say. Thieves are on the prowl from Santa Ana to Ventura.

Since October more than 100,000 pieces of mail have been stolen from trucks in the Postal Service's Los Angeles Division, which covers Los Angeles, Orange, Ventura, San Bernardino and Riverside counties. Total losses are unknown. Welfare checks totaling several hundred thousand dollars have been taken, officials say.

In the year that ended Sept. 30, postal vehicle break-ins in the region nearly doubled from the previous year, to 289. More than 200 have already been reported in the five months since then.

It's an "epidemic-type situation," said David H. Smith, the head Los Angeles postal inspector.

"It started picking up after the riots, then it just took off," Smith said. "Before you could say boo, it jumped from five or six a check day to 25 or 40 a check day." Check days are when public assistance checks are delivered.

Los Angeles postal inspectors recently broke up a gang that they think broke into trucks from Long Beach to San Jose.

The gang is believed to have brought illegal aliens across the border and then coerced them into smashing truck windows and grabbing mail trays. An alleged kingpin and two suspected accomplices are under federal indictment in Phoenix.

The three are accused of changing the names on stolen checks and depositing them in banks in Arizona. Gang members would withdraw cash from automated teller machines or write checks against the accounts, prosecutors say. When the arrests were made in January, one Arizona account contained about $24,000.

Vehicle break-ins are now "the major focus of my attention," Smith said.

This type of crime comes in waves every few years, officials say but the latest surge may be the biggest ever.

As for causes, they cite high unemployment.

Please see THEFTS, A24

# THEFTS: Epidemic of Mail Robberies

Continued from A3

"As people get more desperate for money, they resort to more desperate means," postal inspector Pamela Prince said.

Another likely cause of the surge: The crime has become organized.

In a typical operation, "one central person is controlling a group of runners who are going out and breaking into the vehicles," Smith said. "All it takes is one or two or three really smart operators."

Gang members sometimes cash the checks using phony identification. Or they alter the checks and cash them at places that do not ask many questions. Stolen credit cards can be taken to Las Vegas and charged to the limit.

For a welfare recipient, the theft of a check can be a major problem. Getting a replacement can take months, officials say, despite their policy of making it a high priority.

"For some elderly people on Social Security, if their check is stolen they're in dire straits," postal inspector Ray Chaves said.

Prince says an underlying cause of the increase in break-ins is diminishing respect for the mail and mail carriers. If the Postal Service was once considered sanc-rosanct, last year's riots showed that it no longer is. Several post offices were plundered. One was burned to the ground.

While stealing from unattended vehicles is the most common technique, recent incidents suggest that mail thieves are growing more brazen.

In August, a carrier in Redondo Beach was attacked by a man who cut him with a knife and stole a tub of mail. The attacker has pleaded guilty to assault.

In September, a female carrier was attacked in Los Angeles by two men who held a sawed-off shotgun to her chest, sprayed a chemical disabler in her face and grabbed 500 pieces of mail.

This month, two armed robbers stole a load of mail at a postal facility on Washington Boulevard near Crenshaw Boulevard.

Federal officers have started patrolling streets on check days, and the number of truck break-ins has dropped from more than 25 to 15 or 20 a day, Smith said.

Since October, 12 arrests tied to postal vehicle break-ins have been made in the Los Angeles district. An undercover task force hopes for more arrests, Smith said.

"We are getting more and more leads on who these people are, and we are getting closer and closer to getting identifications," he said.

Burglarizing a postal vehicle and stealing or receiving stolen mail are punishable by up to five years in federal prison. Related offenses such as forgery, interstate transportation of stolen property and violation of organized crime statutes carry heavier penalties.

Postal officials are sending warnings to check-cashing establishments, the ultimate losers when a stolen check is traced back to them. Printed warnings tell how to spot phony identifications, altered checks and other signs of trouble.

Also, about 85% of the old delivery trucks in the Los Angeles district have been replaced with vehicles lacking rear windows.

To encourage public involvement, officials are giving neighborhood groups and post notices asking people to watch for suspicious activity around trucks.

"My job is to stop this," Smith said. "If I have to do it by arrests, so be it. If I have to do it by public awareness, that's great. We're going to get them."

Postmaster
33 College Ave.
Waterville, ME 04901-9998



# Ex-postal clerk gets 60 days for theft

By JOHN HEALY
Gary Gannett Service

PORTLAND — A former U.S. Postal Service mail handler was sentenced in federal court Wednesday to 60 days in prison for stealing two checks worth $15 from the Naples post office.

The sentencing of Lisa M. Burns, 30, highlights what the U.S. government contends is a widening problem of theft in the Postal Service.

The U.S. attorney for Maine has handled eight postal theft cases in the past three years and 50 or more over the last decade, authorities said Wednesday.

"And these are just the ones we've caught," said Postal Inspector Robert Bethel.

Paula Silsby, the assistant U.S. attorney who prosecuted Burns, told U.S. District Judge Gene Carter, "The government believes a significant number of postal employees do precisely what Lisa Burns did, and that is steal from their employer."

The Postal Service was unable to provide any detailed statistics of such crimes. But the president of the local postal workers' union, while conceding that thefts occur, said they are rare.

"I can't see where anyone would say it's widespread and getting worse," said Wayne Poland.

Judge Carter tried to use Wednesday's sentencing hearing to deter other postal employees and to reassure the millions of people who rely on the mail service.

"You were a federal government employee in violation of a solemn oath," Carter admonished Burns, who was earning $16.50 an hour after 10 years with the post office at the time of the thefts in 1982.

Carter stressed that the crime was more serious than simple theft.

"You've violated those who entrust their property to the integrity, the safekeeping and the care of the United States Postal Service," Carter said.

Burns' attorney, William Maselli of Auburn, indicated that he may appeal the sentence. He pleaded for leniency, arguing that Burns suffered from alcoholism at the time of the crime and has since become sober.

Burns was convicted by a federal court jury last November of stealing and cashing two "bearer coupons," the kind of checks consumers receive in popular rebate programs from manufacturers.

The checks, worth $5 and $10, were sent by the post office's inspection service as part of a random investigation intended to root out theft.

Bethel, the postal inspector, said the post office does not monitor the monetary value of internal theft.

"We're not looking at monetary value; it's not important," he said. "The integrity of the mail is all that matters. The sanctity of the mail is the most important thing."

Poland, the head of the Portland local of the American Postal Workers Union, said the national union regularly uses its newsletter to warn postal workers of the risks of stealing.

He added that the union may include a story about the Burns case in an upcoming issue "just to make people aware of what they're jeopardizing."

"I can't understand where anybody would think it would be worth it for such a small amount of money," Poland said.

OAKLAND TRIBUNE
Oakland, California
February 10, 1993

SAN FRANCISCO DIVISION

# Postal truck crooks hit again

## ■ Thieves of welfare, Social Security checks reach out to Richmond

By Cecily Burt
STAFF WRITER

RICHMOND — Crooks targeting monthly deliveries of welfare checks are expanding their territory beyond Oakland and San Francisco, breaking into two postal vehicles in Richmond early this month.

Thieves in Oakland and San Francisco have been targeting first-of-the-month mail deliveries because they include an abundance of public-assistance and Social Security checks. In Oakland alone, more than a dozen postal vehicles have been broken into since the end of last October.

Now thieves have turned their attention to postal vehicles in Richmond. Even though theft of such mail has not typically been a problem in the city, the breakins of two vehicles on Feb. 1 prompted the Postal Inspection Service to offer rewards of as much as $1,000 for information leading to the arrest and conviction of the perpetrators.

One of the vehicles was broken into at about 1:30 p.m. while parked at the corner of South and Beck streets. The other vehicle was broken into at about 3:15 p.m. while parked at 1600 Gayner St.

Persons convicted of felony mail theft can face fines up to $250,000 or five years in jail, or both.

Anyone with information should call the Postal Inspection Service in Oakland at 510 636-2600 and ask for the External Crimes Team. Anonymous tips are welcome.

SAN FRANCISCO CHRONICLE
San Francisco, California
February 10, 1993

SAN FRANCISCO DIVISION

# BAY AREA REPORT

■ REGION

## Reward Offered In Carrier Robberies

The U.S Postal Service yesterday offered two $10,000 rewards for information leading to the arrest of suspects in the beating and robbery of a San Francisco letter carrier and the armed robbery of an Oakland postal clerk.

On February 1, a San Francisco carrier was beaten by three men near the Daly City BART station after he refused to hand over mail containing welfare and Social Security checks, said Michael Baum, spokesman for the U.S. Postal Inspection Service. The robbers stole the carrier's wallet but ran off without taking any mail.

The next day, a gunman described as 25 to 30 years old stole an unspecified amount of cash from a postal clerk outside the North Oakland Postal Station, Baum said.

Anyone with information is asked to phone 415-550-5625 or 510-636-2600.

# Encinitas mail thefts said to trip

By Mirna Alfonso
Staff Writer

Mail thefts in Encinitas have nearly tripled, a federal postal inspector said.

In 1992, 650 mail thefts were recorded, compared with 262 the year before, U.S. Postal Inspector David Fast said.

"We're extremely worried about the situation," he said. "It's just like a tide. You don't know when it's going to hit."

Officials reportedly suspect most of the thefts, which mainly target mailboxes, are committed by the "Route 78" bandits, a loosely knit crew whose members move up the North County coast, then onto Highway 78 into Escondido.

"They're starting to move into the wealthier areas," Fast said, adding that criminals term Escondido "yuppie haven."

The group, which allegedly recruits new people as members are jailed, usually are methamphetamine users who burglarize mailboxes looking for checks, credit cards and identification, Fast said.

The method involves either following mail trucks, knowing when checks will arrive or watching for a mailbox's red flag to be up.

One arrest involved a man named Nick Bruno, also known as Nick Robertson.

On Jan. 4, Bruno was sentenced to five years in federal prison for stealing a number of credit cards and other mail in Carlsbad, Leucadia and Encinitas between 1990 and June 1992.

Bruno had rigged a device with which he quickly jimmied open post office boxes, Fast said.

He finally was caught when he broke i box in the midst of 40 people at the Car Post Office.

Postal inspectors, who had staked ou office, arrested him outside, Fast said.

Officials urge residents not to have checks or credit cards sent to their homes, leave mail in their boxes for pickup, and i can arrange it, to be home when the mail ca arrives.

People who suspect or know that mail been stolen should call the postal inspe office at 233-0610.

"People have to report this more in ord make arrests," Fast said.

"The most minuscule little thing maybe i big thing that breaks these cases," he said.

Blade Citizen
Oceanside, CA
January 24, 1993
SAN DIEGO DIVISION



Steve Malone/News-Press

Santa Barbara police Officer Leonard Gomez checks out a U.S. Postal Service vehicle as mail carrier Steven Berg takes inventory after the Jeep was broken into Monday.

# Mail thieves strike again, seize welfare checks off postal Jeep

By Jesse Chavarria
News-Press Staff Writer

They struck again.

Mail thieves broke into a U.S. Postal Service Jeep in Santa Barbara on Monday and took 1,500 letters, including government welfare checks, authorities reported.

The heist was a worri[illegible] of the year, when thousands of pie[illegible] and dozens of Social Secur[illegible] from Postal Service Jeep[illegible] lower Eastside and lower W[illegible]

"This is getting [illegible] said Lt. John Thayer. "Before Decem[illegible] remember this sort of thing in Santa [illegible]."

Police and postal officials said they suspect the same Los Angeles-based mail-theft ring pulled Monday's job. The thieves struck at the corner of San Andres and Valerio streets at 11:22 a.m.

"It's a pretty heartless thing," Thayer said. "They're taking money from needy people."

The burglary took place minutes after the postal carrier had locked the Jeep and started on door-to-door deliveries in the Westside neighborhood.

The robbers smashed the Jeep's rear window and pulled out two trays of mail. More might have been taken, but a nearby witness saw them, police said.

The trays contained letters bound for homes at the 1600-1900 blocks of San Pascual Street, the 1600-1900 blocks of San Andres Street, the 600 block of Mulberry Avenue, the 500 and 600 block of West Pedregosa Street and the 1500 block of Dutton Avenue, according to Santa Barbara's Post Office spokeswoman Mary Frink.

"As it happened, we were lucky," Frink said.

An off-duty mail carrier spotted the break-in and called 911, Frink said.

"He got a description of one of the suspects and took down the license plate," she said.

Police arrived quickly, but the two men had driven off toward the freeway and vanished.

Police believe their best chance of tracking down the pair is the getaway vehicle, described as a blue Ford Bronco with a white strip "in beat-up condition."

A computer check of the license number identified the truck's plates as from Los Angeles, police said.

Frink also is confident the thieves eventually will be caught.

Authorities already have nabbed suspects in the December mail theft in Santa Barbara, she said.

The arrests came in Phoenix after the suspects attempted to deposit stolen Social Security checks from Santa Barbara into a bank acount, Frink said. She had no further details, however.

PUB: Santa Barbara News-Press
CITY & ST: Santa Barbara
DATE: 2-2-93
LOS ANGELES DIVISION
CASE INSP:
DOMICILE:

FROM:ABCDEFGHIJKLMNOPQRSTUVWX TO:VICE PRESIDENT CORPO MAR 1, 1993 9:17AM #453 P.04

LOS ANGELES TIMES FEB 27 1993

# Man Arrested in Thefts From Postal Trucks

By [redacted]

SANTA ANA—Federal agents Friday arrested a Santa Ana man who allegedly acted as a fence for a gang that is responsible for stealing checks and credit cards from mail trucks throughout Orange and Riverside counties.

Marcello Barragan, 19, was taken into custody Friday morning at his home after he sold stolen checks and credit cards to undercover federal agents twice within the past month, authorities said.

Postal inspectors, assisted by Secret Service agents and Santa Ana police, also seized mail found at Barragan's home that was addressed to others, several credit cards, assault rifles, pistols and knives. About half a dozen more credit cards were found in the trunk of Barragan's dilapidated car.

Authorities also found several mail in the back yard that they believe might have been used for illegal conducting.

Barragan's arrest followed a nearly two-month investigation by a special postal inspection task force formed to combat what authorities call an epidemic-like increase in mail theft from postal vehicles throughout Southern California. In the last five months, about 220 mail trucks have been broken into in Los Angeles, Orange, Ventura, Riverside and San Bernardino counties.

The surge in thefts is attributed to such factors as the weak economy and high unemployment, and to mail theft evolving into an organized crime.

Authorities say gang members prowl neighborhoods in search of mail vehicles that have been left unattended while carriers make their rounds on foot. They smash the trucks' windows and steal bags of mail containing government assistance and insurance checks and credit cards. Other gang members sell the checks, or cash them using phony identification or by altering the names of the payees. Credit cards are often taken to Las Vegas, where they are quickly changed to their limit.

Postal inspectors said the gang Barragan was associated with has stolen hundreds of thousands of dollars worth of checks and credit cards in recent months. The gang also may be involved in armed robberies of mail carriers and drug sales, they said.

BURRELLE'S
NEWSPAPERS
PAGE 3

UNITED STATES POSTAL SERVICE
ROOM 3100
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2100

CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

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

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

**Proposed Amendment 20, § 2S1.1, § 2S1.2.** We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

OFFICIAL OLYMPIC SPONSOR

separateness and that the concept of "closely related" offenses should not apply. The commentary of the proposed guideline also draws a distinction which is not supported by the legislative intent or statutory definitions of "actual money laundering" as compared to "other money laundering." Simply stated, we believe if the government proves the elements of the statute, the defendant should be sentenced accordingly, without a further analysis of the criminal intent by the sentencing court. In view of our concerns with these proposed amendments, we support the existing guidelines which provide for a separate and higher offense level for money laundering not tied to the offense level of the specified unlawful activity. For the above reasons, the Postal Service endorses the position of the Department of Justice to maintain higher levels for money laundering offenses.

**Proposed Amendment 23, § 3B1.3.** We disagree with this proposed amendment's application to employees of the Postal Service, and submit in the alternative a revision to the commentary portion of this section which would make the public trust guideline specifically applicable to postal employees **(Amendment 46)**. Historically, postal employees have held a special fiduciary relationship with the American public because their personal correspondence is entrusted to the care and custody of the agency. This special trust is corroborated in the oath of employment and the long-standing federal criminal statutes which relate to the theft or obstruction of mail and embezzlement which apply exclusively to postal employees. In addition, these types of crimes significantly impair the Postal Service function and negatively impact on the public's trust in the institution.

Our proposed revision to the commentary would make the public trust guideline apply to employees of the Postal Service sentenced for theft or obstruction of United States Mail, (18 U.S.C. §§1703, 1709); embezzlement of Postal Service funds (18 U.S.C. §1711); and

theft of Postal Service property (18 U.S.C. §§1707, 641). To make this amendment comport to guideline commentary format, the statute citations are deleted. Application Note 1 is amended by inserting the following paragraph at the end:

> "This adjustment, for example, will apply to postal employees who abuse their position to steal or obstruct U.S. Mail, embezzle Postal Service funds, or steal Postal Service property."

It is our opinion the enhancement is justified because these crimes disrupt an important governmental function--the nation's postal system--as prescribed in § 5K2.7. Moreover, without the offense enhancement provided by § 3B1.3, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused by the offense under similar rationale discussed in § 2B1.3, comment (n.4). For example, the theft or destruction of mail by employees of the Postal Service necessarily impacts numerous victims, while the total dollar loss may be minimal.

Our proposal clarifies that the special trust relationship a postal employee has with the public and its written correspondence is significantly different from that of the employment relationship of the ordinary bank teller as cited by example in §3B1.3, comment (n.1), of the current guideline. Adoption of our proposed amendment would also provide for consistency in the application of this guideline in light of several court decisions, United States v. Milligan, 958 F.2d 345 (11th Cir. 1992) (court held that a postal clerk who embezzled funds had occupied a position of trust); United States v. Lange, 918 F.2d 707 (8th Cir. 1990) (postal employee who had access to certified and Express Mail was in a position of trust); United States v. Arrington, 765 F. Supp. 945 (N.D.Ill 1991)(a casual mail handler

was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

**Proposed Amendment 44, § 2B1.1(b)(4).** The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

**Proposed Amendment 45, (§ 3A1.4).** The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

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MISSING

# BEFORE THE UNITED STATES SENTENCING COMMISSION
# WASHINGTON, D.C.

March 22, 1993

**TESTIMONY OF**

**THOMAS A. GUIDOBONI, ESQUIRE**
**DAVID W. O'BRIEN, ESQUIRE**

**BONNER & O'CONNELL**
**Suite 1000**
**900 17th Street, N.W.**
**Washington, D.C. 20006**

Mr. Chairman, Members of the Commission, and staff, we appreciate the opportunity to appear before the Commission at this public hearing. We appear on behalf of ourselves as members of the bar with experience in the defense of Federal criminal prosecutions. That experience includes representing Robert Tappan Morris in the so-called "Internet Virus" case. This case, which was tried in the Northern District of New York in 1990, resulted in Mr. Morris' conviction for a violation of 18 U.S.C. § 1030(a)(5)(A) under the Computer Fraud and Abuse Act.[1/] Our testimony today will focus on the amendment proposed by the Department of Justice, which would create a new guideline, § 2F2.1 to address violations of the Computer Fraud and Abuse Act. In the interests of brevity, we will limit our testimony to our major concerns with the proposed amendment.

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1/ United States v. Morris, 89-CR-139 (N.D.N.Y.), aff'd, 928 F.2d 504 (2d Cir.) cert. denied, 112 S. Ct. 72 (1991).

## I. GENERAL CONSIDERATIONS - BASE OFFENSE LEVEL

We agree with the Department that it is often inappropriate to apply the fraud guidelines found at Guideline § 2F1.1 to certain violations of 18 U.S.C. § 1030. In the Morris case, the trial court held that the offense created by 18 U.S.C. § 1030(a)(5) did not require proof of an intent to cause damage, much less an intent to defraud. That ruling was upheld on appeal. 928 F.2d at 509. As a consequence, we argued to the Court at sentencing that Mr. Morris' offense was outside the "heartland" of typical "Fraud and Deceit" cases.[2/] Judge Munson agreed, and also found, under Guideline § 2X5.1, that there was "not a sufficiently analogous guideline" for sentencing Mr. Morris.[3/]

This is not to say, however, that it is always inappropriate for the Fraud and Deceit Guideline to be applied to any of the various offenses contained in § 1030. Those defined by subsections a(4) and a(6), require proof of an intent to defraud, and indexing to the Fraud and Deceit Guideline may be appropriate for these crimes. As to these subsections, as well as subsection (a)(1)[4/],

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[2/] Defendant's Memorandum in Aid of Sentencing is attached hereto as Appendix A. See pp. 4-6.

[3/] The judgment, including sentence under the Sentencing Reform Act in the Morris case, is attached hereto as Appendix B. See p. 7.

[4/] Section 1030(a)(1) which relates to obtaining national defense type data by use of unauthorized computer access is indexed to Guideline § 2M3.2 (Gathering National Defense Information). In our opinion, this is an appropriate indexing for the offense described in subsection (a)(1).

a new guideline is probably unnecessary as these offenses are adequately addressed by appropriate existing guidelines.

The remaining offenses created by § 1030(a) do require a new guideline unrelated to fraud. We believe, however, that the proposed Base Offense Level of 6 is too high, and a Base Offense Level of 4 is more appropriate. This conclusion is supported by reference to existing guidelines. The crime encompassed by subsection (a)(2) can best be described as "theft of information" by use of a computer.[5/] The Base Offense Level for theft is 4. Guideline § 2B1.1. The crimes included in subsection (a)(3) are described in the legislative history of the statute as "computer trespass." See S. Rep. No. 432 (Judiciary Committee), 99th Cong. 2d Session (1986) at 7, reprinted in 1986 U.S. Code Cong. & Admin. News 2479, 2484-85; H.R. Rep. No. 612 (Judiciary Committee), 99th Cong. 2d Sess. at 12 (1986). Trespass too has a Base Offense Level of 4. Guideline § 2B2.3. Finally, the offenses codified in subsection (a)(5) are acts of "malicious mischief," S. Rep. No. 432, supra at 5, 1986 U.S. Code Cong. & Admin. News at 2482; or "malicious damage," H.R. Rep. No. 612 supra at 7, 8. The Base Offense Level for Property Damage or Destruction is also set at 4, Guideline § 2B1.3. Thus, the most analogous guideline offenses carry a Base Offense Level of 4. There is no principled reason for

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5/ Congress has explicitly found that computerized information should be considered "property" for purposes of Federal Criminal Law. S.Rep. No. 612, supra at 13-4, 1986 U.S. Code Cong. & Admin. News at 2491.

utilizing a higher Base Offense Level here simply because the offenses involve the use of a computer.

This raises a related objection to the Department's proposal. In virtually every case brought under § 1030, the prosecution can be expected to urge an upward adjustment of two levels for "use of a special skill," Guideline § 3B1.3, since the offenses included in § 1030 can only be committed by a person with some level of skill in the use of computers. We therefore urge the Commission to conclude that use of a special skill is included in the Base Offense Level or specific offense characteristic, as permitted by Guideline § 3B1.3.

## II. SPECIFIC OFFENSE CHARACTERISTICS

We have several concerns with characteristics b(1) and (2) relating to the reliability and confidentiality of data. Our first is that the definition of "protected information" as set forth in the Commentary is too broad. Section 1030 itself enumerates certain types of information which are protected. These include classified national defense, foreign relations and restricted atomic energy data [subsection (a)(1)]; financial records of a financial institution or card issuer [subsection (a)(2)]; consumer credit information [subsection (a)(2)]; medical records [subsection (a)(5)(B)]; and passwords [subsection (a)(6)]. Level increases should be limited to obtaining or disclosing these types of information.

Our second problem relates particularly to the protection of government "whistleblowers." When enacting the Computer Fraud and Abuse Act, Congress went to some lengths to try to exclude such "whistleblowers" from its coverage. See S. Rep. No. 432, supra at 8, 1986 U.S. Code Cong. & Admin. News at 2485-86; H.R. Rep. No. 612, supra at 7. The proposed guideline appears contrary to this Congressional intent by virtue of its enhancement of the offense level for disclosure of "confidential" "non-public government information".

Another major concern with specific offense characteristics relates to the characteristic of "economic loss" in proposed subsection (b)(4). As we learned in the Morris case, calculation of such loss is speculative and inherently unreliable. See Appendix A at 7-10. This proposition was confirmed in the case of United States v. Craig Neidorf, 90-CR-70 (N.D. Ill. 1990), where a 20 year old student was accused of interstate transportation of stolen property, to wit, an E911 computer file which BellSouth characterized as "proprietary" and valued between $25,000 and $75,000. This prosecution was abruptly terminated mid-trial, when Neidorf introduced evidence that the file was publicly available and could be ordered at a cost of less than $20.[6/]

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[6/] The evidence in the case also indicated that the "proprietary" notice was placed on all BellSouth documents without any review of whether it was proper. This evidence calls into question the proposed enhancement based on obtaining and disclosing "proprietary commercial information."

Nor is inflation of such costs an isolated problem. For example, in Mr. Morris' case the "losses" included the costs of repairing pre-existing security defects in the UNIX operating system software. As the trial judge observed to a government witness, he "was patch[ing] a hole which should have been patched anyway." See Appendix A at pp. 9-10.

The "costs of system recovery" set forth in subsection b(4)(4)(A) are particularly susceptible to this type of abuse. In the Morris case the Army Research Lab spent hours examining and researching the virus long after it was aware of how to stop it. In addition, the Army Lab voluntarily chose to remain off the network for many hours after the other infected sites had reconnected. Nevertheless, all of this time was included in the Labs' damage estimate. At a minimum "costs" as used in the guideline should be limited to "reasonable costs."

Finally, we submit that unintentional costs or damages should not be weighed as heavily as intended consequences. Use of a computer is not equivalent to the use of an inherently dangerous instrument, and what constitutes an "unauthorized access" to another computer is not always clear-cut. See United States v. Morris 928 F.2d at 510. Under the circumstances it is inappropriate to utilize the same loss calculations for unintended results as are applied to intentional fraudulent conduct.

## CONCLUSION

In summary, we believe that a new guideline is appropriate for the offenses proscribed by 18 U.S.C. § 1030(a)(2), (a)(3), and (a)(5), but unnecessary for the other offenses in this statute. The Base Offense Level for the new guideline should be set at 4, not 6, and no upward adjustment permitted for use of a special skill. Finally, the specific offense characteristics must be more narrowly and realistically articulated in order to promote the goals of both the Sentencing Reform Act and the Computer Fraud and Abuse Act.

We thank the Commission for this opportunity to present our views.

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT TAPPAN MORRIS,

Defendant.

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DEFENDANT'S MEMORANDUM
IN AID OF SENTENCING

Case No. 89-CR-139
Hon. Howard G. Munson

## I. INTRODUCTION

On January 22, 1990, after an eight day trial, a jury in the United States District Court for the Northern District of New York, Syracuse Division, returned a guilty verdict against the defendant on a one count indictment charging a violation of 18 U.S.C. § 1030(a)(5)(A). Post-trial Motions For Judgment Of Acquittal Or For A New Trial were argued and denied from the bench on February 27, 1990. Mr. Morris is now before the Court for sentencing. The offense carries a maximum penalty of five years imprisonment, 18 U.S.C. § 1030(c)(3)(A)[1/], and a fine of not more than $250,000. 18 U.S.C. § 3571(b)(3).[2/] Mr. Morris

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1/ Mr. Morris has not been previously convicted of "another offense under this subsection or an attempt to commit [such] an offense." 18 U.S.C. § 1030(c)(3)(A).

2/ Pursuant to 18 U.S.C. § 3571(d), the Court could consider an alternative fine "of twice the gross gain or twice the gross loss." For reasons set forth at pp. 7-10, infra, defendant submits that imposition of such a fine "would unduly complicate or prolong the sentencing process."

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is also subject to a mandatory special assessment in the amount of $50.00. 18 U.S.C. § 3013(a)(2)(A).

## II. CALCULATION OF THE SENTENCING GUIDELINES

Since the date of Mr. Morris' offense was November 2, 1988, the Federal Sentencing Guidelines apply to his case. Pub. L. No. 98-473, §235(a)(1) as amended by Pub. L. No. 99-217, §4, 99 Stat. 1728 (Dec. 26, 1985). 18 U.S.C. § 3553(a)(4) provides that the Court must consider the guidelines "that are in effect on the date the defendant is sentenced." The parties have agreed, however, that such an application could raise constitutional problems under the ex post facto clause of Article I, § 9 of the United States Constitution, see Miller v. Florida, 482 U.S. 423 (1987), and the Court should apply the Sentencing Guidelines which were in effect at the time of the commission of the offense, where applying the later guideline would result in a harsher punishment.[3/] Therefore, unless otherwise indicated, all further citations to the Guidelines will refer to those in effect on November 2, 1988.

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3/ For example, if a loss figure of $165,000 is utilized, under the guidelines in effect at the time of the offense, the offense level would be increased by 6. See Guideline § 2F1.1(b)(1)(G) (as amended June 15, 1988), while under the guidelines currently in place, the increase in offense level becomes 7. Guideline § 2F1.1(b)(1)(H). See Exhibits A and B attached hereto, the letters confirming this discussion and agreement between the parties.

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Appendix A to the Guidelines, the "Statutory Index," specifies that an offense under 18 U.S.C. § 1030(a)(5), is ordinarily referenced to guideline § 2F1.1, entitled Fraud and Deceit. This guideline provides for a base offense level of six. § 2F1.1(a). The government has advised that it is limiting its evidence of "loss" to that which it believes was adduced at trial: approximately $165,000. This loss figure would result in an increase in offense level of six. § 2F1.1(b)(1)(G). In addition, it is anticipated that the government will urge the Court to apply an increase of 2 for "more than minimal planning," § 2F1.1(b)(2)(A), and an upward adjustment of 2 for "use of special skill" § 3B1.3, resulting in a total offense level of 16.

The guideline sentence for an offense level of 16 in a Criminal History Category of I,[4]/ is 21 to 27 months imprisonment, and a fine of $5,000 to $50,000, Guideline § 5E4.2(c)(3),[5]/ plus costs of the sentence, § 5E4.2(3)(i). The defendant submits that he is eligible for a downward adjustment of 2 levels for acceptance of responsibility, Guideline § 3E1.1.

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4/ There has been no suggestion that defendant's "criminal history" would place him in any category other than I. See Guidelines §§ 4A1.1 et seq.

5/ Other maximum fines are arguably available, See Guideline 5E4.2(c)(2)(B), but for a variety of reasons, they are unrealistic, and difficult to establish, See n.2, supra.

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If this adjustment is applied, the offense level becomes 14 with a guideline sentence of 15 to 21 months imprisonment, and a fine of $4,000 to $40,000, Guideline § 5E4.2(c)(3), plus the costs of the sentence. The defendant accepts these calculations as accurate, but for the reasons stated below does not agree that the facts support the application of the particular guidelines utilized.

## III. DEFENDANT'S POSITION ON THE GUIDELINES

### A. The Base Level Offense Classification

The defendant requests a downward departure from the base offense level of 6 on the grounds that the particular offense committed by Mr. Morris is outside the "heartland" of typical fraud and deceit cases, See Guidelines Ch. 1, Part A, 4(b). In this regard, the Sentencing Commission has stated as follows:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of § 5H1.4, and the last sentence of § 5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions,

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> however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

(emphasis added).

It is difficult to conceive of a less "typical" case of "fraud and deceit" than the one before the Court. While there is no single definition of "fraud" in federal law, it is generally understood to mean "wronging one in his property rights by dishonest methods or schemes," and "usually signify [ing] the deprivation of something of value by trick, deceit, chicane or overreaching." Carpenter v. United States, 108 S.Ct. 316, 321 (1987) quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). The statute under which Mr. Morris was convicted, however, requires no proof of "intent to defraud". Compare 18 U.S.C. § 1030(a)(4). Moreover, in enacting the Computer Fraud and Abuse Act of 1986, Congress explicitly rejected the view that "trespass" into a computer should be treated as a theft or fraud by computer. See S. Rep. No. 432 (Judiciary Committee), 99th Cong 2d Sess (1986) at 9-11, reprinted in 1986 U.S. Code Cong. & Admin. News 2479 at 2486-88; H.R. Rep. No. 612 (Judiciary Committee), 99th Cong. 2d Sess at 12. (1986). Thus, § 1030(a)(4) provides that there is no fraud if the only thing of value obtained is the use of the computer itself.

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In this case, not only is the element of fraud lacking, but this Court has ruled that a violation of § 1030(a)(5)(A) may be established even without proof of intent to cause damage or loss. As this Court stated:

> The language and grammatical structure of the statute indicates to the Court that the requirement of intent is only applicable to the conduct of "accessing" and is unrelated to the resulting damage.

United States v. Morris, 89-CR-139, Transcript of Proceedings at 8, lines 11-14 (Nov. 3, 1989). Accord Transcript of Proceedings at 6, lines 13-19 (Feb. 27, 1990). Thus, unlike a "typical" fraud case, Morris was convicted although he had no intention to cause damage or loss to others. As was observed in a similar context, "the public might have more censure for an intentional act than for gross negligence." United States v. Bradford, 344 A.2d 208, 211 (D.C. 1975).[6/]

It may well be that the Sentencing Commission assigned this offense to the "fraud and deceit" classification because although it adopted an "empirical approach" to promulgation of the guidelines, it had no data available regarding this offense. See Sentencing Guidelines, Ch. 1 Part A, 2. The offense came into existence one year before the guidelines were promulgated, and it

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6/ The reference is to sentencing for voluntary or involuntary manslaughter, both of which were punished under a single statutory provision.

appears that only two cases under the 1986 version of 18 U.S.C. § 1030 have now reached sentencing. Both occurred after publication of the guidelines. In the first, United States v. Herbert Zinn, Jr., No. 88-CR-672 (N.D. Ill. 1989) the defendant was sentenced to nine (9) months imprisonment and a $10,000 fine. In the second, United States v. Kevin David Mitnick, CR-88-1031(A) (C.D. Cal. 1989), the defendant received a sentence of six (6) months community confinement, followed by six and one-half (6½) months in a halfway house. Unlike Morris, both of these defendants were charged with 18 U.S.C. § 1030(a)(4), requiring proof of intent to defraud, both cases involved repeated incidents, and in the Mitnick case the defendant had two prior convictions for some form of computer abuse.

Under these circumstances, it would appear that a downward departure in Mr. Morris' case is supported by the "empirical" approach, and would actually further the stated goals of the Sentencing Reform Act, achieving both uniformity and proportionality of sentencing. See Guidelines, Ch. 1, Part A, 3. The conduct in this case differs significantly from the norm of fraud and deceit cases, and warrants a downward departure.

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B. The Specific Offense Characteristic Of Loss

Guideline § 2F1.1, Application Note 7, refers to the Commentary for § 2B1.1 for a discussion on valuation of loss. Application Note 2 to § 2B1.1 provides that "loss means the value

of the property taken, damaged or destroyed." In this case, little or no evidence was offered that anything was "taken, damaged or destroyed." Indeed, the government elected not to proceed under the "alters, damages or destroys" language of the statute, but charged instead that Morris "prevented authorized use." For this reason alone, no increased offense level for "loss" is appropriate.

Second, although the government has indicated it is limiting its evidence of loss to that adduced at trial, it nevertheless asserts that amount to be $165,000.00. Three reporters, who attended every day of the trial, independently calculated these losses to be approximately $150,000.[7/] This $15,000.00 (10%) difference demonstrates the inherent unreliability of the government's calculation. Application Note 3 to Guideline § 2B1.1 requires that the determination of "loss" must be based on "reasonably reliable information."

A third issue is the type of loss which may properly be included. Section 1030(a)(5) requires that it be a loss caused by the prevention of authorized use. A substantial portion of

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7/ Mike McAndrew, "Computer Hacker to Explain Actions," Syracuse Post-Standard, January 18, 1990 at B10; Dan Kane, "Hacker Could Go To Prison," Syracuse Herald-Journal, January 23, 1990 at p. A8; Evan Schuman, "Worm Jury Is Out," Unix Today, January 23, 1990 at 4.

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the "loss", the government claims it proved at trial was related to labor expended at the various facilities "infected" by the worm program for the purpose of assuring that no computer files were destroyed and no future disruptions were likely to occur. However, while these investigations were proceeding, nothing "prevented the authorized use" of the computers. Since the statutory language makes it clear that the loss contemplated has to be caused by the prevention of authorized use, much of the government's evidence must be disregarded.

The legislative history expands on the definition of "loss" only slightly. Significantly, however, the Senate Report speaks in terms of the "costs of reprogramming or restoring data to its original condition. . ." S. Rep. No. 432, supra at 12, reprinted in U.S. Code Cong. & Admin. News 2489. Much of the labor cost attributed by the government to the defendant's conduct was actually spent repairing pre-existing security defects in the UNIX operating system. As the Court observed to a government witness during the trial: "What you did was patch a hole that should have been patched anyway."

This point is significant for two reasons. It demonstrates that the time spent repairing these "holes" cannot be said to be ". . . restoring data to its original condition," but is more properly characterized as improving the original condition.

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Additionally, Mr. Morris' conduct did not "cause" these defects. For sentencing purposes, this situation might be analogized to one where a person enters another's premises without permission, through a door with a defective lock, and while inside accidently breaks a chair. The cost of restoring the chair to its original condition may fairly be said to be caused by the individual who entered, but not the cost of repairing or replacing the lock on the door. Since the government includes both types of cost in its estimate, its estimate is again overstated and unreliable.

Finally, if the court is disposed to accept the government's loss figures, it should nevertheless grant a downward departure on the basis that "the total dollar loss that results from the offense. . .overstate[s] its seriousness." Application Note 11 to Guideline § 2F1.1. The note indicates that where, as here, the defendant's conduct is not the sole cause of the loss, a downward departure may be warranted.

C. "More Than Minimal Planning"

Guideline § 2F1.1(b)(2)(A) provides for an increase in offense level of 2 if the offense involved "more than minimal planning." Application Note 2 refers to the Guideline § 1B1.1, Application Instructions for definition of this term. The term is defined in Application Note 1(f) to § 1B1.1. This definition has been criticized as being "at best, imprecise." T. Hutchinson

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& D. Yellen, Federal Sentencing Law and Practice, § 2F1.1, Annot. 2 at 147 and § 1B1.1, Annot. 10 at 24 (1989). One example supporting this criticism is particularly apt here:

> What is the planning typical for an offense in the simple form? If, for example, a defendant is prosecuted for computer fraud and § 2F1.1 (fraud and deceit) applies, is the standard for comparison the planning involved in a simple fraud or in a simple computer fraud?

T. Hutchinson & D. Yellen, supra at 24. Even more puzzling is the question what is a "simple form" of the offense committed by Mr. Morris?

The background Note to §2F1.1 explains the Commission's intentions in utilizing an enhancement for "more than minimal planning," as follows:

> The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of actual harm.

This generalization demonstrates why such an enhancement is inappropriate in the instant case where the offense was the result of a single incident and wholly unintentional consequences. Indeed, the evidence at trial showed that Mr. Morris went to great lengths to try to limit the adverse consequences of his program, but was unsuccessful. Put another way, the offense itself was the result of too little, not too much planning, and the loss was entirely unintentional. For

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these reasons, increasing the offense level would be inconsistent with the Sentencing Commission's intent.

D. Use Of Special Skill

The government is expected to urge an upward adjustment of 2 for "use of a special skill, in a manner that sufficiently facilitated the commission or concealment of the offense." Guideline § 3B1.3. The Application Note states that the term "refers to a skill not possessed by members of the general public and usually requiring substantial education training or licensing."

Defendant opposes this upward adjustment for several reasons. First, the offense itself can only be committed by someone with some level of knowledge in the use of computers, but mere knowledge in computers does not equate to the type of examples given: "pilots, lawyers, doctors, accountants, chemists and demolition experts."

Second, Mr. Morris did not have "substantial education training or licensing," as compared to the above examples. He had been a first year graduate student in computer science for about six weeks at the time of the offense. As Cornell University (which later suspended him) concluded in its Report on the Computer Worm at 38 (Feb. 6, 1989):

> Many students graduate or undergraduate, at many institutions could have accomplished this act. The knowledge and skill required are possessed by most UNIX hackers.

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A similar sentiment was expressed by government witness Eugene H. Spafford, who has written describing the code for the virus or worm program as follows:

> The code was apparently unfinished and done by someone clever but not particularly gifted, at least in the way we associate with talented programmers and designers. There were many bugs and mistakes in the code that would not be made by a careful competent programmer. The code does not evidence a clear understanding of good data - structuring, algorithms, or even of security flaws in UNIX, . . . In general, the code is not that impressive, and its "success" was due at least as much to large amount of luck as it was due to programming skill possessed by the author.

Eugene H. Spafford, "The Internet Worm Program: An Analysis." Purdue Technical Report CSD-TR-823 at p. 26 (rev. December 8, 1988). Thus, even if Morris possessed a special skill, it was not "used in a manner that facilitated the commission or concealment of the offense." United States v. Foster, 876 F.2d 377, 378 (5th Cir. 1989). In sum, these two authorities, neither of whom is sympathetic toward the defendant, both concluded that no special skill was involved in the offense. The Court should not do otherwise.

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E. Acceptance of Responsibility

Mr. Morris requests a reduction in offense level of 2 based on his acceptance of responsibility as provided in Guideline § 3E1.1. As the testimony at trial revealed, Robert Morris

admitted to his father, who was a high federal government official in the area of computer security, that he was responsible for unleashing the worm program. He did this by telephone about 24 hours after the worm program was released, and with the full expectation that the elder Mr. Morris would report it to the appropriate authorities. Mr. Morris (Sr.) did so advise the FBI on November 5, 1988, and undoubtedly reported it to other federal authorities prior to that time.

Robert also gave a "proffer" on December 19, 1988, to the U.S. Attorney and the FBI. The statement consists of more than 180 pages of transcript, and fully covers his involvement in the matter. He also accepted responsibility for his actions before the Academic Integrity Hearing Committee at Cornell University on April 17, 1989, in a meeting which ultimately led to his suspension from Cornell. In his testimony at trial, Mr. Morris acknowledged creating the worm, described it as an experiment which was "a dismal failure" and testified that "it was a mistake and I'm sorry".

**Guideline § 3E1.1(b) provides that:**

> **A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea, or a finding of guilt by the court of jury or the practical certainty of conviction at trial.**

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Application Note 2 is even more to the point. It states as follows:

> Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if 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 challenge to the applicability of a statute to his conduct).

The latter example describes this case. Mr. Morris' chief contention was that § 1030(a)(5) did not apply to the facts of his case. It is fair to say that except for the issue of the extent of the loss, a matter about which Morris had no direct knowledge, virtually all of the facts in the case were undisputed. Under these circumstances, failure to reduce the offense level by 2 on the basis of the defendant's acceptance of responsibility would amount to an "augmentation of sentence" based on his decision to "stand on [his] right to put the government to its proof rather than plead guilty." United States v. Araujo, 539 F.2d 287, 291-92 (2d Cir.), cert. denied, 429 U.S. 983 (1976). Such an augmentation "is clearly improper." United States v. Hutchings, 757 F.2d 11, 14 (2d Cir.), cert. denied, 472 U.S. 1031 (1985).

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## IV. CONCLUSION

Taking into consideration the arguments previously advanced, the defendant recommends the following calculation under the Sentencing Guidelines:

1. Base Offense level of 4 - This represents a downward departure from 6 to 4. The 4 is arrived at by analogy to the Guideline for Property Damage or Destruction, Guideline § 2B1.3(a). This type of departure is consistent with the Commission's provision for "specific guidance for departure, by analogy or by other numerical or non-numerical suggestions," Ch. 1, Part A, 4(b).

2. Specific Offense Characteristic (loss) +4. This figure is calculated by reference to Guideline § 2F1.1(b)(1)(E), $20,0001 to $50,000, which is a more realistic total of the "loss," if any, caused by Mr. Morris' actions.

3. Specific Offense Characteristic (more than minimal planning) +0. For the reasons stated above, defendant does not believe it appropriate to increase the offense level on this basis.

4. Adjustment for Use of Special Skill +0. For the reasons stated above, defendant does not believe an upward adjustment on this basis is appropriate.

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5. Adjustment for Acceptance of Responsibility -2. For the reasons stated above, defendant submits he is entitled to this adjustment.

The Offense Level under defendant's calculation then becomes 6, which, with a Criminal History Category of I, calls for a guideline sentence of 0-6 months imprisonment, and a fine of $500 to $5,000; plus the cost of the sentence.

Permissible sentences in this guideline range include such options as probation, community confinement, and intermittent confinement, See Guideline § 5B1.1. Defendant intends to supplement this memorandum orally to address these particular options, including the possibility of community service.

Respectfully submitted,

BONNER & O'CONNELL

By: Thomas A. Guidoboni

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Attorneys for Defendant,
Robert T. Morris
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HANCOCK & ESTABROOK

By: _____
Mark J. Shulte
Additional Attorneys for
Defendant Robert T. Morris
Mony Tower I, P.O. Box 4976
Syracuse, New York 13221
Tel. No. (315) 471-3151

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Memorandum in Aid of Sentencing has been served upon the following counsel of record this 30th day of April, 1990.

By hand on:

Mark D. Rasch, Esquire
Ellen R. Meltzer, Esquire
Fraud Section, Criminal Division
United States Department of Justice
Second Floor
1400 New York Avenue, N.W.
Washington, D.C. 20005

By mail on:

Andrew T. Baxter, Esquire
Assistant U.S. Attorney
369 Federal Building
100 S. Clinton Street
Syracuse, New York 13260

BONNER & O'CONNELL

By: Thomas A. Guidoboni
Thomas A. Guidoboni

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ADMITTED ALSO *VA *MD *NY

March 13, 1990

HAND DELIVERED

Mark D. Rasch, Esquire
Fraud Section, Criminal Division
United States Department of Justice
Second Floor
1400 New York Avenue, N.W.
Washington, D.C.

Re: United States v. Robert Tappan Morris
89 CR-139 (N.D.N.Y.)

Dear Mark:

This letter is in part to confirm, and in part, to expand upon our telephone conversation of March 12, 1990, concerning the government's position at sentencing in the above-captioned case.

In response to my initial question on the amount of "loss" upon which the government would rely, you advised that the government would rely on the amount you believe the government proved at trial, which was approximately $165,000 and certainly not more than $200,000. I then asked what the government's position would be with regard to which guidelines applied - those in effect at the time of the offense (as amended June 15, 1988) or those in effect at the time of sentencing (as amended November 1, 1989). You asked if it made any difference, and I said I would so determine and get back to you with a response and a more detailed description of the issue.

In response to your question, it appears to me that the guidelines utilized do make a difference in this case. The 1988 guideline for offenses involving fraud and deceit [§2F1.1] establishes a base offense level of 6 [subsection(a)] and an increase in level of 6 for a loss between $100,001 and $200,000

EXHIBIT A

[subsection(b)(1)(G)]. Assuming no other increases or decreases, and a Criminal History Category of I, this would result in a guideline sentence of 10-16 months. Under the 1989 guidelines, the base offense level remains at 6 [§2F1.1(a)], but the increase in offense level becomes 7 for amounts between $120,001 and $200,000 [subsection(b)(1)(H)]. Under the same assumptions described above, this would result in a guideline sentence of 12 to 18 months.

The problem arises because 18 U.S.C. § 3553(a)(4) provides that the court must consider the guidelines "that are in effect on the date the defendant is sentenced." This may create ex post facto problems when, as is the case here, the new guidelines increase the guideline sentence. See Miller v. Florida, 107 S.Ct. 2446 (1987). In recognition of these potential constitutional problems, the Department of Justice has stated its policy as follows:

> As a general rule, the guideline in effect on the date the offense was committed should be used instead of the newer guideline if the new guideline increases the guideline sentence above that which was in effect on the date of the offense in any way.

U.S. Dept. of Justice, Prosecutors Handbook in Sentencing Guidelines and Other Provision of the Sentencing Reform Act of 1984, at 72 (Nov. 1, 1987) (emphasis in original). I, of course, agree with the Department's analysis on this point.

I trust this information is sufficiently detailed to permit you to respond to my inquiry on which set of guidelines (1988 or 1989) the government will seek to have applied with regard to the offense level in this case, and I await your view.

Very truly yours,

BONNER & O'CONNELL

By Thomas A. Guidoboni
Thomas A. Guidoboni

TAG/ps

cc: Robert Tappan Morris

Washington, DC 20530

MAR 16 1990

Thomas A. Guidoboni, Esq.
Bonner & O'Connell
900 17th Street, N.W.
Suite 600
Washington, D.C. 20006

Re: United States v. Robert Tappan Morris
(Dkt No. 89-CR-139)(N.D.N.Y.)

Dear Mr. Guidoboni:

This will respond to your letter dated March 13, 1990 regarding the applicability of the Sentencing Guidelines to your clients' conduct. Specifically, you inquired about the government's position concerning the applicability of changes in the relevant Guidelines between the date of the commission of the offense and the date of sentencing. Citing the Prosecutors Handbook in Sentencing Guidelines, at 72 (1987) you pointed out that:

> As a general rule, the guideline in effect on the date of the offense was committed should be used instead of the newer guideline if the new guideline increases the guideline sentence above that which was in effect on the date of the offense in any way.

(emphasis in original).

Please be advised that, consistent with the Department of Justice policy and the ex post facto clause of Article I § 9 of the United States Constitution, the government will apply the Sentencing Guidelines which were in effect at the time of the defendant's commission of the offense where, as here, applying the later Guideline would result in a harsher punishment. The Guidelines in effect on November 2, 1988, the date of the commission of the offense were those promulgated in June of 1988.

EXHIBIT B

I trust this responds to your concerns. If you have any questions, please call me at 786-4390.

Yours truly,

Laurence A. Urgenson
Chief, Fraud Section
Criminal Division

By: Mark D. Rasch
Trial Attorney

# United States District Court

Northern District of New York

UNITED STATES OF AMERICA

V.

ROBERT TAPPAN MORRIS

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

U.S. DISTRICT COURT N.D. OF N.Y. FILED

Case Number 89-CR-139

MAY 16 1990

AT ____ O'CLOCK ____ M.
J.R. SCULLY, Clerk
SYRACUSE

(Name of Defendant) Thomas J. Guidoboni, Esq.
Defendant's Attorney

Arrest 5/16/90

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.

☒ was found guilty on count(s) Count 1 of the Indictment after a plea of not guilty.

Clerk, U.S. District Court
By: _____ Deputy

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Count Number(s) |
|---|---|---|
| 18 USC, Sec. 1030 (a)(5) | Intentional access of Federal interest computers without authorization thereby preventing authorized access and causing a loss in excess of $1,000.00 | 1 |

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐ It is ordered that the defendant shall pay to the United States a special assessment of $ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

_____

May 4th, 1990
Date of Imposition of Sentence

Defendant's mailing address:

Howard G. Munson
Signature of Judicial Officer

Howard G. Munson, USDJ/NDNY
Name & Title of Judicial Officer

Defendant's residence address:

same as above

May 16, 1990
Date

APPENDIX B

Defendant: Robert Tappan Morris
Case Number: 89-CR-139

## PROBATION

The defendant is hereby placed on probation for a term of three years.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

1. Robert Tappan Morris shall perform 400 hours of community service in a manner determined by the Probation Office and approved by the Court.

Defendant: Robert Tappan Morris
Case Number: 89-CR-139

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: Robert Tappan Morris
Case Number: 89-CR-139

## FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 10,050. , consisting of a fine of $ 10,000. and a special assessment of $ 50. .

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

On Count 1 of the Indictment. The Special Assessment of $50. is due immediately and should be made payable to Clerk, USDC/NDNY.

This sum shall be paid ☐ immediately.
☒ as follows: The fine of $10,000. must be paid during the first year of probation in amounts determined by the Probation Officer.

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: Robert Tappan Morris
Case Number: 89-CR-139

## RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

It is further Ordered that Robert Tappan Morris pay for the cost of his supervision at a rate of $91.00 per month as directed by the Probation Office.

The Court has determined that formulating an Order of restitution would unduly complicate and prolong the sentencing process.

(See Addendum)

Defendant: Robert Tappan Morris
Case Number: 89-CR-139

A D D E N D U M

The Probation Officer, using the guideline for 2F1.1., as reflected in Appendix A of the Statutory Index of the US Sentencing Commission Guideline Manual, has found the Base Offense Level to be 6. The Total Offense Level to be 14 and the Criminal History Category to be 1. Guideline Range to be 15 to 21 months. The Probation Officer, however, finds that a new sentencing statute permits the court to depart from the Guideline-specified sentence when it finds, "an aggravating or mitigating of a kind or to a degree not adequately taken into consideration by the Sentencing Commission," and recommends a downward departure.

The Court agrees with the Probation Officer that there is no applicable guideline at this time for this specific offense. The court will not accept the scoring of this offense by the Probation Officer under the guideline for "Fraud and Deceit," but will depart for the following reasons:

1. It is the conclusion of this court that the characteristics of this case were not the type of case, "heartland case," used by the Sentencing Commission in placing 18 USC 1035 (a) (5) under the Fraud and Deceit Guideline and that the Commission did not adequately take into consideration the specific characteristics of this type of case in considering alternative guidelines.

2. Although in and of itself, this offense is an extremely serious offense, by placing it in the Fraud and Deceit guideline in this specific case the total dollar lost overstates the seriousness of the offense.

3. Because of the lack of similar prosecutions of this type available to the Sentencing Commission, there was not sufficient information to establish any other appropriate guideline when 18 USC 1035 (a) (5) was placed in the Fraud and Deceit Category.

Addendum continued on page 7.

Defendant: Robert Tappan Morris
Case Number: 89-CR-139

4. Under these circumstances, section 2X5.1 of the Sentencing Guidelines provides that "if there is not a sufficiently analogous guideline, the provisions of 18 USC 3553 (b) shall control." Section 3553 (b) in turn provides that "in the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purpose set forth in subsection (a) (2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by the guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

dated: May 16, 1990

Howard G. Munson

Hon. Howard G. Munson
US District Judge
Northern District of New York

Statement of

Carol A. Brook
Deputy Director
Federal Defender Program, Inc.
Chicago, Illinois

on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission
Washington, DC

March 15, 1993

My name is Carol A. Brook, and I am the Deputy Director of the Federal Defender Program, Inc., in Chicago, Illinois, which provides representation for indigent defendants in the Northern District of Illinois and in the Court of Appeals for the Seventh Circuit. I will present the views of the Federal Public and Community Defenders on the proposed amendments to the Federal Sentencing Guideline Manual published by the Commission last December 31.

There are presently 50 Federal Public and Community Defender Organizations providing representation in 56 of the 94 federal judicial districts. Our offices operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. We represent defendants before magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of defendants in federal courts. Data for the most recent annual reporting period indicates that defender organization attorneys represented over 36,000 persons during that period. We represent persons charged with frequently-prosecuted federal crimes (like drug distribution) and with infrequently-prosecuted federal crimes (like sexual abuse). We represent persons charged with white-collar crimes (like embezzlement) and persons charged with street crimes (like first degree murder).

Federal Public and Community Defenders have a great deal of experience with the guidelines. Our comments on the proposed

amendments are based on our experience, and our desire to see that the guidelines fully implement the statutory purposes of sentencing and that the federal sentencing system is just, fair, and humane.

Since the original creation of the guidelines, the Federal Defenders have been concerned about the paucity of alternative sentences available. The failure to make these alternatives available largely results from a combination of three factors: First, the Commission's merging of the "in-out" decision of whether to incarcerate someone or to place that person on probation with the decision of how long to make the sentence; second, the Commission's reading of 28 U.S.C. § 994(j), which basically makes every offense a "serious" offense and thus eliminates all sentences but prison even for first offenders; and third, the Commission's failure to implement Congress' mandate in 28 U.S.C. § 994(k) that prison not be imposed where the primary purpose of a sentence is rehabilitation.

The Commission's refusal to separate the "in-out" decision from the question of length of sentence is the greatest obstacle to the imposition of alternative sentences. In 18 U.S.C. § 3582(a), which was part of the enabling legislation to the Sentencing Reform Act, Congress clearly expressed its belief that there should be two separate sentencing decisions -- first, whether prison is an appropriate sentence, and second, if so, for how long. This statute comports with the thought process most judges went through in sentencing before creation of the sentencing guidelines.

Section 3582(a) states in part: "The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable and recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."

Congress' belief in this two-step sentencing process was further expressed in 28 U.S.C. § 994(a)(1)(A), also part of the Commission's enabling legislation, where Congress directed the Commission to promulgate a guideline to determine "whether to impose a sentence to probation, a fine, or a term of imprisonment." Only after that determination is made is the Commission directed to establish a guideline to determine the "appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment." In addition, 28 U.S.C. § 944(e) requires the Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" (emphasis added).

The Commission's failure to heed these directives resulted in a system wherein the only question is "how long." Under this approach, absent a departure, nonprison sentences are authorized in only the lowest sentencing ranges (ten out of 43), requiring even

first offenders with relatively low guidelines to serve prison time.

Yet, in 28 U.S.C. § 994(k), Congress recognized the importance of alternative sentences and required the guidelines to "reflect the inappropriateness of imposing a sentence of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." Thus, under the Sentencing Reform Act, the court should always have the option of determining whether the primary purpose of sentencing is to provide a rehabilitative or educational opportunity (the "in-out" decision), and if that is the case, then the court should have a range of alternative sentences available to it. These alternatives should include everything from intensive supervision to community service to apprenticeships to education to fines and restitution, and should be flexible enough to allow the courts and counsel to mold the alternatives to the needs of the offender, the case and the community.

**Amendments 1, 34, and 35**
**(§ 1B1.3. Relevant Conduct)**

Amendment 1 would revise the relevant conduct rule to preclude the sentencing court from considering "conduct of which the defendant has been acquitted after trial." In addition, amendment 1 would add a new application note to U.S.S.G. § 1B1.3 that states in part, "In an exceptional case . . . such conduct may provide a basis for an upward departure." Amendment 34 invites comment upon whether the relevant conduct rule should restrict the sentencing

court to consideration of (A) conduct admitted by the defendant in connection with a plea of guilty or nolo contendere, or (B) "conduct that constitutes the elements of the offense of which the defendant was convicted." Amendment 35 sets forth two options. Option 1 would revise the relevant conduct rule to preclude consideration of "conduct of which the defendant has been acquitted after a court or jury trial." Option 2 also would preclude consideration of such conduct, but would permit consideration of such conduct if the government proved the conduct by clear and convincing evidence.

We support revising the relevant conduct rule to preclude consideration of conduct for which the defendant has been acquitted. In our experience, one of the most difficult things for people to understand -- and not just our clients, but attorneys and the general public as well -- is that a court can base a defendant's sentence on conduct of which the defendant has been acquitted. Despite the differing burdens of persuasion rationale that supports using acquitted conduct, people do not perceive using acquitted conduct as just or fair.

We support that option 1 of amendment 35. Amendment 1, although similar to option 1 of amendment 35, would add an application note suggesting a departure based upon acquitted conduct "in exceptional circumstances," an inherently ambiguous standard.[1] There is no sound policy reason to preclude

[1]The commentary to the relevant conduct guideline does not make clear what is the norm in cases where a defendant is convicted of some counts and acquitted of others. Thus, the Commission has

consideration of acquitted conduct for the purpose of applying the base offense levels and adjustments of the guidelines -- a structured process -- while at the same time allowing consideration of such conduct for the relatively unstructured process of determining how far to depart. If acquitted conduct is allowed to be considered when determining specific offense characteristics and adjustments, the impact that the acquitted conduct can have upon sentence is regulated by the guidelines. Thus, in a drug offense, possession of a weapon results in a two-level enhancement. A departure, however, need only be reasonable, and what is reasonable to one judge may not be reasonable to another judge. We would support amendment 1 if the departure language were removed.

**Amendment 2**
**(§ 1B1.11, p.s. Use of Guideline Manual in Effect on Date of Sentencing)**

Amendment 2 would amend U.S.S.G. § 1B1.11, p.s., which took effect last November, to provide that where a defendant is convicted of more than one offense and the offenses straddle the effective date of a revision of the Guidelines Manual, the sentencing court is to apply the version of the Manual that is applicable to the most recent offense. Amendment 2 would also

---

given no guidance to courts about what may be an exceptional case, ensuring that the matter will be litigated. A narrow reading of "exceptional circumstances" would require the acquittal to be, in effect, a jury nullification, i.e., the acquittal must be clearly inconsistent with a count of conviction. A broader reading of "exceptional circumstances" would permit the court to depart if the court found that the defendant engaged in the conduct by clear and convincing evidence.

amend the commentary to U.S.S.G. § 1B1.11 to set forth the rationale behind that policy statement.

Just as we opposed the promulgation of U.S.S.G. § 1B1.11, we oppose amendment 2. Congress has not -- indeed, cannot -- delegate to the Commission the authority to determine what the ex post facto clause of the Constitution may require with regard to the Guidelines Manual. The determination of which Manual to apply is a question of law that must be determined in the context of a case or controversy.

We believe the Commission should reconsider U.S.S.G. § 1B1.1 for two reasons. First, the guideline is inconsistent with advice from the Office of the General Counsel of the Administrative Office of the United States Courts. See T. Slawsky, Ex Post Facto Problems: Changes in Sentencing Guidelines and Statutes and Policy Statements on Revocation of Supervision, 55 Fed. Probation 69 (1991). Second, the guideline is in contravention of Miller v. Florida, 432 U.S. 282 (1977).

In Miller, a unanimous Supreme Court held that a change in Florida's sentencing guidelines which increased the guideline range could not be applied to a defendant whose offense was committed before the change was made. We believe Miller clearly controls here.

Thus, although both the current proposal as well as last year's amendment appear to be attempts by the Commission to reduce the complexity of guideline application, we cannot support these

attempts because we believe they sacrifice the constitutional principle of ex post facto for ease of application.

**Amendment 3**
**(§ 1B1.12, p.s. Persons Sentenced Under the Federal Juvenile Delinquency Act)**

Amendment 3 would add a policy statement to Chapter One, Part B, addressing the Supreme Court's decision in United States v. R.L.C., 112 S.Ct. 1329 (1992), which limits the maximum imposable sentence for a juvenile to the maximum of the guideline range applicable to an otherwise "similarly situated" adult defendant, unless the court finds an aggravating factor sufficient to warrant an upward departure from that guideline range. We do not believe this amendment is necessary.

The Supreme Court's holding in R.L.C. is clear and requires no further comment. In R.L.C., the Supreme Court held that 18 U.S.C. § 5037(c)(1)(B), which limits the sentence of a juvenile to the "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," does not refer to the statutory maximum for the underlying offense, but rather to the maximum penalty that could be imposed if the juvenile were being sentenced under the sentencing guidelines. Juvenile cases in the federal system primarily involve Native American children on reservations, and occasionally involve children of military personnel living on base. Since such cases arise infrequently in the federal system we do not feel that further comment by the Commission on the holding in R.L.C. is necessary.

**Amendment 4**
**(§ 2A4.2. Demanding or Receiving Ransom Money)**

Amendment 4 would add a specific offense characteristic, a cross reference, a special instruction, and additional commentary to U.S.S.G. § 2A4.2. The proposed specific offense characteristic would increase the offense level using the table in U.S.S.G. § 2B3.1(b)(6) if the amount of ransom exceeded $10,000. The cross reference would require the application of U.S.S.G. § 2A4.1 (kidnapping) if the defendant was a "participant" in the kidnapping offense. The special instruction would require application of U.S.S.G. 2X3.1 (accessory after the fact) if the defendant's conduct was "tantamount to that of an accessory after the fact to the kidnapping or ransom demand offense."

We oppose this amendment. The amendment attempts to make U.S.S.G. § 2A4.2 a "real offense" guideline. In formulating the guidelines, the Commission found that there was no practical way to construct a pure "real offense" system, and instead "moved closer to a charge offense system." U.S.S.G. Ch. 1, Pt. A(4)(a). This decision is partly reflected by the requirement that the sentencing court apply the offense guideline for the offense of conviction -- not for the acquitted or dismissed counts. The proposed cross reference and special instruction would make this guideline a mere conduit to U.S.S.G. § 2A4.1 and U.S.S.G. § 2X3.1. A person convicted of receiving ransom money, but found not guilty of kidnapping (or who had a kidnapping charge dismissed), would nevertheless be sentenced under the kidnapping guideline. As we

discuss later in connection with amendment 28(C) (pp. 44-46), we oppose the ad hoc creation of a real offense sentencing system.

**Amendment 5**
**(§§ 2B1.1 et al. Theft, Fraud, and Tax)**

Amendment 5 would revise the treatment of loss in certain theft, fraud, and tax guidelines, and the treatment of the specific offense characteristic for "more than minimal planning," and use of "sophisticated means to impede discovery" in those guidelines. The amendment would delete the two specific offense characteristics and would gradually incorporate their enhancements into the loss tables for the affected guidelines.

We support the deletion of the specific offense characteristics, especially more than minimal planning. To begin with, the term "more than minimal planning" is not well-defined. Commentary to U.S.S.G. § 1B1.1 states that the term "means more planning than is typical for commission of the offense in a simple form." What is the "simple form" of mail theft in which a defendant takes mail from several mail boxes in an apartment building? What is the standard for comparison, thefts generally, mail thefts, or mail thefts from apartment buildings? The commentary makes matters worse by stating that "more than minimal planning is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." If the defendant took mail on two occasions, the first and fifteenth of the month (when social security checks are scheduled to arrive), has there been more than minimal planning, or were the thefts "purely opportune?"

Last year the Commission noted that the more than minimal planning enhancement "has proven difficult to apply consistently in practice."[2] We agree. In many districts, the enhancement is routinely applied, especially if there was more than one act. We support deletion of the specific offense characteristics and the gradual incorporation of the enhancements into the loss tables.

It is difficult to evaluate the revised loss tables in amendment 5. We do not know the consideration that led the Commission to establish the levels in the current tables, and we do not know the considerations that led to the revised table. It appears to us that the biggest problem with the loss tables is the proliferation of levels at low amounts -- i.e., the range in amounts at the lower end of the tables is too small. The result is that a relatively small loss yields too great an increase in the offense level. The tables proposed in amendment 5 are a step towards alleviating that problem. We prefer the tables that the Commission had under consideration last cycle, especially the table in option 1 of amendment 5.[3]

In the alternative, if the Commission decides not to revise the tables, we believe the Commission should clarify the definition of the term "more than minimal planning." A simple change that would improve the definition would be to delete the sentence in U.S.S.G. § 1B1.1, comment. (n.1(f)) that states that "more than

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[2]57 Fed. Reg. 90, 94 (1992) (amendment 5 reason for amendment).

[3]See Id. at 95.

minimal planning is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." The more than minimal planning enhancement seems aimed at defendants whose modus operandi indicates that some degree of sophistication of planning was necessary to carry out the offense. Engaging in more than one act does not invariably mean that the defendant's planning was more than minimal. Similarly, we do not believe that the commentary in U.S.S.G. § 1B1.1 should assert that "this adjustment will apply especially frequently in property offenses." If that statement is a factual assertion, we believe that the statement should be deleted because the Commission does not have any data indicating that property offenses are committed in other than a "simple form" any more frequently than are other types of offenses. If that statement is an attempt to encourage courts to apply the enhancement, we believe that it is inappropriate for the Commission to do so.

**Amendment 6, 7, 37, and 65**
**(§§ 2F1.1 et al.)**

Commentary to the fraud guideline suggests that an upward departure may be warranted when the fraud loss table "does not fully capture the harmfulness and seriousness of the conduct". Amendment 6 would revise that commentary to state that an example of such a case is where "the fraud caused substantial non-monetary harm." Amendment 6 would also add an example of substantial nonmonetary harm. Amendment 7 invites comment on whether to amend the commentary to U.S.S.G. §§ 2B1.1, 2B1.2, and 2F1.1 to suggest that an upward departure may be warranted when some of the harm

caused was nonmonetary; "the offense caused particularly significant emotional trauma to, or consciously or recklessly endangered the solvency of, one or more victims;" knowingly or recklessly endangering the health or safety of one or more persons; and the offense involved the risk or death, or the knowing or reckless risk of serious bodily injury or death to more than one person. Amendment 37 invites comment upon whether the commentary to U.S.S.G. § 2B1.1 should be "conformed" in three respects to the commentary to U.S.S.G. § 2F1.1. Amendment 65 invites comment upon whether U.S.S.G. § 2F1.1 should be amended to include risk of loss "when the amount at risk is greater than the amount of the actual or intended loss."

We do not believe that amendment 6 is necessary, although we do not oppose it. If amendment 6 is adopted, the example should be dropped. It is not clear how the failure to preserve a particular donor's blood might cause substantial nonmonetary harm, and no example is preferable to an unclear example.

We oppose amendment 7 to the extent that it involves modifying the commentary to U.S.S.G. § 2F1.1 beyond the modification of amendment 6. There is no evidence of problems with departures under U.S.S.G. § 2F1.1, and in any event a number of the suggested departure grounds are already covered elsewhere in the Guidelines Manual. If a victim suffers extreme psychological injury, U.S.S.G. § 5K2.3 suggests that a departure be considered. Similarly, U.S.S.G. § 5K2.5 suggests considering a departure if the offense caused property loss not covered by the guidelines.

We believe that the goals of amendment 37 can be achieved through adoption of amendment 28(G). We comment on amendment 28 at pp. 44-47.

We oppose amendment 65. Using a loss-risked approach makes determination of the loss speculative, and in any event, in the absence of any indication that the present guideline is producing unjust results, there is no substantial reason to modify the guideline.

**Amendments 8, 9, 39, 48, and 60**
**(§ 2D1.1. Drug Trafficking)**

Amendments 8, 9, 39, 48, and 60 concern a problem that we raised last year -- inappropriately high offense levels for persons who are minimal or minor participants in drug offenses. We support amendment 48 and oppose the other amendments.

Amendment 48

Amendment 48 deals most directly with the problem of the over-punishment of defendants who play a small role in drug trafficking offenses. Amendment 48 would place a cap on offense levels, and the level of the cap would depend upon (1) the type of controlled substance involved in the offense and (2) whether the defendant was a minimal or a minor participant.

Because U.S.S.G § 2D1.1 is quantity-driven, the offense level for a defendant who plays a small role is often so high that the adjustments authorized by U.S.S.G § 3B1.2 do not adequately reduce the offense level to reflect a defendant's lesser role. The Commission's recent amendment to the relevant conduct guideline may

help to some extent to alleviate the over-punishment problem, but the problem should also be addressed more directly.

Amendment 48 reflects the distinctions made by the Commission between types of drugs and type of role. The Commission does not equate heroin and marijuana; distribution of 500 grams of heroin produces an offense level of 28, but distribution of the same amount of marijuana produces an offense level of eight. To maintain the consistency of the guidelines, the cap must maintain the distinction between types of drugs. In addition, the Commission has authorized a greater adjustment for minimal participants (four levels) than for minor participants (two levels). Again, to maintain the consistency of the guidelines, the cap must maintain the distinction between minimal and minor participants.

Amendment 48 maintains both distinctions. Thus, there will be a higher cap for a minor participant in a cocaine offense than for a minimal participant in a cocaine offense. There will also be a higher cap for a minimal participant in a heroin offense than for a minimal participant in a marijuana offense.

Amendment 8

Amendment 8 would provide a single cap of 32 without regard to whether the controlled substance involved was heroin or marijuana. In addition, amendment 8 would also make the cap provision inapplicable to a defendant who "possessed a firearm, had ready access to a firearm, or directed or induced another participant to

possess a firearm in connection with the criminal activity."[4] Amendment 8 also sets forth several options that would preclude couriers and mules from receiving a mitigating role adjustment. We oppose amendment 8.

A single cap will introduce unwarranted disparity into the guidelines. A minor participant in a marijuana offense will be treated the same as a minor participant in a heroin offense, even though heroin offenses are treated more severely in all other respects. This approach is inconsistent with the structure of the guidelines.

We do not believe that the Commission should take a categorical approach to precluding a mitigating role adjustment. A defendant's role in an offense turns upon the specific facts of the case. A defendant who possessed a gun may nevertheless have been a minor participant. The defendant's possession of the gun, moreover, has already been factored into the defendant's offense level because U.S.S.G § 2D1.1(b)(1) calls for a two-level enhancement if a firearm was possessed. Whether a defendant possessed a firearm, or directed another participant to possess a firearm, are appropriate factors to consider, along with the other facts and circumstances of the case, in determining whether a

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[4]There appears to be a problem in proposed new application note 2, which states that "this section" does not apply to the certain defendants. The referent for "this section" would have to be U.S.S.G. § 2D1.1, but that would not make sense because then the drug trafficking guideline would not apply. The apparent intent seems to be to preclude certain mitigating-role defendants from benefitting from the cap, so we read the term "this section" as meaning "the proviso of subdivision (a)(3)."

defendant qualifies for a mitigating role adjustment. Those factors, however, should not be dispositive, and we oppose making them so.

We also oppose any provision that would limit consideration of a mitigating role adjustment for couriers and mules. Such a categorical approach would view transportation of the drugs in isolation from the rest of the entire offense, thereby ignoring the role of the "kingpin", the person who owns the contraband. This would mean that a courier who is paid $1,500 to transport $125,000 worth of cocaine is as culpable as the person who would receive and distribute the cocaine. The Commission has determined that specific offense characteristics and chapter three adjustments are to be made on the basis of relevant conduct. No good reason has been shown to abandon the relevant conduct concept for applying the mitigating role adjustment when the defendant is a courier or mule.

Amendment 9

Amendment 9 would revise the drug trafficking guideline by (1) revising subsection (b)(1) to increase the gun enhancement if a firearm was discharged or a substantial risk of death or serious bodily injury was created (six levels) or if a dangerous weapon was otherwise used (four levels); (2) adding an enhancement based upon the number of participants; (3) adding a downward adjustment of four levels "if the defendant did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills;" (4) revising the drug quantity table so that the highest offense level provided

in the table is level 36; and (5) adding a cross-reference subsection calling for the use of the appropriate chapter two guideline "if the offense resulted in death or bodily injury" and if the resulting offense level is greater than the offense level determined under U.S.S.G § 2D1.1. We oppose amendment 9.

No evidence of problems with the current gun enhancement has been presented. Unless there is evidence that the circumstances described in proposed new subsections (b)(1)(A) and (B) cannot be dealt with by departing, or that departures are frequent and result in disparage punishment, we see no need to amend present subsection (b)(1).

We oppose an enhancement based upon the number of participants. To begin with, the number of participants can trigger an aggravating role adjustment for defendants who are organizers or managers. Some drug offenses simply require more participants than others in order to distribute the same quantity. A marijuana offense typically requires more participants than a cocaine offense, for example. This proposed provision would disproportionately increase offense levels in marijuana offenses. We do not believe that the number of participants reliably helps to indicate the seriousness of the offense.

We do not support amendment 9's revision of the drug quantity table. The drug quantity table, as originally promulgated, ended at level 36. The Commission, effective November 1, 1989, increased the top of the table to level 42 because the Commission found under the original table that there was an increasing number of offenses

involving quantities substantially in excess of the quantity that called for level 36. The Commission sought to achieve consistency in the treatment of those large quantities by raising the top of the table to level 42. In light of that, we do not think that restoration of the original drug quantity table is justified. We do, however, support a revision of the drug quantity table as proposed in revised amendment 39.

We also oppose the new cross reference. There is no evidence that the cross reference is needed, and we oppose the ad hoc creation of a real offense sentencing system.

Amendment 39

The Practitioners Advisory Group, at whose request amendment 39 was published, has revised amendment 39. Revised amendment 39 would provide a cap of 32 for heroin and controlled substances of equivalent seriousness, and a cap of 24 for other controlled substances, most notably marijuana. Revised amendment 39 would also provide a four-level enhancement if the defendant, or someone directed or induced by the defendant, "actually used" a firearm. Revised amendment 39 would amend the drug quantity table so that the highest offense level provided would be level 38, and would add commentary to the mitigating role guideline, U.S.S.G. § 3B1.2, that would preclude a defendant from a mitigating role adjustment if the defendant was a courier, sold the contraband, had an ownership interest in any of the contraband, or financed any aspect of the criminal activity.

We support revised amendment 39's approach to caps. It maintains the distinction between heroin and marijuana, as well as the distinction between minimal and minor participants. Our only objection to revised amendment 39 is that the caps are set too high.

Because there is no evidence of any problem with the current gun enhancement, we oppose expanding it. Unless there is evidence that courts are frequently departing for gun use, and those departures are resulting in disparate punishment, or evidence that the circumstances covered by the proposed new enhancement do not provide a basis for a departure, we see no need for revising the gun enhancement.

We would support reducing the top level of the drug quantity table to level 38. At present, a kingpin in a very large scale drug offense has little, if any, reason to accept responsibility. For example, a leader of a level 42 drug offense has an offense level of 46 (offense level of 42 enhanced four levels under U.S.S.G. § 3B1.1). If the defendant does not accept responsibility, life imprisonment is required in all criminal history categories. If the defendant accepts responsibility, life imprisonment is still required in all criminal history categories because the defendant's offense level would be reduced to level 43. However, if the top of the table were reduced to level 38, that same defendant would have an adjusted offense level of 42, which could be reduced to level 39 by acceptance of responsibility.

Level 39 yields a guideline range of 262-327 in criminal history category I and 360-life in criminal history category VI.

We oppose revised amendment 39's changes in the commentary to the mitigating role guideline, for reasons set forth above in our discussion of amendment 8 (see pp. 15-17). Whether a defendant qualifies for a mitigating role adjustment should depend upon all of the facts or circumstances of the case. The Commission has determined that specific offense characteristics and chapter three adjustments are to be made on the basis of relevant conduct. No good reason has been advanced that would justify abandonment of the relevant conduct concept when dealing with a courier.

Amendment 60

Amendment 60, proposed by the Department of Justice, would revise the mitigating role guideline, U.S.S.G. § 3B1.2, to preclude application of the guideline to "a defendant whose offense level is determined in part by reference to the drug quantity table . . . where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession." We oppose this amendment, for the reasons set forth above in the discussion of the courier and mule provision of amendment 8.

**Amendments 10 and 49**
**(§ 2D1.1. Drug Trafficking)**

Amendment 10 would revise the commentary to the drug trafficking guideline to state that the term "mixture or substance" does not include

> uningestible, unmarketable portions of drug mixtures; i.e., materials that have to be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the creme liqueur in a cocaine/creme liqueur mixture, fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statute, and waste water from an illicit laboratory used to manufacture a controlled substance.

Amendment 49 is similar but would revise the commentary to refer to "portions of a mixture that are uningestible or unmarketable, or that have to be separated from the controlled substance before the controlled substance can be used."

We support both amendments, but prefer amendment 49.[5] The circuits are split in their treatment of materials covered by amendments 10 and 49.[6] We believe that the Commission should resolve the split among the circuits in a way that is consistent with common sense and a rational sentencing system.

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[5]There would seem to be a typographical error in amendment 10. The comma after "uningestible" should probably be replaced by "or".

[6]The following cases have not counted materials that are uningestible or unmarketable or that have to be separated from the controlled substance before the controlled substance can be used: United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992) (mixture of cocaine and liqueur); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992) (cocaine and boric acid); United States v. Jennings, 945 F.2d 129, 135-37 (6th Cir. 1991), modified in other respects, 966 F.2d 184 (6th Cir. 1992) (waste products from manufacture of methamphetamine); United States v. Robins, 967 F.2d 1387 (9th Cir. 1992) (cornmeal and cocaine); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) (waste products from cocaine). The following cases have counted such material: United States v. Mehecha-Anofre, 936 F.2d 623 (1st Cir.), cert. denied, 112 S.Ct. 648 (1991) (cocaine bonded to acrylic and shaped into attache case); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992) (cocaine in creme liqueur); United States v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 110 S.Ct. 517 (1989) (waste product from manufacture of methamphetamine containing some methamphetamine); United States v. Dorrough, 927 F.2d 498 (10th Cir. 1991) (waste product from manufacture of P2P containing some P2P).

The drug offenses and the guidelines both call for using the weight of "a mixture or substance containing a detectable amount of" a controlled substance. Legislative history indicates that Congress believed that "the federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). Consequently, the drug penalties are based on "quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing or distribution chain." Id. at 12. In our opinion, the decisions that exclude the weight of uningestible or unmarketable substances are more consistent with this legislative intent.

> [U]nder a broad application of Chapman, if one could "float a few kilograms of cocaine across the ocean" and "extract the cocaine from the ocean," the weight of the entire Atlantic Ocean would be used to compute that defendant's base offense level. Including [unusable and uningestible substances] in this case as a measure of punishment is no more rational than including the weight of the Atlantic Ocean in sentencing the hypothetical ocean smuggler.

United States v. Salgado-Molina, 967 F.2d 27, 29 (2d Cir. 1992).

**Amendment 11**
**(§ 2D1.1. Drug Trafficking)**

Amendment 11, which would revise the manner in which the drug trafficking guideline deals with determining quantity in cases involving a series of drug transactions, sets forth two options. Option 1 would limit the computation of the offense level to the

largest single quantity with which the defendant was involved at any one time, except in cases where any single quantity rose to level 32 or greater. Option 2 would limit the offense level "by the amount with which the defendant was involved at any thirty-day period, using the thirty-day period that results in the greatest offense level," except in cases where "any single amount with which defendant was involved corresponds to offense level 32 or greater."[7]

Both options address the potential for unfairness and lack of uniformity in sentencing that may occur when government agents purposefully delay making an arrest to increase the quantity involved and thereby raise the offense level. Both would help alleviate the lack of proportionality that may occur in cases involving a series of transactions. For example, when authorities delay making an arrest of a street dealer who sells relatively small amounts of drugs on any given occasion, the current method calls for cumulating amounts over a period of time to arrive at an offense level. This can result in a habit-supporting street dealer who makes a number of small sales over an extended period of time receiving the same sentence as a dealer who regularly sells that amount at one time. We realize that it can be necessary to delay making an arrest of a small-time dealer in attempt to get closer to the person's supplier. This understandable law enforcement strategy, however, does not justify one sentence for the small-time

[7]Presumably, the thirty-day period would be continuous rather than thirty non-consecutive days compiled together in one group.

dealer who is arrested immediately and a much heavier sentence for the small-time dealer whose arrest has been delayed because of law enforcement needs unrelated to the defendant's culpability.

We believe that either option would improve the guideline. We prefer Option 1 because it would provide a more accurate reflection of the extent of a defendant's culpability and would more effectively discourage sentencing manipulation by law enforcement officers.[8] This method of computation would not hinder law enforcement investigations that may require the delay of an arrest.

In our judgment, the thirty-day approach of option 2 would not prevent potential sentencing manipulation and unequal sentences as well as option 1. The proposal's requirement of "any thirty-day period" to define what conduct to take into consideration for determining quantity does not prevent manipulation and lack of uniformity as effectively. Further, the defendant who sells a certain amount of drugs on one occasion cannot be deemed as culpable as an individual who sells the same amount through a number of transactions over a thirty-day period.

**Amendment 12**
**(§ 2D1.1. Drug Trafficking)**

Amendment 12 would revise application note 12 to the drug trafficking guideline. As revised, application note 12 would state that when the quantity is based upon a negotiated amount, the

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[8] See United States v. Barth, 788 F. Supp. 1055 (D. Minn. 1992)("the Commission has failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest").

sentencing court is to exclude any amount that the court determines the defendant was not reasonably capable of producing, or otherwise did not intend to produce. We support this amendment, which will clarify application of the guideline and ensure a more accurate determination of the actual severity of the offense.

**Amendment 13**
**(§ 2D1.1. Drug Trafficking)**

Amendment 13 invites comment on whether § 2D1.1 should be amended to address the calculation of weight under negotiation in those situations when the government sells a controlled substance to a defendant at a price substantially below the market value (a "reverse sting" operation). We would support an amendment to adjust the calculation of weight to reflect the quantity that the defendant could have obtained at the market price to determine the offense level. Such an amendment would promote a more accurate measure of the seriousness of the defendant's crime. Further, by removing the incentive to escalate a defendant's offense level, the amendment would discourage questionable law enforcement activity.

**Amendment 14**
**(§§ 2K1.3 and 2K2.1)**

Amendment 14 would amend the commentary to the guidelines covering firearms and explosives possession offenses to state that the number of qualifying prior convictions is to be determined by application of the career offender guideline's standards. We believe that the amendment will clarify the guidelines, and we therefore support it.

**Amendment 15**
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 15 revises the commentary to U.S.S.G § 2K2.1 to expand the definition of the term "firearm listed in 26 U.S.C. § 5845(c)." In addition, amendment 15 makes a conforming change to U.S.S.G § 7B1.1.

Because the revised definition tracks the statutory language, we consider this amendment to be clarifying and therefore support it.

**Amendment 16**
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 16 would revise the commentary to the firearms possession guideline to state that the enhancement of subsection (b)(4) ["if any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels"] is applied as a matter of strict liability. We oppose the amendment because we do not believe that those who are ignorant or negligent should be treated the same as those who are deliberate or willfully blind.

**Amendment 17**
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 17 invites comment on whether the commentary to U.S.S.G. § 2K2.1 should be revised to clarify whether a departure could be considered based upon "the type or nature of the firearm (e.g., semiautomatic, military-style assault weapon)." Application note 16, which currently addresses this matter, states that an upward departure may be warranted for "multiple National Firearms Act weapons . . . military type assault rifles, [and] non-detectable ('plastic') firearms . . . ."

We believe that the present commentary is adequate and that it unnecessary to amend the commentary at this time.

**Amendment 18**
**(§ 2K2.4. Use of a Firearm in Relation to Certain Crimes)**

Amendment 18 invites comment upon whether the proviso in application note 2 to U.S.S.G. § 2K2.4 is too complicated and confusing. The explanation in the proviso is, of necessity, technical. We do not find it to be confusing or too complex, however. Absent any specific proposed replacement language to evaluate, we do not support revising the proviso.

**Amendment 19**
**(§ 2K2.5. Federal Facilities and School Zones)**

Amendment 19 invites comment upon whether the offense levels of six and eight for violations of 18 U.S.C. § 922(q) (possession of firearm in school zone) and 18 U.S.C. § 930 (possession of dangerous weapon in federal facility) in U.S.S.G. § 2K2.5 are adequate relative to the offense level 12 provided under U.S.S.G. § 2K2.1(a)(7) for certain nonregulatory firearms offenses, or to the offense level six provided under U.S.S.G. § 2K2.1(a)(8) for most regulatory firearms offenses.

We do not believe that any change in U.S.S.G. § 2K2.5 is warranted at this time. That guideline covers a wide variety of conduct. A school teacher who carries a pistol in her car for self-protection purposes is covered,[9] as is a gang member who keeps

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[9]The Washington Post recently reported that a forty-eight year old school teacher in Fairfax, Virginia who carried a pistol in her car for self-protection (legal in Virginia), was arrested and charged with a felony when the pistol was found on the floor of the back seat of her car. The car was parked in a school zone, and

a gun in his locker. The guideline contains a cross reference to deal with cases where the defendant possessed the weapon in connection with another offense, or an attempt to commit another offense. We believe that, absent a showing that there is a need -- and a satisfactory method -- to distinguish among the various ways in which offenses covered by this guideline are committed, the Commission should not act to revise the guideline.

**Amendments 20 and 58**
**(§§ 2S1.1, 2S1.2, 2S1.3, 2S1.4. Money Laundering)**

Amendment 20 would revise the money laundering guideline by combining present U.S.S.G. §§ 2S1.1 and 2S1.2 into a new U.S.S.G. § 2S1.1, and by combining present U.S.S.G. §§ 2S1.3 and 2S1.4 into a new U.S.S.G. § 2S1.2. Proposed U.S.S.G. § 2S1.1, which deals with the more serious offenses, would link the base offense level to the underlying conduct that was the source of the funds. Proposed subsection (a) would direct the sentencing court to use the greatest base offense level from among three alternatives. Proposed subsection (a)(1) uses the base offense level from the underlying offense that was the source of the funds, if the defendant committed that offense and the offense level for that offense can be determined. Proposed subsection (a)(2) calls for a base offense level of 12 plus the number of levels from the fraud loss table corresponding to the value of the funds, if the

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suddenly Ms. Boley, a veteran teacher of 21 years, was faced with a possible maximum term of five years in prison. Wash. Post, Nov. 19, 1992. The Commonwealth of Virginia recognized the absurdity of prosecuting such a case, and permitted Ms. Boley to plea to a misdemeanor, which the court then agreed to dismiss in six months if Ms. Boley stayed on good behavior. Wash. Post, Dec. 2, 1992.

defendant knew or believed that the funds were proceeds of an unlawful activity involving drug trafficking. Proposed subsection (a)(3) calls for a base offense level of eight plus the number of levels from the fraud loss table corresponding to the value of the funds.

Proposed U.S.S.G. § 2S1.1 has two specific offense characteristics. The offense level would be increased two levels if the defendant knew or believed that the transaction were designed, at least in part, to disguise the proceeds of criminal conduct, or that the funds were to be use to promote further criminal activity. If the defendant knew the transactions were designed to disguise the proceeds, an additional two levels are added if the offense (A) involved placement of funds into, or movement of funds from, a company outside of the United States, or (B) otherwise involved the use of a sophisticated form of money laundering.

Proposed U.S.S.G. § 2S1.2 has three alternative base offense levels, directing the use of the alternative that yields the greatest offense level. Proposed subsection (a)(1) calls for a base offense level of eight plus the number of levels from the fraud loss table corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of unlawful activity. Proposed subsection (a)(2) calls for a base offense level of six plus the number of levels from the fraud loss table corresponding to the value of the funds, if the defendant knew or believed that the funds were proceeds of unlawful activity.

Proposed subsection (a)(3) calls for a base offense level of six. Proposed U.S.S.G. § 2S1.2 also has a cross reference that calls for the offense level from the appropriate tax guideline if the offense was committed to evade taxes and if the resulting offense level is greater than the offense level determination under proposed U.S.S.G. § 2S1.1.

Amendment 58, proposed by the Department of Justice, would consolidate present U.S.S.G. §§ 2S1.3 and 2S1.4. This would be accomplished by adding to the present U.S.S.G. § 2S1.3 an additional base offense level of nine, "for a willful failure to file," and an additional specific offense characteristic. The new specific offense characteristic would increase the offense level by four levels (or to level 13 if the resulting offense level was less than 13) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

We support amendment 20 because it improves the present money laundering guidelines. Our experience has been that prosecutors often use the money laundering offenses to get higher sentences than they would get if they prosecuted for the underlying criminal activity. For example, a $20,000 theft with more than minimal planning yields an offense level of 12 under U.S.S.G. § 2B1.1. If the defendant is charged under 18 U.S.C. § 1956, however, the offense level under present U.S.S.G. § 2S1.1 is 20. Under proposed U.S.S.G. § 2S1.3, the defendant's offense level is 12. Amendment 20 would not entirely eliminate the prosecutor's ability to

manipulate punishment by what is charged, but it would certainly curtail that ability.

We oppose amendment 8 because it fails to address the problem of prosecutorial manipulation of charges to get harsher sentences. We also question the assessment of seriousness in amendment 58. An accountant who has a client structure an $18,000 payment into two payments would have an offense level of 13. Another accountant who receives an $18,000 payment and willfully fails to report it would have an offense level of nine. We do not view the first accountant's offense as nearly fifty percent more serious than the second accountant's.

**Amendments 21 and 41**
**(§§ 2T1.1 et al.)**

Amendment 21 would consolidate four tax guidelines and adopt a uniform definition of tax loss. In addition, amendment 20 would create two rebuttable presumptions. First, if a return was filed, the tax loss is presumed to be 28% (34% for a corporation) of the unreported gross income (plus 100% of any false credits claimed), or 28% (34% for a corporation) of the amount improperly claimed deductions. Second, if a return was not filed, the tax loss is presumed to be 20% (25% for a corporation) of the gross income, less any tax withheld or otherwise paid.

Amendment 41, drafted by the Internal Revenue Service, would also consolidate four tax guidelines, establish a uniform definition of tax loss, and create rebuttable presumptions. The definitions and presumptions are based upon the tax rate applicable to the defendant.

We support amendment 21 and oppose amendment 41. We find the consolidated guidelines established by amendment 21 clearer and simpler to apply than the consolidated guidelines established by amendment 41. In addition, amendment 41 would increase penalties. For example, under present U.S.S.G. § 2S1.1, an evasion of $2,500 yields an offense level of seven. Under amendment 41, the offense level would be ten. There is no evidence that the punishment presently called for by the tax guidelines is inadequate. Absent such evidence, there is no justification for an increase.

**Amendment 22**
**(§ 2X1.1. Attempt, Solicitation, or Conspiracy)**

Amendment 22 would consolidate the specific offense characteristics of U.S.S.G. § 2X1.1(b)(1), (2), and (3) into a single specific offense characteristic. We believe that the amendment simplifies the structure of the guideline, making it more comprehensible, and we support it.

**Amendments 23 and 46**
**(§ 3B1.3. Abuse of Position of Trust)**

Amendment 23 would revise U.S.S.G. § 3B1.3, which provides for a two-level enhancement if a defendant "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." Amendment 23 would amend the guideline to require that the defendant abuse a position of "special trust" and would revise the commentary to clarify what "special trust" means. Amendment 23 also invites comment on an alternative to revising U.S.S.G. § 3B1.3 which would add a specific offense characteristic to U.S.S.G. § 2B1.1 and U.S.S.G. § 2B1.2 to

enhance a sentence for abuse of trust in embezzlement cases. When the specific offense characteristic for abuse of trust is applied, there would be no enhancement under U.S.S.G. § 3B1.3. In addition, the example of the ordinary bank teller in the commentary to § 3B1.3 would be deleted.

Amendment 46, drafted by the United States Postal Service, would amend the commentary to U.S.S.G. § 3B1.3 to increase penalties for postal service employees convicted of specified offenses. As revised by this amendment, application note 1 would state that "[t]his enhancement applies to all employees in respect to the following offenses: theft or obstruction of United States mail (18 U.S.C. §§ 1703, 1709); embezzlement of Postal Service funds (18 U.S.C. § 1711); and theft of Postal Service property (18 U.S.C. § 641)."

The present guideline is difficult to apply consistently because neither the guideline nor the commentary defines with enough precision what constitutes an abuse of trust. We support amendment 23, which will clarify what constitutes abuse of trust and revise the commentary to set forth factors that would appropriately describe the kind of relationship necessary to justify a two-level enhancement. This amendment will promote more uniform application of this guideline.

We do not support amending U.S.S.G. § 2B1.1 and U.S.S.G. § 2B1.2 to provide an enhancement for abuse of trust in embezzlement cases. That approach does nothing to clarify what "abuse of trust" encompasses. Indeed, if the "ordinary bank teller" example is

deleted, the enhancement would routinely be applied in every embezzlement case and be nothing more than an increase in the base offense level for embezzlement cases -- even though there has been no showing that the present offense levels are inadequate. Further, this approach would not address the problems that make the abuse of trust enhancement difficult to apply.

We do not support Amendment 46, which would require an abuse of trust enhancement if the defendant is a postal worker convicted of one of the specified offenses, even if no abuse of any trust were involved in committing the offense. For instance, under the proposed amendment, a postal worker convicted of hot-wiring and stealing a mail truck parked on a public street would get the enhancement, while anyone else who did the same thing would not. The proposed amendment is not specific enough to explain why a theft of postal property by a postal employee that did not involve any special access by virtue of the postal employee's position mandates a higher offense level than the same theft committed by someone other than a postal employee.

Amendment 46 raises other problems. There is no meaningful distinction between postal workers and other government workers to justify a blanket application to one group of employees and not to the other. We believe it would be unwise for the Commission to require application of the abuse of trust enhancement based solely on who employs the defendant. To determine whether there should be a two-level enhancement, the focus of inquiry should be on whether there was a unique fiduciary-like relationship as a result of the

defendant's position that substantially facilitated the commission of the offense.

**Amendments 24, 31, and 47**
**(§ 5K1.1, p.s. Substantial Assistance to Authorities)**

Amendments 31 and 47 would each remove the requirement of a government motion for downward departures under U.S.S.G. § 5K1.1, p.s. in all cases and would authorize a defendant to move for such a departure. Amendment 24 invites comment on whether to permit the sentencing court, sua sponte, to depart downward for substantial assistance if the defendant were a first-time offender convicted of an offense that did not involve violence. We support the proposed amendments.

To comply with 18 U.S.C. § 3553(a), the sentencing court must consider the defendant's "history and characteristics" when imposing sentence. Section 5K1.1, however, purports to limit the sentencing court's consideration of one aspect of the defendant's history and characteristics -- whether the defendant has assisted law enforcement authorities -- by requiring a government motion before the court can depart. While 18 U.S.C. § 3553(e) requires a government motion before the court can impose a sentence below a minimum term required by statute, 28 U.S.C. § 994(n) does not mandate such a requirement when the departure is below the guideline range but not below the statutory minimum. The Commission, however, determined that U.S.S.G. § 5K1.1, p.s. would call for a government motion. The Commission has never explained why it took this approach, so it is unclear why the Commission does not trust federal judges to determine if a defendant has

substantially assisted authorities absent a motion by the prosecutor.

The government motion requirement creates unfairness. If there is a dispute between the government and the defendant as to the nature and extent of the defendant's cooperation, the government can foreclose the resolution of that dispute by a neutral third party -- the court -- by failing to make the necessary motion.

The available data suggests that the problem of fairness is more than theoretical because of the increase in the number of substantial assistance departures. Indeed, departures under U.S.S.G. § 5K1.1, p.s. have become the growth industry of the Guidelines. The Commission's data indicates that the substantial assistance departure rate in FY 91 (11.9%) was nearly fifty-percent greater than that rate in FY 90 (7.5%). U.S. Sentencing Com'n, 1991 Annual Report table 56; U.S. Sentencing Com'n, 1990 Annual Report table C-5. More recent Commission data indicates that the rate has continued to climb and is presently at about 15.1%. The national data reveals significant variance among federal judicial districts. In FY 91, in 15 districts, the rate of substantial assistance departures was less than half the national rate, and in two districts there were no substantial assistance departures at all. U.S. Sentencing Com'n, 1991 Annual Report table 56. In six districts, the rate in FY 91 was more than twice the national rate (the rate was 41% in the Eastern District of Pennsylvania). Id. The rate can vary quite substantially between adjacent districts.

For example, the rates in the Northern and Middle Districts of Florida are 36.3% and 20.4%, respectively, while the rate in the Southern District of Florida is 8.2%. Id. The Commission's most recent data indicates that this variance between districts continued through FY 92.

In addition, conduct that would qualify a defendant for a government motion in one district may be insufficient in another. For example, in the Central District of Illinois, it appears to have been the policy of the United States Attorney to move under U.S.S.G. § 5K1.1, p.s. only if the defendant agreed to go undercover with a wire. See United States v. Curran, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989), rev'd sub nom United States v. Spears, 965 F.2d 262 (7th Cir. 1992). If two defendants provided equally substantial assistance in that district, only the one who wore a wire would be eligible for a government motion under U.S.S.G. § 5K1.1, p.s.

The policy in the Central District of Illinois, however, does not appear to be the policy in the Eastern District of Virginia, see United States v. Campbell, 704 F. Supp. 661, 663 (E.D. Va. 1989), or in the District of Columbia, see United States v. Roberts, 726 F. Supp. 1359, 1375-76 (D.D.C. 1989), rev'd sub nom United States v. Doe, 934 F.2d 353 (D.C. Cir.), cert. denied, 112 S.Ct. 268 (1991).

Because there are no nationwide standards that govern the exercise of prosecutorial discretion under U.S.S.G. § 5K1.1, p.s. the potential for disparity cannot be adequately controlled.

Further, prosecutorial decisions are generally considered unreviewable, so uniform national standards, were they to exist, would not guarantee consistent applications anyway. See United States v. Chotas, 913 F.2d 897, 905 (5th Cir. 1990) (Clark, J., concurring and dissenting)("it seems to me to be grossly inconsistent with the goal of reducing sentencing disparity to remove sentencing discretion from the judge and place it with the prosecutor whose decisions are not reviewable"), cert. denied, 111 S.Ct. 1421 (1991).

In addition to the lack of uniform standards, the Commission's study of mandatory minimum sentencing provisions raises the possibility of racial discrimination in the applications of U.S.S.G. § 5K1.1, p.s. The Commission's data suggests that racial discrimination infects prosecutorial decisionmaking with regard to mandatory minimums and substantial assistance departures.[10]

If the government-motion requirement reflects a concern about prolonging sentencing hearings because of substantial assistance claims, that concern may already be realized. In addition to litigating whether the prosecutor has acted in bad faith, a defendant can litigate whether the prosecutor has unconstitutionally withheld a motion. Wade v. United States, 112

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[10]The substantial assistance departure rate for whites, where there was a five year mandatory minimum, was 19.9%. The rates for blacks and hispanics was 13.8% and 6.8%, respectively. Where the mandatory minimum was ten years, the substantial assistance departure rates were: whites, 25%; blacks, 18.3%; and hispanics, 11.8%. U.S. Sentencing Com'n, Mandatory Minimum Penalties in the Federal Criminal Justice System 81 (Tables 23A-23E, 24A-24E)(Aug. 1991).

S.Ct. 1840 (1992). Indeed, in Wade, the government conceded that a defendant would be entitled to relief if a prosecutor's refusal to file a motion under U.S.S.G. § 5K1.1, p.s. was not "rationally related to any legitimate Government end . . . ." Id. at 1844.

The removal of the government motion requirement would allow sentencing courts to focus on the relevant issue of whether the defendant provided substantial assistance to authorities. This would eliminate collateral litigation as to whether a prosecutor's decision to refrain from filing the motion was based on an unconstitutional motive or whether the prosecutor was acting in bad faith.

We believe that federal judges can be trusted to decide fairly and justly, and without a government motion, whether a defendant has substantially assisted authorities. We therefore support amendments 31 and 47 which, if adopted, will make the focus of the inquiry whether the defendant actually provided substantial assistance and will eliminate peripheral litigation on why the government did not file a motion.

While we believe that the government-motion requirement should be eliminated altogether, we would support the adoption of the proposed language in amendment 24 if neither amendment 31 or 47 were adopted. Because a provision like that in amendment 24 would apply only in a limited number of cases, adopting amendment 24 would enable the Commission to test the effect on sentencing proceedings of removal of the government-motion requirement.

**Amendments 25 and 36**
**(§ 6B1.2, p.s. Standards for Acceptance of Plea Agreements)**

Amendment 25 would revise U.S.S.G. § 6B1.2, p.s. by adding commentary recommending that the government disclose to the defendant information known to the government that is relevant to application of the guidelines "in order to encourage plea negotiations that realistically reflect probable outcomes." Option 1 of amendment 25 would encourage disclosure during "plea discussions." Option 2 would encourage disclosure "prior to the Rule 11 colloquy." Amendment 36 is similar, except that disclosure would be encouraged prior to the "entry of a guilty plea."

We favor option 1 of amendment 25. To make a knowing and intelligent waiver of a trial and plead guilty or nolo contendere, a defendant should be fully aware of the sentencing consequences of the plea. In a guideline sentencing system, those consequences are capable of reasonably accurate determination. At least, the areas of disagreement can be identified so that a defendant can reasonably assess the consequences of a plea.

Because of the scope of the relevant conduct rule, as well as the sentencing court's ability to depart from the guideline range on the basis of factors not adequately accounted for in the guidelines, it is important to know before a plea what matters the government will be bringing to the court's attention. Without such information, a defendant may enter a plea expecting a certain range of punishment and then be confronted with a fight to prevent that range from increasing.

There are benefits to the courts if this amendment is adopted. Sentencing disputes could be identified early on and resolved, or the issues narrowed. Presentence reports could be completed more quickly, and sentencing hearings would go more smoothly, with counsel able to focus on matters in dispute. There would be fewer motions to withdraw pleas and 2255 motions based upon ineffective assistance of counsel. Finally, there would be a greater appearance of fairness, which would enhance the federal criminal justice system not only in the eyes of the defendant but also in the eyes of the public.

**Amendment 26**
**(Carjacking)**

Amendment 26 invites comment, first, on the most appropriate guideline for the recently-enacted armed carjacking statute, 18 U.S.C. § 2119, enacted by the Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 101, 106 Stat. 3384 (1992). Amendment 26 also invites comment on whether the offense levels in §§ 2B1.1, 2B1.2, and 2B6.1 should be raised for offenses involving stolen vehicles to reflect the increase in the statutory maximum from five to ten years under sections 102 and 103 of the Anti Car Theft Act of 1992.[11]

We believe that the robbery guideline, U.S.S.G. § 2B3.1, is the most appropriate guideline. At common law, robbery required the trespassory taking of property, by force or fear, from the

[11]The Notice of Proposed Amendments in the Federal Register refers to "§ 2B1.6." The reference is probably a typographical error, and the correct reference should be § 2B6.1.

person or presence of another, with intent to steal the property. See 2 W.R. LaFave & A.W. Scott, Substantive Criminal Law § 8.11 (1986). Those elements are present in the other offenses covered by U.S.S.G. § 2B3.1. Hobbs Act robbery, for example, is defined as

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. 18 U.S.C. § 1951(b)(1).

The definition of carjacking in 18 U.S.C. § 2119(a) contains the elements of common-law robbery and is similar to the other robbery offenses covered by U.S.S.G. § 2B3.1. We therefore believe that U.S.S.G. § 2B3.1 is the appropriate offense guideline.

We do not believe that the offense levels of U.S.S.G. §§ 2B1.1, 2B1.2, and 2B6.1 should be increased for offenses involving stolen vehicles simply because the Anti Car Theft Act of 1992 increased the maximum penalty for such offenses from five to ten years. We do not believe that an increase in a statutory maximum requires an increase in the offense levels of the applicable offense guideline. A statutory maximum sets an appropriately severe penalty for the most aggravated form of the offense. An increase in the statutory maximum means Congress believes the most aggravated form of the offense should be treated more seriously, but does not necessarily means that the heartland form of the offense should be treated more severely.

**Amendment 27**
**(Chapter Two)**

Amendment 27 would consolidate several chapter two offense guidelines with other offense guidelines that cover similar offense conduct and that have identical or very similar characteristics. We do not perceive any policy changes in the consolidation. Because this amendment will simplify the guidelines, we support it.

**Amendment 28**
**(Miscellaneous Sections)**

Amendment 28 would make substantive and technical amendments to numerous sections. We oppose amendments 28(A), 28(C), and 28(F). We do not oppose the other parts of amendment 28.

Amendment 28(A)

Amendment 28(A) would revise the commentary to the first degree murder guideline, U.S.S.G. § 2A1.1, to eliminate a discussion of 18 U.S.C. § 1111 (first degree murder within the special maritime and territorial jurisdiction of the United States). The background note simply states that (1) the discussion in application note 1 regarding downward departures applies to 18 U.S.C. § 1111 only if section 1111 does not mandate life imprisonment, and (2) whether section 1111 mandates life imprisonment is a matter to be resolved by the courts. The background note discussion is accurate and pertinent, and we see no reason to delete it.

Amendment 28(C)

Amendment 28(C) would add real-offense cross-reference provisions to four guidelines, U.S.S.G. § 2A3.1 (criminal sexual

abuse), U.S.S.G § 2B3.1 (robbery), U.S.S.G. § 2B3.2 (extortion by force), and U.S.S.G § 2E2.1 (making or financing an extortionate extension of credit). We have previously expressed our concern that the Commission, apparently inadvertently, is changing the nature of the guidelines from charge-offense with real offense elements, to real offense. Under the mixed system adopted by the Commission, U.S.S.G. § 1B1.2 directs the use of the offense of conviction to determine the applicable offense guideline in chapter two of the Guidelines Manual, and U.S.S.G. § 1B1.3 directs the use of the real offense conduct to determine the base offense level and specific offense characteristics under the offense guideline, as well as the adjustments to that guideline under chapter three of the Manual.

As the Commission itself has indicated, in drafting the initial set of guidelines,

> one of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).[12]

The Commission first attempted to draft a set of guidelines incorporating a pure real offense system. The Commission found, however, that a real offense system was impractical and "risked return to wide disparity in sentencing practice".[13] The Commission

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[12]U.S.S.G. Ch. 1, Pt. A(4)(a), at 4.

[13]Id. at 5.

then opted for the present system, one based on the offense charged but with "a significant number of real offense elements".[14]

Amendment 28(C) would alter that system for four guidelines by rendering meaningless the direction in U.S.S.G. § 1B1.2 to use the offense of conviction for determining which chapter two offense guideline to use. We believe that this approach is wrong. The Commission, for good reasons, has rejected a comprehensive real offense system and should not, ad hoc, abandon that decision. If the Commission wants to make a fundamental alteration of the present system, the Commission should tackle the issue head-on and across-the-board. The problems that the Commission identified when it rejected a comprehensive real offense system are only magnified by the creation of a real offense system ad hoc.[15]

Amendment 28(F)

Amendment 28(F) invites comment upon whether U.S.S.G. § 2A6.1 (threatening communications) should be amended to preclude grouping together multiple threatening communications to the same victim on different occasions. We do not believe that such a change is

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[14]Id. See also W. Wilkins and J. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 497-500 (1990) ("The Commission ultimately settled on a system that blends the constraints of the offense of conviction with the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.")

[15]We are not endorsing a real offense system. Indeed, we have strong reservations about a system in which the charge that the government has proved beyond a reasonable doubt would serve only to set a maximum and otherwise would be virtually irrelevant to determining punishment. Rather, we are suggesting that a major alteration of the guideline system ought to be undertaken directly and comprehensively, not inadvertently and on an ad hoc basis.

warranted. In our experience, the vast majority of persons who are prosecuted for sending threatening communications are mentally unbalanced and have no intention of carrying out their threats. There is no evidence that the guideline presently produces sentences for such people that are too lenient. If the defendant took any action indicating an intention to carry out a threat, subsection (b)(1) increases the base offense level by 50%. Absent any evidence that the present guideline produces inappropriate results, we oppose any modification of U.S.S.G. § 2A6.1 along lines suggested in amendment 28(F).

**Amendment 29**
**(Chapter 5, Part H. Specific Offender Characteristics)**

Amendment 29, proposed by the Criminal Law Committee of the Judicial Conference, would amend the introductory commentary to Chapter 5, Part H, by adding language stating that a court may depart from the guidelines when factors not ordinarily relevant to a departure decision "are present to an unusual degree and are important to the sentencing purposes in the particular case."[16] We support this amendment. The Commission, in Chapter Five, has specified a number of factors that are "not ordinarily relevant" to determine whether to depart. It follows that there are some situations in which such a factor is relevant, and one of those

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[16]There appears to be a typographical error in the amendment, which refers to "the Introductory Commentary to § 5H1.1". The introductory commentary is to Chapter 5, Part H, and applies to all of the policy statement in Chapter 5, Part H -- not just to U.S.S.G. § 5H1.1. The reference in the amendment should probably be to "the Introductory Commentary to Chapter 5, Part H", the reference used in the synopsis of the amendment.

situations would seem to be when that factor is present with other factors that also are "not ordinarily relevant." The Judicial Conference language would make this logic explicit in the commentary and prevent any misunderstanding.[17]

**Amendment 30**
**(Chapter One, Part A(4)(b). Departures)**

Amendment 30 invites comment on whether the language in Chapter One, Part A(4)(b) can be read as overly restrictive of a court's ability to depart. We believe that certain language in Chapter One, Part A(4)(b) can be, and has been, read as overly restrictive of a court's ability to depart. Thus, for example, the Eighth Circuit has stated that "[t]his circuit has determined that departures pursuant to section 3553(b) were intended by the Commission to be allowed only in rare cases." United States v. Johnson, 908 F.2d 396, 399 (8th Cir. 1990). Similarly, the Third Circuit has concluded that "the Guidelines, commentaries and policy statements clearly indicate that departures should be rare." United States v. Uca, 867 F.2d 783 (3d Cir. 1989).

Congress viewed departures as a way to avoid mechanistic sentences,[18] and therefore, departures must be based on the

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[17]For an example of such misunderstanding, see United States v. Sigwart, 916 F.2d 916 (4th Cir. 1990)(case remanded to sentencing judge who mistakenly interpreted U.S.S.G. § 5H1.1 to prohibit departures based on factors deemed "not ordinarily relevant").

[18]"The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983).

particular facts of the case. Further, it is through departures that the Commission is able to refine and improve the guidelines. As the Commission itself has stated, "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted." U.S.S.G. Ch. 1, Pt. A (4)(b), at 6. Given these concerns, the Commission should scrupulously avoid discouraging departures.

We recommend the following modification to Chapter One, Part A(4)(b). On page six, paragraph two, delete "Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because" and insert in lieu thereof "Second,". On page six, paragraph four, delete "In its view, however, such cases will be highly infrequent."

**Amendment 32**
**(First Offender Sentencing Options)**

**Amendment 32 invites comment on whether the Commission should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a nonviolent or otherwise nonserious offense. If so, amendment 32 invites comment upon whether that objective should be achieved by (A) providing an additional ground for departure in Chapter Five, Part K or (B) increasing the number of offense levels in Zone A in Criminal History Category I.**

A major problem with the guidelines, in our opinion, is that they produce overly-harsh punishment, particularly in Criminal History Category I. We therefore encourage the Commission to take steps to allow courts to impose a sentence other than imprisonment in the case of a first offender or an offender with a minor criminal record.

Last cycle, we proposed that the Commission adopt a modified version of one of the amendments then under consideration. We again recommend that proposal, which would enlarge Zone A in Criminal History Category I to level nine. We would not distinguish among various types of offenses because, by definition, all level four offenses, for example, are of the same severity. The violence factor is accounted for in the determining the base offense level.

In order to accommodate our recommendation, the range in offense level nine would have to be changed to 0-6. In addition, the range in other offense levels would have to be modified somewhat in order to address disproportionate increase ("cliff") concerns. The following table indicates how those concerns would be addressed in light of the Commission's modification of Zone A last cycle:

| Offense Level | Present Range | Recommended Range |
|---|---|---|
| 9 | 4-10 | 0-6 |
| 10 | 6-12 | 4-10 |
| 11 | 8-14 | 6-12 |
| 12 | 10-16 | 9-15 |
| 13 | 12-18 | 10-16 |
| 14 | 15-21 | 14-20 |
| 15 | 18-24 | 18-24 |
| 16 | 21-27 | 22-28 |
| 17 | 24-30 | 26-32 |
| 18 | 27-33 | 28-34 |

Last cycle, the commission proposed an amendment that would expand Zones B and C (options 2 and 5 of last cycle's amendment 29).[19] We supported that proposal then, and we continue to support it. That proposal would have expanded Zone B to cover offense levels where the bottom of the range is ten months or less (a two-level expansion for Category I through IV and a one-level increase for Category V and VI). Such a change would be technical in nature, because there is little practical difference between a sentence of probation with a confinement condition and a split sentence. Defendants who would be made eligible for probation with a confinement condition if Zone B were expanded, are presently eligible for a split sentence.

The proposal last cycle also would have expanded Zone C to authorize a split sentence if the bottom of the guideline range was 12 months or less. Such a change would expand Zone C by one offense level at each Criminal History Category, but would not affect a substantial number of people.[20] The type of person

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[19]57 Fed. Register 90, 109 (1992).

[20]Commission date indicates that had this provision been in place in fiscal year 1990, an additional 248 persons would have been in Zone C under Criminal History Category I. P. Martin et

picked up by expanding Zone C, moreover, is not likely to be the sort of person for whom the Commission would think a split sentence is inappropriate.[21]

**Amendment 33**
**(Sentencing Options)**

Amendment 33 invites comment upon whether the Commission should increase the availability of the type of sentences provided for in Zones A and B of the sentencing table to more offense levels within all Criminal History categories.

We would support such an amendment for the reasons set forth in our discussion of amendment 32.

**Amendment 38**
**(§ 2B1.1. Theft)**

Amendment 38 invites comment upon whether the theft guideline should contain downward adjustments if the defendant did not personally benefit from the theft, and whether offense levels should be capped for minimal and minor participants. We believe that the Commission should study both matters. That study would enable the Commission to determine whether there are sufficient instances of a defendant who does not personally profit from the offense to warrant drafting a special offense characteristic for

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al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 10, (Oct. 23, 1991).

[21]In fiscal year 1990, there were no homicide, kidnapping, or robbery cases in offense levels 8 through 14, under all criminal history categories. Id. at Table 11. There were 94 drug cases, 21 sex offense cases, and 98 firearms cases in those offense levels, under all criminal history categories, in fiscal year 1990. Id. There were 20,171 cases sentenced in fiscal year 1990. Id. at Table 10.

U.S.S.G. § 2B1.1, and whether the aggregation problems of the drug guideline also infect the theft guideline. In the meantime, we suggest that the Commission add language to the commentary making clear that the heartland of the guideline encompasses personally profiting from the offense, and that consideration a departure would be warranted if the defendant did not personally profit from the offense.

**Amendment 40**
**("Cocaine Base")**

Amendment 40 invites comment on whether the Commission should ask Congress to "modify or eliminate the provisions that distinguish between punishment for powdered cocaine and cocaine base (crack) at the quantity ration of 100 to 1." We believe that the Commission should request that Congress eliminate this distinction.

The stark fact is that crack offenses are committed overwhelmingly by African-Americans and that powdered cocaine offenses are committed primarily by whites. The Commission's own data shows that from April 1, 1992 through July 31, 1992, African-Americans comprised 92.6% of the defendants sentenced for drug offenses involving crack, and non-blacks accounted for 70.3% of those defendants sentenced for powdered cocaine.

There is no rational basis for differentiating penalties. Indeed, there is no objective scientific data to show that crack is more dangerous than cocaine powder, particularly to the extent Congress has decreed. The disparate levels of punishment only cast doubt on the fairness of the federal criminal justice system and

are inconsistent with the goals of eliminating unwarranted sentencing disparity.

The disparate treatment evidenced, by the Commission's own data, raises constitutional problems as well. Indeed, the Minnesota Supreme Court struck down a similar state penalty provision. State v. Russell, 477 N.W. 886 (Minn. 1991). The Minnesota Supreme Court held that the statute violated equal protection because of the lack of a "genuine and substantial" basis for the distinction. We ask the Commission to urge Congress to act promptly to repeal this discriminatory distinction.

**Amendment 42**
**(§§ 3D1.3, 2D1.1, and 2S1.1)**

Amendment 42, drafted by the Internal Revenue Service, offers two options for increasing offense levels for drug trafficking and money laundering offenses. Option 1 -- which would affect all offenses, not just drug trafficking and money laundering offenses -- would amend the grouping rules to call for a two-level increase when offenses are grouped together under U.S.S.G. § 3D1.2(c) and the count with the specific offense characteristic that requires such grouping has a lower offense level than the offense level applicable to the group. Option 2 would amend the drug trafficking and money laundering guidelines to call for a two-level enhancement if the defendant failed to report income from drug trafficking in excess of $10,000 in any year or if the defendant failed to report income in excess of $10,000 in any year.

We oppose both options. The Internal Revenue Service has not produced any evidence suggesting that punishment under the drug

trafficking or money laundering guidelines is inadequate. Because people who engage in criminal activities rarely report to the IRS that they earned money illegally, and the amount of such money, the IRS proposal amounts to nothing more than an across-the-board increase in offense levels for the drug trafficking and money laundering guidelines.

**Amendment 43**
**(§ 3D1.4. Determining the Combined Offense Level)**

Amendment 43, drafted by the Internal Revenue Service, would revise the counting of units for purpose of the grouping rules. At present, U.S.S.G. § 3D1.4 does not assign any unit, or fraction of a unit, to a group that is nine or more offense levels less than the highest offense level of the groups. Amendment 43 would require assigning one-half unit to such a group.

We oppose amendment 43. The Internal Revenue Service has not presented any evidence of the need for a revision. It is not clear why the Commission should require that a defendant whose offense level under U.S.S.G. § 2D1.1 is 32 should receive a two-level increase in that offense level because the defendant is convicted at the same time of a level four trespass. Absent any evidence of a need to revise, we do not believe that the Commission should further increase the complexity of the grouping guidelines.

**Amendment 44**
**(§ 2B1.1. Theft)**

Amendment 44, drafted by the Postal Service, would amend the theft guideline by (1) adding a two-level enhancement if undelivered mail was taken and (2) requiring an offense level of at

least 14 if the offense involved "an organized scheme to steal undelivered United States mail." We oppose both parts of the amendment.

The Postal Service has presented no evidence to suggest that present penalties for theft of undelivered mail are inadequate. The second part of the amendment, moreover, would mean that an organized scheme to steal undelivered mail is equated with a loss of at least $70,000.[22] The Postal Service has given no rationale for treating such a scheme as equivalent to a loss of at least $70,000.

**Amendment 45**
**(Chapter 3, Part A. Victim-Related Adjustments)**

Amendment 45, proposed by the Postal Service, would add a new guideline calling for an increase in the offense level "if the offense affected more than one victim." We oppose the amendment.

There has been no evidence presented that there is a need for such an enhancement. While the proposed enhancement might seem straight-forward, there are problems in application. For example, if a thief steals a bundle of 200 Sears catalogs addressed to "occupant," is there one victim (Sears), 200 victims (the "occupants" at the addresses on the catalogues), or 201 victims (Sears plus the 200 "occupants") -- or some lesser number that

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[22]Under U.S.S.G. § 2B1.1, the base offense level is four. Because there is an organized scheme, the two-level enhancement of subsection (b)(5) would apply, yielding an offense level of six. To get to level 14 requires an eight-level enhancement, which in turn requires a loss in excess of $70,000.

accounts for those "occupants" who do not want the catalog, do not care if it is delivered, or throw it away immediately upon receipt?

**Amendment 50**
**(§ 2D1.1. Drug Trafficking)**

Amendment 50 would revise the commentary to the drug trafficking guideline, U.S.S.G. § 2D1.1, by adding language to the asterisk footnote to the drug quantity table to specify that the weight of LSD means the "actual weight of the LSD itself", and excludes the weight of any carrier. We support amendment 50.

LSD, unlike marijuana, for example, is sold by the dose, not by weight. The weight of the typical dose of LSD, as set forth in the commentary to the drug trafficking guideline, is 0.05 milligrams. In other words, one gram of LSD will produce 20,000 doses.

Because the typical dose of LSD is minuscule almost to the point of invisibility, the dose must be consumed with the aid of a carrier, typically a paper called "blotter paper." The weight of the blotter paper is more than 100 times the weight of the LSD it contains.[23] If the carrier is something other than blotter paper, such as a sugar cube, the weight differential can be even greater. Thus, in an LSD case, the defendant's offense level will be driven

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[23]The Seventh Circuit calculated that blotter paper with 100 doses of LSD weighs about 110 times the weight of the LSD alone. United States v. Marshall, 908 F.2d 1312, 1315 (7th Cir. 1990), aff'd sub nom Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919 (1991).

mainly by the weight of the carrier medium, not by the weight of the LSD.[24]

The vast disparity between the weight of the carrier and the weight of the LSD produces results that are inequitable, incompatible with the purposes of sentencing, and inconsistent with a market-oriented approach to drug penalties.[25] A drug manufacturer who makes enough LSD for 10,000 doses and is apprehended with the LSD in liquid form, before it is inserted into a carrier, will have an offense level of 20 because the weight of the LSD is 500 milligrams. A defendant with 100 doses in blotter paper -- one percent of the number of doses that the manufacturer's LSD would produce -- would also receive an offense level of 20. As Judge Posner has observed, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."[26]

Congress has decided, for purposes of determining criminal liability and maximum punishment, that the weight of a "mixture or

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[24]For example, 100 doses of liquid LSD weighs five milligrams and carry an offense level of 12. Using the Seventh Circuit's formula, 100 doses of LSD on blotter paper weigh about 550 milligrams and carry an offense level of 20. See n. 23 supra. If sugar cubes are used for the carrier, 100 doses of LSD weigh about 225 grams and carry an offense level of 36.

[25]The Attorney General's designee on the Commission has agreed that there is potential for disparity if the carrier is weighed. See R. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50, 56 n.19 (1990).

[26]United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner, J., dissenting), aff'd sub nom Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919 (1991).

substance containing a detectable amount of" LSD should be used. See 21 U.S.C. § 841(b). The Commission has adopted this approach in U.S.S.G. § 2D1.1 for purposes of determining the relative severity of offenses,[27] and the Supreme Court has affirmed that 21 U.S.C. § 841(b) and U.S.S.G. § 2D1.1, as presently written, call for counting the weight of the carrier medium.[28]

Congress, however, has not mandated that the Commission require counting the weight of the carrier. The Commission is free to use a different method. The weight of the LSD itself not only is a better measure of offense seriousness than the combined weight of the LSD and the carrier, but is also more consistent with a

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[27]The asterisk footnote to that table states that "unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."

[28]Chapman v. United States, ____ U.S. ____, 111 S.Ct. 1919 (1991).

market-oriented approach to drug penalties.[29] We urge the Commission to adopt amendment 50.

**Amendment 51**
**(§ 2D1.1. Drug Trafficking)**

Amendment 51 would revise the asterisk footnote to the drug quantity table to specify that the term "cocaine base" means "the lumpy, rock-like form of cocaine base usually prepared by processing cocaine HCl and sodium bicarbonate. `Crack' is the street name for this form of cocaine base." We support the amendment.

All forms of cocaine derive from the cocoa plant, which is grown mostly in South America. The leaves of the cocoa plant are mashed together to form a paste, which is treated with chemicals to form cocaine base. The cocaine base is then usually transported to Columbia, where it is refined, using acetone and hydrochloric acid,

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[29]In Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919, 1925 (1991), the Supreme Court stated that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence". The purity of LSD is not affected by the carrier, whether it be blotter paper, a sugar cube, or a glass of orange juice. The carrier serves only to make it possible to consume a dose of LSD. While one carrier (say, a sugar cube) may be more appealing than another (say, blotter paper) on grounds of taste, the carrier does not dilute or weaken the LSD. As Judge Posner has observed, counting the weight of the carrier "would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer." United States v. Marshall, 908 F.2d 1312, 1332 (7th Cir. 1990) (Posner, J., dissenting), aff'd sub nom Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919 (1991).

into cocaine hydrochloride, an acid. This acid, when dried, is the white powder form of cocaine.

"Crack" is made by converting the acid form into a base form. That is accomplished by dissolving the powder in water and baking soda (or ammonia) and heating the solution. After the acid is removed, the substance is hardened into a block, which can be broken into smaller pieces for sale to the consumer. Because the crack form of cocaine has a significantly lower melting point than the powder form, the crack form can be smoked.

Smoking gets the cocaine absorbed into the blood stream faster than snorting. Crack produces a shorter, more intense high than cocaine powder.[30]

Congress has established a 100 to one ratio between "cocaine base" and cocaine.[31] The Commission's drug quantity table is based upon this statutory ratio.[32]

While Congress used the term "cocaine base" in the statutory language, the legislative history indicates that Congress was concerned with "crack", the street term for the rock form of

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[30]For a general description of the differences among cocaine powder, cocaine base, and crack, see S. Henegan et al., Report of the Drugs/Role Harmonization Working Group 22-24 (Nov. 10, 1992); Drug Enforcement Administration, U.S. Dep't of Justice, Drugs of Abuse 37-40 (1988 ed.).

[31]While distribution of five kilograms of cocaine is required to trigger a ten-year mandatory minimum term of imprisonment, distribution of only 50 grams of "cocaine base" will trigger the ten-year mandatory minimum. 21 U.S.C. § 841(b)(1)(A)(ii), (iii).

[32]R. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50 (1990).

cocaine base that can be smoked, and not with other forms of cocaine base. See, e.g., 132 Cong. Rec. S27180 (daily ed. Sept. 30, 1986) ("title I addresses the widespread emergence of crack cocaine in this country . . . . I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride . . . " (remarks of Sen. Chiles). Certain characteristics of crack were seen as justifying greater penalties: Crack's rock-like form makes it marketable in small quantities at a relatively low price and therefore more attractive to purchasers. Crack's high purity and method of ingestion (smoking) produces a more intense high and was perceived to make crack more addictive than the powder form of cocaine. See, e.g., 132 Cong. Rec. S14822 (daily ed. June 20, 1986) ("Because crack is so potent drug dealers need to carry much smaller quantities of crack than cocaine powder") (remarks of Sen. D'Amato).

A consequence of Congress' use of the term "cocaine base" instead of the street term "crack" is that courts have wrestled with the question of whether forms of cocaine base other than "crack" should receive the greater penalties applicable to "crack." See, e.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991) (enhanced penalties apply only to "crack"); United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992) (enhanced penalty applies to cocaine base that was not crack and that was bonded to suitcase). The legislative history behind the enactment of enhanced penalties for "cocaine base" indicates that Congressional concern was focussed on the rock form of cocaine base -- "crack". The

Commission, too, seems to be concerned with crack because the drug equivalency table in U.S.S.G. § 2D1.1, comment. (n.10), provides that "1 gm of Cocaine Base ("Crack") = 20 kg of marihuana". Amendment 51, therefore, will bring the guidelines closer to what Congress intended, and we urge the Commission to adopt it.

**Amendment 52**
**(§ 5B1.1. Imposition of a Term of Probation)**

Amendment 52 would revise U.S.S.G. § 5B1.1 to require the sentencing court, if a defendant is eligible for straight probation, to impose a nonincarcerative sentence unless the court finds that imprisonment is necessary to serve the purposes of sentencing. In addition, amendment 52 would revise U.S.S.G. § 5B1.1 to require the sentencing court, if a defendant is eligible for probation with a confinement condition, to impose the minimum period of confinement permitted unless the court finds that a greater period is necessary to serve the purposes of sentencing.

We support amendment 52, which will implement the Sentencing Reform Act's mandate to sentencing courts to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. This provision also carries out the Act's directive to the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" in the guidelines, and the directive to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or other serious offense."

**Amendment 53**
**(§ 4A1.2. Definitions for Computing Criminal History)**

Amendment 53 would amend the related case rule in U.S.S.G. § 4A1.2 to require the court to count sentences separately if the offenses from which the sentences resulted were separated by an intervening arrest, and to count them as one sentence if they were not separated by an intervening arrest. We believe that the amendment will simplify the guideline, making it easier to apply, and we support the amendment.

The criminal history score does not measure the number of prior convictions, and was not intended to do so, see U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987). Criminal history points are assigned for other than prior convictions (for recency of release from imprisonment, U.S.S.G. § 4A1.1(e), for example), and some prior convictions are not counted at all (stale convictions, see U.S.S.G. § 4A1.2(e), for example).

The basic rule is that, for purposes of assigning criminal history points, "prior sentences imposed in unrelated cases are to be counted separately." U.S.S.G. § 4A1.2(a)(2). Prior sentences are unrelated "if they were for offenses separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2, comment. (n.3). Prior sentences for related offenses "are to be treated as one sentence" for assigning criminal history points. U.S.S.G. § 4A1.2(a)(2). When sentences are related, the court is to use the longest term of imprisonment if the sentences

were concurrent and the aggregate term of imprisonment if the sentences were consecutive. Id.

The related case doctrine as presently formulated not only is complicated and difficult to apply, but it also produces unjustifiably disparate treatment of similarly-situated defendants. For example, a defendant steals goods from a parked truck on day one, passes a forged check on day two, steals a car on day three, and is arrested for the three offenses on day four. If all three offenses were committed in one jurisdiction, the cases against defendant usually are consolidated for trial and sentencing. Assuming that the defendant is sentenced to concurrent 18 month terms of imprisonment, the defendant will receive three criminal history points. If the defendant commits the offenses in three different jurisdictions (Virginia, Maryland, and the District of Columbia, for example), the cases cannot be consolidated for trial or sentencing. If each jurisdiction sentences the defendant to 18 month terms of imprisonment, to run concurrently, the defendant will receive nine criminal history points (because there is no single common scheme or plan). The difference between three and nine points is two criminal history categories. Thus, defendants with the same prior criminal conduct receive substantially disparate criminal history scores, and the only reason is the artifact of where they were prosecuted.

The related case doctrine, when parsed, really turns on whether there was an intervening arrest. The same-occasion provision is unnecessary because, by definition, offenses occurring

on the same occasion cannot be separated by an intervening arrest and will therefore always be related. The single common scheme or plan provision is overridden by the intervening arrest provision. Even if the offenses were part of a single common scheme or plan, the sentences are counted separately if there was an intervening arrest. The related case doctrine can be simplified and made easier to apply -- and disparate counting reduced -- by adoption of amendment 53.

**Amendment 54**
**(§ 4A1.2. Definitions for Computing Criminal History)**

Amendment 54 would amend the commentary to U.S.S.G. § 4A1.2 to clarify the meaning of the term "instant offense." We support the amendment.

A defendant is assigned criminal history points for a prior sentence only if the sentence results from a conviction "for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). To avoid double counting, and to insure consistency with the multiple count rules of U.S.S.G § 5G1.3, the term "instant offense" has to include "relevant conduct". Cf. U.S.S.G. § 4A1.1, comment. (n.4) (the term "instant offense" in U.S.S.G. § 4A1.1(d) includes "any relevant conduct"). The Fifth Circuit, however, adding an unnecessary level of complexity to the guidelines, has held that the inquiry is not whether the prior sentence is for conduct that is "relevant conduct", but rather "whether the prior conduct constitutes a `severable, distinct offense' from the offense of conviction." United States v. Thomas, 973 F.2d 1152, 1158 (5th

Cir. 1992). We believe that the Commission should clarify the matter by adopting amendment 54.

**Amendment 55**
**(§ 4B1.1. Career Offender)**

Amendment 55 would amend the career offender guideline to require the court, if the defendant is found to be a career offender, to impose a sentence that is at the top of the guideline range for Criminal History Category VI and the offense level otherwise determined. We support the amendment.

The Sentencing Reform Act requires the Commission to assure that certain career offenders receive a sentence "at or near the maximum term authorized". 28 U.S.C. § 994(h). The Sentencing Reform Act also amended 18 U.S.C. § 5037(c)(1)(B) to authorize a court to sentence a juvenile to the "maximum term that would be authorized if the juvenile had been tried and convicted as an adult". The Supreme Court has held that this phrase in section 5035(c)(1)(B) refers to the maximum sentence that the juvenile could have received by application of the sentencing guidelines. United States v. R.L.C., 112 S.Ct. 1329 (1992). We believe that the strikingly similar language of 28 U.S.C. § 994(h) should be interpreted similarly, i.e., to refer to the maximum of the applicable guideline range.

**Amendment 56**
**(§ 1B1.10, p.s. Retroactivity of Amended Guideline Range)**

Amendment 56 would revise U.S.S.G. § 1B1.10, p.s., which, implementing 18 U.S.C. § 3582 (c)(2), provides that a court may reduce a sentence of a defendant sentenced to imprisonment if the

guideline range applicable to the defendant has been reduced, after defendant was sentenced, as a result of an amendment listed in subsection (d) of the policy statement. Amendment 56 would add amendment 459 to the list of amendments in subsection (d) and also would revise subsection (a) to provide that the court, when the reduction is due to an amendment not listed in subsection (d), can reduce the defendant's sentence if the court finds that such a reduction would be consistent with the purposes of sentencing.

We support the amendment. Under 18 U.S.C. § 3582(c)(2), a court can resentence a defendant based upon a subsequently-lowered guideline range "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The Commission, in U.S.S.G. § 1B1.10, p.s. has indicated that a court may reduce a defendant's sentence only if the reduction in the guideline range is the result of a guideline amendment specified in subsection (d) of that policy statement. The Commission has specified eleven numbered amendments in subsection (d).

We believe that amendment 459, which revised the acceptance of responsibility guideline, should be added to the list in subsection (d). That amendment affects a considerable number of persons, and at a time when prison resources are stretched to the maximum, it would be desirable, as well as fair, to authorize the courts to adjust sentences of persons sentenced under the former acceptance of responsibility guideline.

We also believe that the sentencing court should be able to modify the sentence of a defendant when the guideline range has

been reduced because of an amendment other than an amendment listed in subsection (d), if the reduction would serve the ends of sentencing. Such a provision would implement the Sentencing Reform Act's directive in 18 U.S.C. § 3553(a), which requires the court to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

**Amendment 57**
**(§ 4A1.2. Instructions for Computing Criminal History)**

Amendment 57, drafted by the Department of Justice, would revise the commentary to U.S.S.G. § 4A1.2 that addresses collateral attacks on prior convictions. The amendment would delete, "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." The amendment would also add language stating that "The Commission does not intend this guideline or commentary to confer any right to attack collaterally sentencing a prior conviction or sentence beyond any such right otherwise recognized in law . . . ."

We oppose this amendment. The present language makes clear the Commission's intention, and there is no evidence that courts have misunderstood the language. Absent such evidence, we do not believe any change is called for.

**Amendment 59**
**(§2F2.1. Computer Fraud and Abuse)**

Amendment 59, proposed by the Department of Justice, would add a complex new guideline to Chapter Two, Part F to deal with computer fraud and abuse. We oppose amendment 59.

We are unaware of very many prosecutions for computer fraud and abuse. Because a court can depart from the fraud guideline if the monetary loss "does not fully capture the harmfulness and seriousness of the conduct," U.S.S.G. § 2F1.1, comment. (n. 10), there is no urgent need for a separate guideline to cover a handful of cases. Given the complexity of the proposed guideline, we suggest that the Commission set up a working group to study whether the Commission should take action.

**Amendment 61**
**(§ 4B1.2. Definitions of Terms Used in Section 4B1.1)**

Amendment 61, proposed by the Department of Justice, would expand the definition of crime of violence to include possession of a firearm by a felon and nonresidential burglaries. We oppose this amendment because it would dramatically increase the number of defendants who will be sentenced as career offenders, when there has been no demonstration that the present definition is inadequate.

The Commission consciously chose to limit the definition of the term "crime of violence" for purposes of the career offender guideline to include those crimes that have as an element "the use, attempted use, or threatened use of physical force against the person of another." In 1991 and again in 1992, the Commission specifically excluded from the definition of the term "crime of violence," the unlawful possession of a firearm by a felon, a possessory offense that does not present the same risk of harm as crimes of an assaultive nature. We see no reason for the Commission to reverse its two previous determinations.

Similarly, by specifying that burglary of a dwelling is a crime of violence, the Commission determined that nonresidential burglaries should not be considered as a "crime of violence" for determining career offender status. A nonresidential burglary does not present the same level of risk to another person that residential burglary presents. Equating the two would mandate identical punishment for a defendant who had broken into an occupied home and a defendant who had broken into an unoccupied car.

**Amendment 62**
**(SS 2B1.1 et al. Theft, Bribery, and Fraud)**

Amendment 62, drafted by the Department of Justice, invites comment on whether theft, bribery, and fraud guidelines should be revised to require a four-level enhancement for all offenses involving a financial institution. We oppose the amendment.

We perceive no reason to increase the offense level simply because a financial institution is involved. The Justice Department's rationale is that in recent years Congress has increased the maximum term of imprisonment for financial institution offenses.

We disagree with the Justice Department's unstated premise that any increase in a statutory maximum requires an increase in the offense levels of the applicable offense guideline. A statutory maximum sets an appropriately severe punishment for the most aggravated form of the offense. An increase in the maximum means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily

mean that Congress believes that the heartland form of the offense should be treated more severely.

We believe that in enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the financial institutions provisions of the Crime Control Act of 1990, Congress was concerned with high level officials -- such as chief executives and controlling investors -- who caused substantial losses to the institutions that they directed or controlled. Under amendment 62, the theft, fraud, and bribery guidelines would provide four-level enhancements whether the loss to the financial institution was $10,000 or $10,000,000. We do not believe that Congress substantially increased penalties in the Financial Institutions Reform, Recovery, and Enforcement Ace and in the financial institution provisions of the Crime Control Act of 1990 so that tellers who embezzle a few thousand dollars could be punished more severely. The obvious Congressional concern was with the directors and senior officials of financial institutions who caused enormous losses to the institutions with which they were associated.[33]

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[33]For example, Congress directed the Commission to "promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(m), 103 Stat. 501 (emphasis added). To comply with that directive, the Commission added what is now subsection (b)((7)(A) of U.S.S.G. § 2B1.1. U.S.S.G. App. C (amend. 317).

Similarly, Congress in 1990 directed the Commission to act to make sure that the guidelines ensured that a defendant convicted of any of the above offenses receive an offense level under chapter 2 of not less than 24 "if the defendant derives more than $1,000,000

Congressional attention was not directed at low- and mid-level officials whose crimes involved relatively modest sums of money, and whose punishment would be substantially increased by amendment 62.

**Amendment 63**
**(§ 2D1.1. Drug Trafficking)**

Amendment 63, submitted by the Department of Justice, requests comment upon whether the caps on base offense levels for distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants should be removed or raised so that violations involving very large quantities of these drugs will result in greater sentences. Because there has been no showing that the present guidelines call for inappropriately low sentences for offenses involving those controlled substances, we do not believe that an amendment by the Commission concerning those controlled substances is called for.

The amendment also invites comment upon whether the definition of a "unit" of anabolic steroid in the last paragraph of U.S.S.G. § 2D1.1 should be changed from "a 10 cc vial of injectable steroid or fifty tablets," to "a one cc vial of injectable steroid or five tablets," and whether "fewer" than five tablets should be equivalent to a one cc vial of injectable steroid. The recommended changes would result in a substantial increase in the base offense level for persons charged with trafficking in anabolic steroids.

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in gross receipts from the offense." Crime Control Act of 1990, Pub. L. No. 101-647, § 2507, 104 Stat. 4862 (§ 2507 is captioned "Increased Penalties in Major Bank Crime Cases").

The provision on steroids took effect only 17 months ago[34] and was the result of careful study by the Commission. The Justice Department has given no rationale for the proposed change, and there is no evidence to indicate that the current provision results in unjustifiably low sentences. We do not believe that the Commission should amend the steroid provision.

**Amendment 64**
**(§ 2K2.1. Unlawful Possession of Firearms)**

Amendment 64, drafted by the Department of Justice, invites comment upon seven proposals for revising offense levels under U.S.S.G. § 2K2.1: (1) increasing from 18 to 22 the base offense level for offenses involving National Firearms Act firearms; (2) increasing from 12 to 22 the offense levels for offenses involving semiautomatic firearms; (3) increasing by four levels the base offense level for offenses involving prohibited persons; (4) increasing from 18 to 22 the minimum offense level for possession or use of a firearm in connection with another felony; (5) deleting the level 29 cap on the offense level for adjustments under subsections (b)(1) through (b)(4); (6) increasing from 12 to 16 the base offense level for distributing a firearm to a prohibited person; and (7) increasing more rapidly the enhancement under subsection (b)(1) for the number of firearms.

We do not believe that the significant increase in offense levels called for by amendment 64 is warranted. The Commission substantially increased offense levels under U.S.S.G. § 2K2.1 in

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[34]U.S.S.G. App. C (amend. 369).

two consecutive years, 1990 and 1991. We are unaware that the impact of those changes has been measured; indeed, given the ex post facto clause, it is unlikely that the impact can be measured yet. Until the impact can be measured, we think Commission action would be premature.

**Amendment 66**
**(Gang-related Crime)**

Amendment 66, proposed by the Department of Justice, invites comment on whether the guidelines should provide for a four-level enhancement for "felonies committed by a member of, on behalf of, or in association with a criminal gang." The proposed amendment would define a criminal gang as "a group, club, organization, or association of five or more persons whose member [sic] engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses."

We believe the Commission should not provide such an enhancement. The report of the Commission's own working group on violent crime reveals the many difficulties involved in establishing suitable definitions of "gang"[35] and "gang-related crime." Neither the law enforcement nor the academic communities have reached a consensus about how to define those terms. The difficulty in coming up with a definition may explain why not one

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[35]"For example, someone, somewhere, would have to decide whether a group 1) had an identifiable leadership; 2) claimed control over a particular territory; 3) recognized itself as a 'denotable group'; 4) was a distinct aggregation; or 5) had been involved in a sufficient number of unlawful activities to create a consistent negative response from the community." S. Winarsky et al., Violent Crimes/Firearms/Gangs Working Group Report 52 (Oct. 14, 1992).

of the twenty-one states surveyed by the working group presently has gang affiliation or related activity as a specific factor in its sentencing guidelines.

The difficulty in coming up with a definition is compounded by the proof problems that would arise from trying to apply the definitions of "gang" and "gang-related."[36] As the working group points out, "[i]dentifying a crime as a 'gang crime' may require subjective judgments regarding crucial issues such as motivation of the perpetrator."[37] Experts do not agree on the extent of the connection between gang membership and violence, and "some researchers have found spurious relationships between the two."[38]

The proposed definition has not overcome the difficulties. It would allow for a gang enhancement for simple membership in a group that happened to have members who had committed "a series" of violent crimes or serious drug offenses. This definition would seem to cover a member of the Roman Catholic Church because there are other members of the church who have committed violent crimes or serious drug offenses. The proposed definition would require that a sentencing court impute knowledge of the other group members' activities. Indeed, the larger the group and the more diverse its membership, the more likely the group would be

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[36]"Even if a definition of gang could be agreed upon, some system of accurately operationalizing the criteria (e.g., determining that wearing colors is an accurate indicator of collective identity) would have to be developed." Id. at 52.

[37]Id. at 53.

[38]Id. at 54.

considered a "gang" under the suggested definition. Applying such a broad definition poses serious constitutional problems as well.[39]

[39]The working group report discusses three of these problems, including conflicts with the "void for vagueness" doctrine, the "overbreadth" doctrine and unconstitutional restrictions of the right of freedom of association. Id. at 58.

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# Statement of

# Rabbi Moshe C. Horn, J. D.

# on behalf of the

# ALEPH INSTITUTE

# before the

# UNITED STATES SENTENCING COMMISSION

# Washington, D.C.

# March 22, 1993

*"You shall do no unrighteousness in judgemnet"*
*Leviticus 19:15*

*"A judge should always envision himself as having*
*a sword hanging just overhead . . . when rendering judgement"*
*Talmud*

P.O.Box 6663 • Surfside, Florida 33154
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Good morning honorable commissioners.

I am before you today representing the Aleph Institute. A non-profit organization which for the past twelve years has been working with federal and state inmates throughout the country. Our programs are ecumenically based and include in-prison counseling and religious services as well as intensive retreats and educational lectures and presentations. We work with offenders at all stages of criminal proceedings both pre-sentence and post conviction. We thank G-d for our success in offering Federal courts and correctional agencies community based punishment programs for sentenced offenders. The alternative programs incorporate community service projects designed to sensitize the offender of their societal duties and includes rigorous instruction in doctrines dedicated to moral and ethical behavior.

I am the Prison Program director and General Counsel for the organization for the past four years. Each year I work with hundreds of offenders and their families. I help them cope with the trauma of their prosecution and subsequent punishment. I also foster their realization that they are fortunate to be punished; they develop a resolve to become a better individual from their experience and help others to stay on a proper societal path. I stand before this prestigious Commission to offer a hindsight view of the effect the Federal Sentencing Guidelines has had on our criminal justice system. A view not ordinarily entertained by my honored colleges of the many legal associations present today. All of us as members or officers of the legal profession have a duty to the citizens of this country to protect their welfare by punishing criminals in a manner that effects retribution and deterrence. But, we must not lose sight of the fact that we have a duty to the offender who is a human being and also a component of the community, he deserves a some iota of respect surely more than being classified as an integer on a chart.

The U.S. Sentencing Commission is charged in its establishing policies and practices for the federal Criminal Justice System to "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process . . ." 28 USC § 991 (b)(1)(c).

For every offender in prison there are family members, dependents, employees and many other individuals who suffer also. Our communal duty extends to these victims also. I appeal to the honorable commissioners to take a more active role in bringing the human element back into sentencing. As it states in the Talmud, "one who destroys the life of another is as if he destroyed the entire world; one who saves the life of another is as if he had saved the entire world" (Tractate Sanhedrin 37a)

The many offenders I meet are disoriented by the amorphous style of sentencing we have developed. Any sentencing goal trying to be relayed in practice simply flies over the heads of offenders when their individuality is bypassed to detach them from the actions they performed.

The comments on the amendments herein presented are focused toward a more balanced administration of justice which is based on the premise that the federal Sentencing Guidelines are designed to guide a federal judge's authority and not

usurp it.

**Re: Amendments 1, 34, & 35**

In the pursuit of justice one should not put the defendant in a position that condemns them without examining the totality of the circumstances. Criminal conduct should be in the purview of the court which is empowered to fully investigate the matter as provided by the constitutional provisions insuring fair adjudication. To bring past conduct for which a defendant was acquitted into an unrelated sentencing proceeding is shocking to the conscience. Therefore, it is urged that option one of amendment 35 of the proposed amendments from the Practitioners Advisory Group be adopted in accordance with the constitutional provisions of due process and prevention of "double Jeopardy" claims. Furthermore, amendment 34 relating to past conduct that was admitted by a defendant should likewise not be considered under Guideline §1B1.3 unless independent elements are established to substantiate the conduct is relevant to the instant case before the court. The Commission must bear in mind that an overwhelming majority of cases involve defendants who are advised to plead guilty in the interests of expediting the administration of justice. If conduct a defendant pleads guilty to can automatically be held relevant, then a chilling effect on guilty pleas will be effected forcing many cases to trial which could have been summarily disposed. This will create a burden on an already overburdened criminal justice system.

**Re: Amendments 8, 9, 39, 48, & 60**

It is urged that the commission reexamine the substantial reliance on the factual conduct used to determine the applicability of a minimal role adjustment. The mens rea and/or foreseeability of the defendant regarding the parameters of the criminal activity is a critical factor for the court to examine. There are cases where the overt acts of a defendant indicate a minimal role in the offense but evidence of the defendant's intent to be a ready, willing and able participant in the future management or execution of the criminal scheme should surely prevent delegating the defendant a mitigating role. Similarly, if the facts place the defendant in a more accountable role his inability to foresee the full consequences of his actions should be a factor to consider. Therefore, we recommend that within amendment 8, the commentary note 3 should be merged with note 6 and the language in note 3, "in addition, although not determinative . . ." should be stricken. This will make the critical factor, "a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity . . ." a characteristic that is ordinarily associated with a mitigating role. It is also recommended that option two, within note 7, should be adapted. This will reflect a proper understanding that the defendant's factual interest in an outcome may illustrate they are not culpable for the full accountability of the offense.

**Re: Amendments 24, 31 and 47**

Ordinarily, within Jewish Law there is a negative view on informers and informing ("You shall not go about as a talebearer" Leviticus 19:16). However, that applies to

providing false information or information that serves no purpose of protecting others from harm. There is an obligation on every person, especially within the Jewish faith, to "eradicate the evil from thy midst" and bring to the attention of authorities any danger to the welfare of the community. (see People v. Drelich 506 N.Y.S. 2nd 123 where a Rabbi heard a confession of a murderer from his congregation and was compelled by Jewish Law to testify against the individual at subsequent proceedings in accordance with Judaic doctrines, Clergy privilege held not to apply.) We must not deter an individual's unfettered adherence to values he holds dear when he punishes evil and eradicates violent crime through their unilateral assistance to the governmental authorities. I as a rabbi and member of the Jewish faith find it reprehensible that criminal proceedings center on criminal agents drafted by the prosecution and guided by them to decide what form and manner their societal duty will be manifest. §5K1.1 assistance letters and information should not be vested only in the prosecutor but there should be provisions which allow law enforcement officers to summarily submit an evaluation to the court, relaying a more an objective view on the value of the assistance. Clearly, a judicial authority is in a better position to differentiate between assistance rendered due to ethical and moral beliefs as opposed to assistance rendered due to personal motives and gains. Evidence from law enforcement officials will tend to show the candor and sincerity of assistance rendered as opposed to solely relying on the prosecutor who has the dual interest of convicting the defendant and obtaining evidence for other convictions.

Allow me to take this opportunity to appeal to the Commission to take action and reiterate to the Congress their long standing position calling for the repeal of mandatory minimum sentences. 'Equal justice for all' never meant to apply to equalizing all crimes but to equalizing the judicial treatment of all individual criminals who require special attention to their needs and circumstances. We can not uniformly categorize crimes without suffering a severe inequality of justice. "The uniformity produced . . . would not conform to most understandings of equal justice. Equality does not mean sameness . . . treating unlike cases alike - can violate rather than promote equality." Alschuler, Albert W. *The Failure of Sentencing Guidelines: A Plea for Less Aggregation,* University of Chicago Law Review. Vol. 58 Num. 3 (Summer 1991)

**Re: Amendments 25 and 36**

Standards of fairness dictate that the prosecutor should disclose all relevant facts, circumstances and characteristics which apply to the application of the sentencing guidelines. Such is in conformance with constitutionally accepted principles of due process and ethical behavior of a prosecutor (which includes a duty to the welfare of the defendant) as has been held in Brady v. Maryland and US v. Rosa

**Re: Amendments 29 and 30**

It is important to recognize that every defendant presents a unique set of characteristics tending to show any criminal disposition, ability to rehabilitate, and propensity to be a law abiding citizen. It is critical that a court examine the character of the defendant very carefully (see US v. Duarte 901 F2nd 1498 where the Ninth

Circuit held the District Court erred in ignoring the contents of character letters "for purposes of determining the appropriate sentence within the applicable guideline range." Id. at 1501). Although §5H1.1 - 12 indicate specific offender characteristics which are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range . . ." (emphasis added) The language not ordinarily relevant has been construed to hold "that the guidelines do not categorically prohibit a judge from departing on the basis of offender related characteristics, whether enumerated in the guidelines or not." US v. Mogel 956 F2nd 1555, at 1561 (11th Cir. 1992).

The statutory purpose of the sentencing guidelines is to "[maintain] sufficient flexibility to permit individualized sentences when warranted by mitigating . . . factors not taken into account in the establishment of [the guidelines]" 28 USC § 991 (b)(1)(b). It has always been the congressional intent to vest wide discretion to a sentencing judge in fashioning a sentence (see Senate Report no. 225, 98th Cong. 2d. Sess. 52). Amendment 29 should be revised to include language instructing a court to openly examine offender characteristics and render discretionary decisions as to the role each characteristic should or should not have in the sentencing process.The Commission should foster the execution of judicial discretion and clarify that it was never the Commission's intent to fossilize judicial practice. (see US v. Concepcion 795 FSupp 1262 (EDNY 1992) where the Honorable Judge Weinstein did not engage the "temptation [to] simply skirt these underlying [sentencing] concerns and entrust the task of punishment to the federal Sentencing guidelines . . . Congress has directed the federal courts to impose penalties 'not greater than necessary' to achieve the the statutorily defined purposes of sentencing. 18 USC §3553 (a)(2). Id at 1296

The Commission should not limit this amendment to the sole factors enumerated in §5H1 but should consider adding language which takes into account post crime rehabilitation, family dependence and impact, illness of the defendant and various other factors traditionally envisioned as mitigating factors in sentencing. The fact that irreparable harm may occur to the defendant if incarcerated is also a critical factor of sentencing. Clarification within §5H1 is required to include cases where the socio-economic condition should be a factor in sentencing because it is a stressing environment, in some cases amounting to duress. It is amazing to many individuals such as myself, who work with offenders, to note that the Guidelines completely ignore post ameliorative conduct on the part of the offender. Rehabilitation should be introduced as accepted terminology in the sentencing process and a more enlightened approach to criminal justice should be formulated. As one guiding factor a federal judge introduced, "a defendant's commitment to religious study and moral improvement may appropriately be taken into account in deciding whether to depart from the guidelines." Weinstein, J. "Alternative Punishments Under the New Federal Sentencing Guidelines," 1 Fed. Sent. Rep. 96, at 101 (1988)

The guidelines language in Chapter One, Part A, 4(b) contains language in the third paragraph which solely focuses on the characteristics of the offense and not the offender. This paragraph should be revised to be in tandem with the previous paragraph that a sentencing court may find the circumstances of the offense relative to the offender may require a departure given the facts of a particular case.

## Re: Amendment 52

This amendment fails to take into account a stated purpose of sentencing namely "to provide the defendant with needed educational and vocational training, medical care or other correctional treatment in the most effective manner." 28 USC §3553 (a)(2)(D). The amendment should be revised to take into account alternative modalities of punishments such as boot camps, house arrest, community service, and other punitive measures which capitalize on the productive potential of the offender and eases the burden society has to bear for the costs of incarceration. "A sentence of imprisonment 'is not an appropriate means of promoting correction and rehabilitation . . .' 18 USC§3582 (a); S. Rept. 98-225 at 76-77;119. and the commission is instructed to 'insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . .' 28 USC §994 (K)" Feinberg, K. "The Federal Guidelines and the Underlying Purposes of Sentencing," 3 Fed. Sen. Rep. 326 (May/June 1991)

Amendment 52 should be revised and expanded to reflect successful options developed by correctional institutions and those agencies working with judicial authorities to positively impact offenders. These proposed revisions would reflect the attitude of the newly appointed Attorney General Janet Reno who stated before her confirmation hearings that she will seek alternative modes of punishment for first time offenders. The three ranges of the sentencing table should be changed to include other options other than the draconian condition of confinement in order to reflect the modern trend.

## Re: Amendment 56

We strongly urge adoption of this amendment as it encourages remorse and fosters a positive step towards contrition and repentance for past misdeeds.

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**STATEMENT OF**

**STEVEN SALKY, CHAIRPERSON**

**COMMITTEE ON THE U.S. SENTENCING GUIDELINES**

**SECTION OF CRIMINAL JUSTICE**

**On Behalf Of**

**THE AMERICAN BAR ASSOCIATION**

**Before the**

**UNITED STATES SENTENCING COMMISSION**

**Concerning**

**SENTENCING GUIDELINE AMENDMENTS**

**March 15, 1993**

My name is Steven Salky. I appear before you today at the request of ABA President J. Michael McWilliams to convey the ABA's views on proposed amendments to the Sentencing Guidelines. I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States Sentencing Guidelines. Our committee is made up of professionals from every aspect of the criminal justice system - the federal judiciary, federal prosecution, private and public defense bar, law academia and criminal justice planning. We appreciate this opportunity to comment on the proposed 1993 amendments and issues for comment.

**THE AMENDMENT PROCESS**

As in prior years, we remain interested in the process by which amendments are developed and promulgated.

We once again commend the Commission for its willingness to publish all amendment proposals, including those submitted by parties outside the Commission. While this publication policy has been criticized as diverting the attention of the audience from those few amendment proposals that are being seriously considered, we believe the quality of the Commission's final deliberations will be enhanced by the diversity of viewpoints obtained from a liberal publication policy. Additionally, comments generated by proposals not presently being seriously considered may become useful in future amendment cycles.

We urge the Commission to continue publishing all amendment proposals that any one Commissioner supports. The Commission should, however, prioritize proposals. This could be accomplished in either one of two ways. The Commission could indicate in the

Federal Register which amendment proposals are being seriously considered for passage and which are unlikely to receive serious consideration. Alternatively, the Commission could initially publish all proposals and then grant "certiorari" and subsequently publish the fewer proposals that will be voted upon. Regardless of the method chosen, a priority system would continue to encourage public comment on a variety of matters, but would direct the energy of outside parties (and the Commission staff) to a limited number of proposals each year.

We also commend the Commission for continuing to rely in large part on the working group reports generated by its capable staff. We have encouraged the Commission over the years to act on the basis of empirical data and analysis, to the extent possible. Most of the working group reports submitted to the Commission this year contained recommendations based on an evaluation of the available empirical evidence. The working group reports are most valuable when they not only analyze the data generated from the case files submitted to the Commission, but also consider the manner in which the guideline in question is used in the plea bargaining and sentencing process. By determining how the guideline is applied in "real life," the working group reports can help the Commission and outside commentators fashion amendment proposals that make sense. The Commission carries out its statutory responsibilities most effectively when it carefully reviews such comprehensive working group reports before enacting amendments.

To commend the Commission for establishing working groups to study an area before it considers specific amendments is not to suggest that the Commission should never amend a guideline without a working group report. However, there should be a presumption against any substantive amendment that is not preceded by research and analysis that justifies an alteration.

Our praise should not overshadow our continued criticism of the fact that the amendments, either individually or as a package, do not include any assessment of prison impact. The Sentencing Reform Act explicitly requires that the Commission continually assess the impact of the Guidelines as a whole on the existing capacity of penal, correctional, and other facilities and services. The Sentencing Reform Act further requires that any guideline be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons. The projections in your 1991 Annual Report and the projections in your Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarcerations, and Prosecutorial Discretion and Plea Bargaining are for significant increases in the use of incarcerative sentences and in the average length of prison sentences. The Commission, however, continues to ignore its responsibility to evaluate the potential impact of any amendment on prison populations, despite the crisis in federal prison over-crowding. In our view, every working group report ought to contain a prison impact analysis. While the effect on the

rate of imprisonment may not be a basis to accept or reject a proposed amendment, it should be considered.

We continue to believe that the Commission should amend the Guidelines in accordance with pre-approved administrative rule-making procedures set forth in the Code of Federal Regulations, as was envisioned by the Sentencing Reform Act. Our Committee, in conjunction with the ABA Section of Administrative Law, is in the process of developing suggested rulemaking procedures for the Commission and we recommend that the Commission devote attention to this matter in the coming year.

Finally, we are concerned with a view we have heard expressed that no further amendments should be made to the Guidelines this year. While we have often in the past cautioned against over-amending the Guidelines, we think it equally indefensible to vote against a proposed amendment simply for the sake of avoiding changes to the Manual. Congress empowered the Commission to annually amend the Guidelines because it recognized that experience would constantly point out the need for refinement. While the Commission may one day amend the Guidelines to perfection, we do not believe that day has yet arrived. Especially while the Commission remains a full-time body, we think it important to vote on proposed amendments as if they matter. It would indeed be unfortunate if several of the worthy proposals in this year's amendment package failed because two or more Commissioners decide

simply to vote against all proposals. We urge you to vote on the merits of the amendment proposals.

**THE AMENDMENTS**

We support several important proposals in this year's package. As detailed further below, we are pleased that there are serious proposals, based upon working group reports, to revise the money laundering offense guidelines and the drug offense guidelines. If the Commission were to pass no other amendments this cycle, the passage of the proposals in these two areas, with modifications we address further below, would significantly enhance the fairness and even handedness of the Federal Sentencing Guidelines.

Before addressing these and other Commission generated proposals, I want to comment upon the one amendment and three issues for comment published at our committee's request.

Proposed amendment 31 would eliminate the requirement that the government make a motion before the court can consider a downward departure on the basis of a defendant's substantial assistance to authorities. The Sentencing Reform Act requires such a motion only in cases governed by a mandatory minimum statute. In our opinion, the Commission's enactment of §5K1.1 finds no support in the Sentencing Reform Act. Moreover, §5K1.1 allows government attorneys, not Article III judges, to exercise critical sentencing authority in a significant number of cases. We recognize that the government attorney is in the best position to advocate to the court whether a defendant's cooperation is deserving of a downward

departure. However, to allow the government to control the court's ability to even consider a departure, completely reverses the normal division of authority and responsibilities between the executive and judicial branches.[1]

As expressed in issue for comment 32 and 33, the ABA continues to support the fundamental principle of parsimony in punishment. Sentences authorized by the Guidelines and sentences imposed by judges ought to be no more severe than necessary to achieve the purposes of sentencing. We continue to believe that imprisonment should not be the sanction of choice for all offenders and that alternative sanctions ought to be imposed in a greater percentage of cases in the federal system. While reasonable people can disagree about the proper severity of sanctions to be imposed at various levels within the guideline grid or table, the current Guidelines result in the imposition of imprisonment on more offenders and for greater periods of time than has been the case in the pre-guideline system. We would advocate expansion of the use of alternative forms of punishment.

The issues we propose for comment in Amendments 32 and 33 are not designed, however, to define which offenders should be sentenced to imprisonment and which should be sentenced to

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[1] The limited repeal of the government motion requirement in cases involving first time non-violent offenders, as proposed in Amendment 24, appears to be based solely on political considerations. There is no principled distinction between first time non-violent offenders and other offenders with regard to the government motion requirement.

probation. Rather, we advocate that the Commission focus on whether to increase the availability and imposition of non-incarcerative sentences by, on the one hand, providing an additional ground for departure or, on the other hand, increasing the number of offense levels within Zone A and/or Zone B. Increasing offense levels within Zone A or Zone B will preserve uniformity, but may result in certain advantages to white-collar offenders. Authorizing additional grounds for departure may result in more alternative sentences, but increase unwarranted disparity. Our point is to encourage the Commission to seriously consider for future amendment cycles the correct mechanism for decreasing the use of prisons in federal sentencing.

In proposal 34, we encourage the Commission to seriously re-evaluate the initial policy decision it made to require judges to base sentences on the so-called "real offense conduct", instead of conduct that either is admitted by the defendant in a plea or constitutes the offense for which the defendant was convicted after trial. We recognize this is a critical issue that was decided by the Commission at the outset of its tenure. However, after long and serious debate, the ABA, in producing a third edition of its Sentencing Standards, recently resolved that the severity of sentences imposed should be determined with reference to the offense of conviction and not the so called "relevant conduct," where different from the offense of conviction. We, therefore, continue to believe that the issue is worthy of re-evaluation.

We repeat below the current ABA Standard and the relevant portion of the Reporters Note that concerns this issue.

Standard 18-3.6. Offense of conviction as basis for sentence.

> The legislature and the agency performing the intermediate function should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

Reporters' Note:

> This Standard endorses the "offense-of-conviction" approach to sentencing and disapproves of the practice of "real-offense" sentencing. Under offense-of-conviction systems, the basis for sentence is limited to the charge or charges of conviction, the defendant's history of prior convictions (see Standard 18-3.5), defined aggravating and mitigating factors associated with the current conviction (see Standards 18-3.2 and 18-3.3), and any personal characteristics of the defendant permitted to influence sentence determination (see Standard 18-3.4). . . .
>
> The Standards take the view that conviction, by trial or plea, is a prerequisite for a criminal sanction based on alleged criminal conduct. In offense-of-conviction jurisdictions, sentence may not be based on charges of which defendants were acquitted, charges foregone pursuant to plea agreements, or other alleged offenses that have not culminated in convictions.

Our four proposals, as well as our comments on specific amendments, are informed by the recently promulgated ABA Standards

on Sentencing Alternatives and Procedures and ABA Standards on Appellate Review of Sentences ("Sentencing Standards"). These new Sentencing Standards, the Third Edition of the ABA Standards on these subjects, were recently approved by the ABA's Criminal Justice Section and by the ABA House of Delegates. These new standards are the culmination of several years of extensive work and debate by a balanced committee chaired by the Chief Justice of the Supreme Court of North Carolina, the Honorable James E. Exum, Jr. The Committee was made up of private defense counsel and public defenders, state and federal prosecutors, federal and state judges, respected criminal justice professionals, and distinguished law professors and academicians. While serving primarily as guidance for state legislatures and state policy making bodies, the Sentencing Standards were developed and debated within the "shadow" of the existing federal guidelines and contain standards which differ in significant respects from the current Guidelines manual. The Third Edition Standards represent the ABA's current thinking about critical issues facing this Commission, and we commend them to you for careful consideration. I have today provided your Chief Counsel and your Staff Director with copies of these newly approved Standards. We would be pleased at an appropriate time to meet or discuss with the Commission the significant differences between the system envisioned by the Standards and the current federal Sentencing Guidelines.

Turning now to our comments on several of the other proposed amendments, we set forth our thoughts below.

**AMENDMENT 1**

We endorse this amendment because it is consistent with the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures. As mentioned, Standard 18-3.6 provides that the severity of sentences imposed and the types of sanctions imposed should be determined with reference to offense(s) of conviction and not upon the so called "real offense", where different from offense of conviction. This Standard would prohibit the enhancement of sentences based on a finding by the court that, despite the defendant's acquittal, he or she committed additional offenses.

The critics of this amendment argue that because of the different standards of proof at trial and sentencing and because of different rules regarding the admissibility of evidence at the two stages, this amendment advantages defendants without justification. They also claim that the amendment will lead to disparity. We disagree. First, there is a compelling justification for prohibiting enhanced sentences based on acquitted conduct, i.e., promoting fairness and respect for fairness in the sentencing process. In our view, the perceived and actual fairness of the criminal justice system is undermined if persons acquitted of crimes are nonetheless punished for having committed them. Second, it is the uneven consideration of acquitted conduct at sentencing that promotes disparity; the preclusion of its consideration may actually promote uniformity.

The amendment will, of course, affect only a very small number of cases, as it prohibits consideration of only "relevant conduct" for which the defendant "was acquitted after trial." According to the Commission's latest statistics, only a relatively small percentage of federal criminal cases go to trial. In a not insignificant percentage of those cases today, acquitted conduct is not considered at sentencing because: (a) the government cannot demonstrate post-trial that the defendant committed the "relevant conduct" by the requisite standard of proof (preponderance of evidence in most cases); (b) the acquitted conduct is not relevant conduct to the offense of conviction; and (c) the maximum penalty provided by statute for the offense(s) of conviction is lower than the guideline sentence. Thus, the amendment proposal will not, as some have posited, result in a radical shift in policy.

**AMENDMENT 2**

The so called "one book" rule, Policy Statement §1B1.11, was promulgated during the last amendment cycle in the dead-of-night, without public comment, and without any apparent study. The adoption of the policy statement was indefensible as a matter of procedure. We oppose any amendment which seeks to extend the application of this Policy Statement.

**AMENDMENT 5**

We oppose this amendment for several reasons. First, the decision to sentence larceny and theft cases exactly the same as fraud and deceit cases is contrary to prior practice and increases disparity by treating dissimilar offenders in a similar manner. Second, the elimination of more than minimal planning (and the related increase in the theft and fraud loss tables) is at odds with the empirical analysis of pre-guidelines sentencing practices that recognized planning, independent of actual harm, was an important factor for judging relative culpability. See U.S.S.G. §2F1.1 comment (background). Indeed, the amendment encourages disparity by treating a sophisticated planned fraud that netted $100,000 over a lengthy period the same as a single false statement that resulted in the same actual loss. The elimination of the "planning" variable eliminates the court's ability to rationally distinguish between offenders.

**AMENDMENT 8**

We support the basic thrust of this amendment. As we have argued in the past, the current guidelines for drug trafficking offenses overstate the importance of quantity and understate the importance of a defendant's role in the offense. This amendment would be a significant step toward correcting this imbalance.

There are, however, a few aspects of the proposed version of 3B1.2 that we believe are ill-considered. First, proposed application note 2 appears to us to be unnecessary. The fact that the defendant possessed or had access to a firearm is certainly an appropriate sentencing factor, but it does not necessarily speak to his or her role in the offense. A minor or minimal participant in the offense who possesses a firearm should receive the enhancement contained in 2D1.1, but should not be penalized by losing the offense level cap proposed in this amendment. Adoption of application note 2 would have the odd effect of punishing a minimal participant more harshly than a kingpin for having access to the same firearm.

Second, proposed new application note 7 would limit the court's ability to find that a courier or "mule" played a mitigating role in the offense. These are precisely the defendants who are receiving far too harsh sentences under the current guidelines. Applications notes 5 and 6 would establish appropriate criteria to determine whether a defendant is a mere courier (e.g., no ownership interest in the contraband), and anyone who satisfies those criteria should receive a minimal role adjustment. If the Commission insists on including application note 7, option 1 is preferable.

**AMENDMENT 10**

We applaud the Commission's effort to establish a common-sense understanding of the term "mixture or substance." A rigid interpretation of the relevant statute and guidelines has led to irrational and disparate sentences for many defendants. We regret that the Supreme Court did not resolve the statutory issue definitively in the Chapman case, but there is nothing in Chapman which prevents the Commission from establishing a rational definition of "mixture or substance" for guideline purposes. We therefore support this amendment.

**AMENDMENT 13**

Because we believe that quantity, especially where the quantity is controlled in whole or in part by government agents, is overvalued, we support an amendment addressed to reverse sting operations. To determine an appropriate amendment, it is necessary to realize that the problem is actually broader than stated by the request for comment. The problem exists not only where government agents set a below-market price, but whenever agents, in a reverse sting operation, create artificial market conditions that increase a defendant's purchasing power. Two recent cases reviewed in the comments of the Practitioner's Advisory Committee illustrate the problem.

In our opinion, the guidelines should provide that in a reverse sting case, where the government sets or agrees to artificial market conditions which have the effect of increasing the defendant's purchasing power, the court should determine the defendant's offense level on the basis of the amount of drugs that he or she could have actually purchased based on the agreement.

**AMENDMENT 20**

The ABA strongly supports the proposed amendments to §§ 2S1.1 and 1.2, pertaining to money laundering offenses and structuring violations.[2]

The most important aspect of the proposed amendments is that they remove the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially

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[2] The ABA opposes amendment 58 which would amend § 2S1.3. This proposal would significantly increase base offense levels for currency reporting violations. We believe the proposed changes would be inconsistent with the advances proposed in amendment 20.

the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

Although we support the amendment, we are concerned that the proposal does not address the pervasive use of government stings in money laundering cases. Sting operations provide continued opportunities for sentence manipulation. 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. As in drug sting operations, the agents control the amount of money laundered. Accordingly, there is increased risk of prosecutorial manipulation of the guidelines by government agents increasing the amounts of tendered funds to increase the guideline range.

More importantly, in sting cases there will never be commission of the underlying offense by the defendant. Thus, under proposed § 2S1.1(a)(1), the defendant in a sting operation (who engages only in the laundering offense) will receive a potentially higher sentence than those defendants that both launder money and commit the underlying offenses. Accordingly, we recommend that the amendment be adopted with a lower base offense level for violations of 18 U.S.C. § 1956(a)(3).

**AMENDMENT 21**

Amendment 21 proposes a consolidation of the tax guidelines and a unified definition of tax loss. The guideline includes a rebuttable presumption of tax loss based on a percentage of the unreported gross income. The percentage varies depending on the type of tax offense involved. To our knowledge, this the only guideline that has sought to use a rebuttable presumption.

We believe that a rebuttable presumption improperly relieves the government of its burden to establish by at least a preponderance of the evidence that the guideline base offense level applies. While we know of no case specifically considering the validity of a rebuttable presumption in the sentencing context, we believe the presumption is misconceived. Criminal tax cases are complex in origin and often voluminous in their documentation. Documentation available to the government may not be released to the defense since, for example, in an evasion case the government

need not prove a specific dollar amount, but only a substantial additional tax due and owing. The probation officer is, even without the presumption, unlikely to "second guess" the government's tax computations. To increase the government's advantage by, in effect, totally relieving it of its burden of proof, is both unwise and unjustified.

**AMENDMENTS 25 AND 36**

The Sentencing Reform Act was designed in part to promote honesty in sentencing. The current guidelines often result in the opposite by requiring the court to consider "relevant conduct" beyond the offense of conviction without imposing any requirement on the government to honestly notify the defendant of the "relevant conduct" it will raise at sentencing. While the requirements of Rule 32 are a partial remedy, encouraging the government to disclose the "relevant conduct" earlier in the process will not only promote honesty, but will eliminate the litigation that inevitably results when the government seeks a sentence based upon relevant conduct not revealed prior to defendant's entry of a plea.

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By Federal Express

March 12, 1993

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

Attention: Public Information

Dear Commissioners:

On behalf of the Pennsylvania Association of Criminal Defense Lawyers, I offer the following comments with regard to the proposed amendments to the Sentencing Guidelines.

Our organization is opposed to any intrusion upon the discretion of the sentencing judge. However, given that the Sentencing Guidelines are a reality, we would urge the adoption of the following amendments thereto:

Amendment 1, excluding acquitted conduct as relevant.

Although the position of the PACDL is that that function of the jury within our system of criminal justice is evaded whenever any allegedly criminal conduct not the subject of conviction is utilized for purposes of sentencing, Amendment 1 would at least the ameliorative effect of eliminating conduct from consideration as to which a jury has actually rendered a verdict.

Amendments 8 and 9, placing an offense ceiling level for those defendants found to having a mitigating role, and reducing the upper limit of the Drug Quantity Table from 42 to 36.

The proposed change would better reflect the culpability of low level participates in a drug conspiracy whose knowledge of the scope of the conspiracy would otherwise increase their base offense level.

Amendment 20, tying the base offense levels for money laundering and structuring to the underlying conduct.

This amendment will eliminate the anomaly that results where there was either no illegal underlying activity or that activity had a base offense level lower than that prescribed for the structuring or money laundering.

Amendment 29, permitting departure where offender characteristics are present in an unusual degree and combined in ways important to sentencing.

The PACDL favors this amendment as allowing for greater discretion in the sentencing judge.

Amendment 47, eliminating the need for government motion under U.S.S.G. Section 5K1.1.

This amendment is favored insofar it will make the issue of whether there has been "substantial cooperation" one for resolution in the way the other factual disputes are resolved, i.e., by a court.

With respect to the issue for comment following proposed Amendment 5, the PACDL would urge that the best approach is to delete the reference to repeated conduct and to better define "extensive or sophisticated planning."

Thank you for your consideration.

Respectfully submitted,

ANNE M. DIXON

AMD/rab
cc: Joshua D. Lock, Esquire
President, Pennsylvania Association
of Criminal Defense Lawyers

STATEMENT OF STEPHEN ROBERT LaCHEEN, ESQUIRE

Before the United States Sentencing Commission

March, 1993

Ladies and Gentlemen:

It is an honor and a pleasure to have been afforded time to speak before you today in support of the proposal to amend the Money Laundering Guidelines, and in particular the Structuring Guideline, in accordance with the proposal of the Commission's Working Group. See 57 Fed.Reg. 62832, 62839 (Dec. 31, 1992). I am the senior partner of a private law firm in Philadelphia which conducts a large part of its practice in federal criminal defense. My immediate impetus for coming down to Washington today is my involvement in a case which I believe illustrates particularly well the need for an amendment of the kind proposed by the Working Group.

My client, Ronald P. Shirk, is a former police officer who went into the licensed gun dealer business in a rural area of upstate Pennsylvania. His business prospered and gradually became largely a wholesale operation. As you may be aware, many of those who buy and sell firearms legitimately are "rugged individualists" by nature, and many of them have a strong libertarian bent which makes them jealous of their privacy and suspicious of governmental involvement in the lives of individual Americans, as well as of established financial institutions.

Such people often deal in cash when the rest of us city types would not. This is also true to a great extent of those who choose to live in that part of central Pennsylvanian, far from either Philadelphia or Pittsburgh. Mr. Shirk, I would have to say, tends to share these tendencies.

I was therefore both interested and surprised to see the October 14, 1992, Working Group report on money laundering offenses, which states that "representatives of [the Department of Justice] reported [to the Working Group] that, as far as they knew, prosecutors did not bring cases involving structuring of lawfully derived funds." Report and Initial Findings of U.S. Sentencing Comm'n Money Laundering Working Group (Oct. 14, 1992), at 24. I know, from my representation of Mr. Shirk over the past several years, that that assurance is utterly false.

Mr. Shirk came under investigation several years back by the Internal Revenue Service on suspicion of tax evasion; I believe they thought he was skimming cash from the business and underreporting his income. In any event, those charges came to trial and with my help and that of an honest jury, he was acquitted of the tax charges. At the same time, however, he was convicted of structuring currency transactions. During the years in question, Mr. Shirk's business took in an average of several thousand dollars a day in cash, but not as much as $10,000 per day. He accumulated these cash receipts (after removing the hundreds, which for his own reasons he "collected" in a safe) and then took them to the bank. The structuring charges were premised on an analysis of his banking records,

which showed that after his bank revoked a CTR exemption he had formerly enjoyed (in the mistaken belief that a CTR exemption was not available to a business which was primarily wholesale, not retail), the frequency of these banking trips increased from weekly to every few days, with the average size of the deposits kept below the reportable threshold.

The U.S. Court of Appeals for the Third Circuit recently upheld these convictions, on the theory that Mr. Shirk's intent to avoid the necessity of filing CTR's could be equated with the statute's prohibited intent to "evade" the bank's reporting requirement. Since the Third Circuit disagrees with the First on the question whether this conduct is even criminal, we are hopeful of being vindicated in the Supreme Court. But in the meantime, we are presented with the sentencing issue that is of interest to the Commission and which is the subject to the Working Group's recommendation: the appropriate punishment for "currency structuring" consisting entirely of the cash receipts of a legitimate business, involving no ulterior criminal intent, or at least none other than to facilitate tax evasion; that is, where the funds are not criminally derived.

I have no doubt in my own mind that such cases as ours do not fall within the "heartland" of what is currently classified under Guideline § 2S1.3 at offense level 13 (plus an enhancement when the total amount exceeds $100,000). Thus, I certainly agree with the Working Group's conclusion that structuring, per se, is not an aggravating circumstance warranting that base offense level. Report and Findings, at 4. And I wholeheartedly

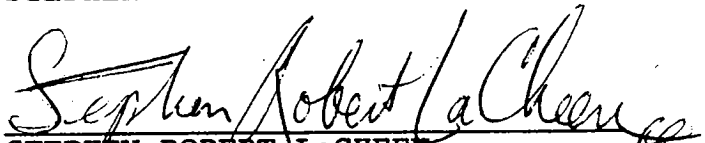
endorse the concern, in this context, that offense levels now demanded for structuring "lawfully derived funds" may properly be viewed as "not reasonable." Id. at 24. The change would assist judges in fulfilling their obligation to impose sentences which are not "greater than necessary" to achieve the statutory purposes of punishment. 18 U.S.C. § 3553(b). The comment appended to the proposed change, as published, correctly states that the amendment would "assure greater sensitivity to indicia of offense seriousness." Our trial judge, William W. Caldwell of the Middle District of Pennsylvania, agreed, and departed downward to a nine month sentence. The government appealed, however, and the Third Circuit reversed the departure, remanding for the imposition of a guideline sentence which would presumably fall in the range of 24 to 30 months.

Ironically, under the proposed amendment, the guideline sentence for Mr. Shirk's conduct would not exceed six months, with a sentence as lenient as straight probation being within the range. Thus, even the downward departure granted by Judge Caldwell would be classified as unduly severe. Again, there is perhaps some hope for Mr. Shirk on certiorari, or if we come up with a different departure theory at resentencing on remand. But the facts of this case -- and others like it around the country, where overzealous IRS agents find support in a Department of Justice that cannot resist the thought of demanding forfeiture of a multimillion dollar concern on the ground that the business itself was used to "facilitate" the offense --

demonstrate the inadequacy of relying on the departure mechanism.

For these reasons, I am in full support of the Working Group's conclusion that the guidelines must be amended to differentiate these cases of mere regulatory noncompliance (if that) from cases where the structuring of currency transactions is undertaken as a technique of money laundering. And when that amendment occurs, please do not forget to add it to the list in § 1B1.10(d), so that if the effective date comes too late to help Mr. Shirk at his resentencing, the cases of manifest injustice, such as ours, that may exist in the system as a result of the prior wording of the guideline may be corrected by a motion under 18 U.S.C. § 3582(c)(2) to reduce the sentence.

Respectfully submitted,
STEPHEN ROBERT LaCHEEN & ASSOCIATES

By: 

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Statement of

**Michael P. Dolan**
**Acting Commissioner**
**Internal Revenue Service**

Before the

United States
Sentencing Commission

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# Impact of Sentencing Guidelines On Tax Compliance

March 22, 1993



UNITED STATES SENTENCING COMMISSION

TESTIMONY OF

MICHAEL P. DOLAN
ACTING COMMISSIONER OF INTERNAL REVENUE

MARCH 22, 1993

Mr. Chairman and Members of the Commission, I am Michael P. Dolan, Acting Commissioner of the Internal Revenue Service. With me today is Acting IRS Chief Counsel David Jordan and Associate Chief Counsel (Enforcement Litigation), Patrick J. Dowling.

Before presenting my testimony today, I want to express my appreciation to the United States Sentencing Commission for the opportunity to appear at this hearing to discuss a major issue of concern to the Internal Revenue Service - the November 1992 amendments to the Sentencing Guidelines will adversely affect tax administration.

The Internal Revenue Service views this as an extremely vital issue as we address serious compliance problems that challenge the health of our voluntary tax system. The seriousness of the compliance problems facing the tax system and the impact that the 1992 amendments would have on

our compliance efforts resulted in correspondence to Senators Biden and Thurmond, the Chairman and Ranking Minority Member, of the Judiciary Committee. Our concerns were upheld by Senators Biden and Thurmond in letters to Judge Wilkins on September 18, 1992.

Our mission is, and will continue to be, to foster voluntary compliance. Yet, as we looked at events that were occurring in the tax system, we realized that change is needed in order to preserve the fairness and effectiveness of our voluntary assessment system.

The Sentencing Commission has historically supported the Service in addressing these concerns. In 1987, when the original Sentencing Guidelines were promulgated, the Commission noted in the Background Commentary to Section 2T1.1 the tax compliance need for increasing the number of prison sentences in criminal tax cases and highlighted this need by pointing out that "[c]urrent estimates are that income taxes are underpaid by approximately $90 billion annually." Today, the underpayment of income taxes is estimated to range from $110 billion to $127 billion. The largest part of this income tax gap, and the most troublesome part in terms of our ability to collect it, is the reporting gap--the amount of tax liability not

voluntarily reported on returns. This accounts for $113.7 billion or 89.5 percent of the $127 billion estimate.

A tax gap also exists in areas besides income tax -- the Treasury is being denied billions of dollars in uncollected excise taxes, payroll taxes and estate and gift taxes.

Coupled with the growing tax gap is the fact that our enforcement activities have not kept pace with the growth in the number of returns filed and the increase in the complexity of those returns. In today's world, there are too many returns, too many complex laws and too few enforcement resources to permit us to continue "business as usual."

In an effort to respond to these problems, the Service spent a number of years formulating a new approach to tax administration. The Service has begun to implement its new approach which we call "Compliance 2000".

Compliance 2000 recognizes that a good part of what we call noncompliance with the tax laws is caused by taxpayers' lack of understanding of what is required in the first place. For these taxpayers, it makes good business sense to increase our efforts to help them comply

through outreach, education and burden reduction rather than using enforcement means. An example of this is our nationwide effort encouraging nonfilers to contact the IRS and receive assistance in returning to the taxpaying rolls.

Compliance 2000 also recognizes that, despite our most aggressive assistance and outreach efforts, some segments of the population will not voluntarily respond. In those cases, we will direct our enforcement resources and employ our traditional enforcement arsenal -- the examination of returns, the imposition of civil penalties, the filing of suits seeking injunctions, the collection of delinquent taxes using liens and levies and in particularly egregious cases, criminal investigations and prosecutions -- to obtain compliance. The success of our Compliance 2000 efforts will depend, in part, on the effectiveness of our tax enforcement efforts. By effectively identifying and dealing with intentional noncompliance we will be sending a message to every American -- that there are serious consequences to failing to voluntarily comply with the tax laws.

For example, one of the most serious challenges to voluntary compliance today are those taxpayers who do not file returns. To assure the continued well-being of the tax system, it is imperative that we bring the six

to nine million nonfilers into the system and keep them in the system. As part of Compliance 2000, we are educating nonfilers on the need to contact IRS and receive assistance in returning to the taxpaying rolls. But educating and assisting nonfilers is not enough. We expect to rely heavily on our tax enforcement efforts to bring in the nonfilers who will not return to the system voluntarily. In chronic and particularly flagrant cases we will need to resort to criminal prosecution, and in these cases the Sentencing Guidelines will have a significant impact on our ability to succeed in returning nonfilers to the system. Sadly, after the 1992 amendments, the Guidelines may actually impede our efforts.

Several statistics illustrate the focused role that criminal prosecutions and, more specifically, the Guidelines play in the overall tax enforcement effort. Last year, we processed 204 million returns; assisted more than 74 million taxpayers; and examined 1.3 million tax returns. Our Criminal Investigation function initiated roughly 5,500 investigations and in concert with the Justice Department obtained tax-related convictions in 2,651 cases, representing one conviction for every 76,900 returns filed and less than 4 criminal investigations for every 1,000 returns examined.

Criminal tax enforcement has always been small in comparison to our civil enforcement; but it is an important part of the our overall tax compliance efforts. Criminal investigation and prosecution are reserved for only the most serious tax violations we uncover. We define the seriousness of a tax offense not simply in terms of the amount of taxes lost in a particular case, but rather in terms of the nature of the offense and the threat it poses to the integrity of the Federal tax system.

Those 2,651 criminal convictions are selected and brought to send a dual message. To the vast majority of Americans who voluntarily comply with the tax laws and pay their fair share, the message is one of fairness and equality -- that their Government will ensure that those who intentionally do not comply with the tax laws will be brought to Justice. To those who have committed tax crimes or who are contemplating doing so, the message is one of warning -- there will be severe consequences for their actions. To ensure that this message strikes home to virtually every individual and business in the country, our Criminal Investigation Program takes great care in ensuring that their investigations cover a wide spectrum of occupations, businesses, income brackets, regions of the country and types of violations.

What message is conveyed to taxpayers -- when, after we take care selecting a case and expending scarce enforcement resources, the violation is deemed minor enough to warrant a virtual certainty of probation for the offender? What does this tell honest taxpayers about the government's commitment to maintain the integrity of the tax system? What does it tell potential violators about whether it is worth risking prosecution to violate the revenue laws? The message conveyed can hardly be clear enough to serve a deterrent purpose.

Given their limited number, our criminal cases ought generally to hold out a high likelihood of incarceration, if only for a short period of time, in order to vindicate the honesty of most taxpayers and deter potential tax offenders. This Commission, indeed, once recognized as much, stating that "[u]nder pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as...tax evasion, that in the Commission's view are 'serious'". Yet, by contrast, the revised Sentencing Guidelines virtually eliminate the prospect of jail time for all but offenses involving the largest amounts of unreported tax.

As you know, under these guidelines, the recommended prison term is tied to the amount of the tax loss, i.e., the amount of tax that was intended to be evaded. Under the Sentencing Table amendments to the Guidelines which took effect in November 1992, the maximum amount of tax loss that could, with an acceptance of responsibility, result in a sentence of straight probation in an evasion case was increased from $10,000 to $40,000. This makes it unlikely that taxpayers with up to $142,000 in unreported income will be incarcerated under the guidelines for tax evasion. But fewer than 8 percent of all individual taxpayers receive that much income in one year (and only 20 percent receive that much in three years), much less evade reporting it.

The result is even worse in a failure to file case. In failure to file prosecutions, the maximum tax loss that could, with an acceptance of responsibility, result in a sentence of probation was increased from $20,000 to $70,000. As a result, taxpayers who willfully fail to file tax returns and receive up to $250,000 in income over a three-year period are unlikely under the guidelines to be incarcerated for their crimes. But only 6% of all taxpayers earn that much in three years and far fewer are able to earn that much in a single year. In sum, only a very small percentage of all taxpayers

who commit tax crimes face a certainty of some incarceration under the current guidelines -- no matter how short the period of confinement.

Another of many examples of challenges to the tax system involves the Service's electronic filing program, which has increasingly been the target of false filings and fraudulent claims for refund involving use of the earned income credit. These cases normally fall in the $2,000 to $3,000 range and, although considered small when measured under the "tax loss" standard of the guidelines, they are difficult to investigate and must often preempt other investigative work, because they involve direct losses to the Treasury.

The electronic filing program reduces the burden of filing for millions of taxpayers; helps honest taxpayers get their refunds promptly; and saves the Service the costs of storing and handling paper returns. But in spite of its value to the government and the taxpaying public, perpetrators of these crimes need only glance at the sentencing guidelines to know that if they commit an electronic filing offense and are caught, they will draw sentences in the 0 to 6 month range and are unlikely to face any period of confinement. For them, the risks may not outweigh the possible rewards of flagrant crime. Likewise, the investigators charged with protecting the

system are aware that when they select one of these cases for investigation their efforts are likely to do little more than publicize the low sentences produced by the Guidelines and that pursuing such investigation may actually have the unintended result of encouraging similar violations.

Nonfiling and electronic filing fraud are not isolated problems. We are faced with similar enforcement challenges involving employment and withholding taxes, fraudulent nonpayment of assessed taxes, and excise tax related violations, to name a few. Although many of these crimes may involve small tax losses, the tax system cannot withstand widespread abuses of this kind.

Our criminal investigation program plays an important role in Compliance 2000, our comprehensive strategy for reducing the tax gap and improving voluntary compliance over the long-run. We have spent a great deal of time structuring our criminal program to send a message to the American public that the tax system is fair and that tax crimes will not be tolerated. The current Guidelines send a very different message -- that tax crimes are not serious. This message is sent by a sentencing system which holds out the possibility of a purely probationary sentence, rather than certain incarceration, for almost all tax violators.

Deterrence has been and remains the primary reason we commence criminal tax investigations. The high likelihood of obtaining probationary sentences may actually deter criminal investigations and prosecutions and create a class of significant tax violations where the threat of criminal investigation and prosecution is practically nonexistent. As a result, a purely statistical analysis of historical sentencing patterns will not show the impact of predictably low sentences on the behavior of the broad range of potential tax violators whose crimes are likely to be sentenced in the 0 to 6 month range and who may, therefore, never be investigated or prosecuted.

We are cognizant that last year's change in the Sentencing Table was not prompted by a need to produce lower sentences for tax offenses but was actually motivated by concerns wholly apart from the sentencing of these cases. There was, in fact, no evidence prior to the 1992 amendments that guideline ranges in tax cases were too severe or otherwise in need of downward modification. But last year's Sentencing Table modifications, together with the contemporaneous implementation of Compliance 2000, prompted us to consider how the sentencing of tax crimes ought ideally to fit within our compliance efforts. As a result, rather than simply seek to recoup the two sentencing levels lost as a result of last year's amendment,

we proposed Amendment 41, which was published along with the Proposed Guideline Amendments for public comment.

Amendment 41 is designed to facilitate the primary goal of Compliance 2000 - to enhance voluntary compliance with the tax laws. It provides for certain confinement (without regard to possible adjustments and departures) of most tax violators whose crimes produce tax losses exceeding $10,000. But the key feature of the proposal is the affirmative use of acceptance of responsibility to encourage those who generate tax losses of $10,000 or less to reenter the tax system as a precondition to a sentence of probation.

For most tax offenses, Amendment 41 established a base offense level of 10, which applies to offenses generating a tax loss of $10,000 or less. A violator at this level who receives a 2 level downward adjustment for acceptance of responsibility will fall into level 8 and be sentenced in the 0 to 6 month range. Thus, eligibility for straight probation would be contingent on the offender's willingness to accept responsibility. In tax cases, we contemplate that the courts would grant the downward adjustment for acceptance of responsibility both before and after a trial only when the offender acknowledges the violation and takes steps to reenter the tax system by filing correct amended returns and attempting to pay back taxes

or by disclosing all pertinent tax information to the Service and providing truthful financial information sufficient to establish the existence of a current inability to pay the taxes.

We recognize that this is a novel approach which differs from that used in sentencing under the Fraud and Theft Tables. But, tax fraud is different from other forms of fraud and theft directed against the Government. Virtually every individual, family, business, and organization in the United States and many foreigners come in contact with the internal revenue laws in one form or another. Consequently, every taxpayer, every year has the opportunity to either voluntarily comply with the law or to cheat the Government out of tax revenues. Deterrence is , therefore, crucial in tax cases, and when incarceration is inappropriate, it is essential that the sentencing system at least encourage the tax offender's honest reentry into the system.

We recognize that proposed Amendment 5 is also under consideration by the Commission and recognize that its adoption would alleviate most of the damage caused by last year's change in the Sentencing Table. It provides for an incarceration rate roughly in the range of Amendment 41 and is, in fact preferable to 41 in at least one respect, because it provides for

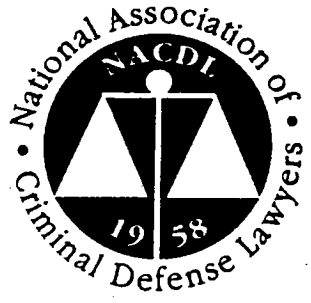
higher sentences in the very high tax loss ranges. Although we agree that this change should be made, we favor the concept behind Amendment 41, because it would eliminate the possibility that a tax offender could be sentenced to probation for committing the more serious tax crimes without having accepted responsibility or otherwise made an honest attempt to return to the tax paying rolls. By contrast, Amendment 5 admits to the possibility that some tax evaders -- potentially a very large class of them -- could, and in all likelihood would, be sentenced to probation without imposing upon them the need to make an effort to return to the tax system.

In addition, Amendment 5 eliminates the 2 level upward adjustment for sophisticated means. We do not favor this change, because it would eliminate the ability to distinguish defendants whose crimes are highly sophisticated or who go to greater lengths to conceal their wrongdoing. On balance, although we like some aspects of Amendment 5, we prefer Amendment 41 because it more closely supports the compliance philosophy behind Compliance 2000.

Members of my staff and the Office of Chief Counsel have had a number of promising discussions with the Commission's Staff concerning these issues, and I want to thank the Commission for the many courtesies

that have been extended to us. It is my sincere hope that our collective efforts can achieve sentencing guidelines for tax cases that reflect the breadth of the Service's investigative responsibility; the importance of deterring tax crimes; and the potential for using criminal sentencing to return tax offenders to the taxpaying rolls. Only through successful achievement of these goals will the health and well-being of our voluntary tax system be preserved.

Mr. Chairman, this concludes my testimony. I, or members of my staff, would be pleased to answer any questions you, or members of the Commission, may have at this time. Again, thank you for the opportunity to address the Commission this morning.




Statement of

ALAN J. CHASET

on behalf of the

NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

before the

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON PROPOSED AMENDMENTS

to the

UNITED STATES SENTENCING
COMMISSION GUIDELINES MANUAL

*Washington, DC*
*March 22, 1993*

***Comments and remarks of Alan J. Chaset on behalf of the National Association of Criminal Defense Lawyers to be submitted to the United States Sentencing Commission concerning proposed Amendments to the Commission's Guidelines Manual***

***March 22, 1993***

**Judge Wilkins and Members of the Commission:**

My name is Alan J. Chaset and I am here today on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization whose membership is comprised of more than 6,000 lawyers and 25,000 affiliate members who practice in every state and federal district throughout the nation. As you know, NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for all persons accused of crime, to foster the independence and expertise of the criminal defense bar and to preserve the adversary system in the criminal justice arena. For the past five years, I have served as the Chairman or Vice Chairman of the NACDL Sentencing and Post-Conviction Committees and have had the opportunity and pleasure of working with members of the Commission and its staff on several matters including the drafting of proposed amendments and the training of various participants in the criminal justice system. I also have the distinct privilege of serving as a member of the Commission's Practitioner's Advisory Group.

As the Commission is most aware, NACDL has long been a vocal opponent of the sentencing guidelines as promulgated by this Commission. Whether in somewhat heated public exchanges or in the relative quiet of the Commission's conference room and offices, we have consistently taken the position that the guidelines as drafted are not working and not working fairly. And we have consistently argued that newly proposed amendments merely add to the confusion and disparity already created by prior versions. While the messenger appearing before you today may be different from years past, the basic message I bring is the same: we do not like the guidelines for a number of good and sufficient reasons, but mostly because we believe that they are unnecessarily harsh and inappropriately inflexible.

Having now repeated that position and without intending to abandon that stance, please permit me to offer both some general comments about the Commission and its guidelines as well as some specific responses and comments to some of the individual proposals before us today.

First, I do want to thank the Commission for its efforts to oppose the proliferation of criminal statutes that include mandatory minimum sentencing sanctions; NACDL shares many of the same concerns as the Commission in this regard. Next, I want to commend the Commission for recognizing that future training endeavors under the guidelines need to be focused more on the defense bar; NACDL shares the concern with this problem and has already noted its willingness to help address the solution. And I want to encourage the Commission to keep providing increased access to Commission working groups and draft proposals; NACDL recognizes the need to work with the Commission at all stages of the process, rather than just appearing here when the opportunities for further change have been significantly circumscribed. Finally, I want to applaud the Commission for its willingness to publish the proposed amendments submitted by various interested groups from outside the Commission; NACDL believes that the consideration of competing proposals, including those that call for somewhat radical changes, serves to inform both the current and future amendment cycles as well as current and future Commissioners.

In that last regard, NACDL recognizes that the composition of the Commission may well change over the coming months. Obviously, we will want to be active in the attempt to secure appointments (and re-appointments) of those who more closely share our views on some of the important issues here. Regardless of that effort and its outcome, however, NACDL believes that there remains a distinct need to insure that a representative of the defense bar serve in an *ex officio* capacity on the Commission similar to the designee of the Attorney General and the Chairman of the U.S Parole Commission. We would urge the Commission to lend its full support to the effort to secure such a position.

Turning now to the amendment package published by the Commission, please permit me to state several general principles with which we have approached each of the specific proposals. Articulating where we

stand on these basic points makes it easier for us to offer comments on the many and often very detailed proposals and should similarly facilitate the Commission's understanding of where we stand and the bases for those positions.

First, NACDL believes that the sentencing guidelines should focus initial attention on the decision as to whether or not an individual needs to be incarcerated for his/her offense: the "in-out" decision. Only after it is thus determined that some period of imprisonment is warranted would the incarcerative guideline calculations come into play. As a closely related corollary, we support the fundamental principle of parsimony articulated in the Sentencing Reform Act: that sentences ought to be the least severe necessary to achieve the purposes of sentencing.

Second, we believe that the guideline calculations should be based solely on the precise conduct for which the defendant has been found, or to which the defendant has plead, guilty. We are, therefore, supportive of changes that move the system to offense-of-conviction based sentencing and away from the "real offense" concept. Next, we believe that the current system significantly undervalues and dramatically overlooks a large variety of offender characteristics, matters that we view as most critical in the fashioning of an appropriate sentence. While we support the concept that similar offenders who commit similar offenses should be treated similarly, we do not feel that the system affords sufficient opportunity to highlight and weigh legitimate differences and dissimilarities.

Fourth, NACDL believes that trial judges should be generally provided with broader authority and greater discretion to depart from the calculated guideline range. That flaw in the current system is most blatant and the need for change most glaring in the area of substantial assistance and cooperation. We believe that each actor in the system should be able to initiate the consideration of a departure in this regard. By so amending, we believe that much of the real and perceived disparity concerning the operation of §5K1.1 can be dramatically lessened.

Additionally, we share the view of many that the current version of the guidelines overemphasizes drug quantities and dollar amounts and provides insufficient emphasis on who the offender is and what function he/she may have played in the offense. While we recognize the confounding impact of mandatory minimums at this juncture, we look for changes that might provide a better and fairer mechanism for rationalizing each of these competing matters.

And finally, we believe that there have been too many inappropriate changes to the guidelines over the very few years of their existence. While we remain advocates for some basic changes, NACDL believes that the need for any amendment to the system must be demonstrated and supported by empirical data and sound analysis and must be accompanied by an assessment of the potential impact that the change might have on the population of the Bureau of Prisons. As we move into a period of government downsizing, program elimination, and general austerity, the Commission must now undertake its statutory obligation to insure that the guidelines minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.

Turning now to the amendments and requests for comments as proposed, NACDL offers the following responses:

**AMENDMENT 1**

NACDL endorses the proposal to exclude acquitted conduct from the already overbroad scope of "relevant conduct." Whether viewed from our position regarding the offense-of-conviction/real offense rubric or considered on the basis of fundamental fairness and the appearance thereof, this amendment clearly warrants adoption by the Commission. Similarly, we are thus supportive of Option B under proposed Amendment 34 and Option 1 under proposed Amendment 35.

**AMENDMENT 2**

NACDL strongly opposes the attempt to expand the application of the Commission's significantly flawed "one book" policy to multiple count cases. We believe that §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing) is substantively violative of the *ex post facto* clause and that its adoption last cycle without opportunity for public comment is also procedurally defective.

**AMENDMENT 5**

NACDL opposes the proposal to eliminate the "more than minimal planning" specific offense characteristic from several guideline sections and the related modification to the applicable loss tables. While we believe that the appropriate application of the concept of "more than minimal planning" could be benefitted by further discussion and more rational examples (including the removal of the "repeated acts" language in the Notes to §1B1.1), we see its elimination as inappropriately increasing the opportunity for dissimilar offenders to be treated similarly and for further incorrectly emphasizing the amount of money involved as the primary basis for length of punishment.

As to the other amendments related to fraud offenses, we oppose AMENDMENTS 6, 7 and Option C of AMENDMENT 37 as unnecessary. And, while we wish to de-emphasize the significance of dollar amounts in the determination of guideline ranges, we are supportive of those portions of AMENDMENTS 37 & 38 that tend to more rationally and fairly define and guide loss calculations.

**AMENDMENT 8**

As stated above and as stressed in prior years' testimony, NACDL believes that the drug guidelines overvalue quantity and undervalue role and do so most blatantly and most unfairly at the low end of the distribution chain. We believe that this amendment makes an attempt to begin to correct this imbalance, as do some of the proposals within AMENDMENTS 39 & 48. At this juncture, however, we merely want to reiterate our basic position on the general operation of the existing drug guidelines and on the need for significant recrafting.

**AMENDMENT 10**

NACDL supports the effort to narrow the definition and scope of the term "mixture or substance" as used in determining drug amounts under the guidelines. While we would go further here, the thrust of this change and those reflected in AMENDMENTS 49 & 50 merit adoption by the Commission.

**AMENDMENTS 12 & 13**

As part of our opposition to the overvaluation of drug amounts, NACDL has long shared the growing concern about the manipulation of guideline factors and ranges by government agents, particularly in reverse sting operations. While we feel that the Commission should address other abuses than just the setting of artificially low prices, we see this clarification and this potential addition as steps in the correct direction.

**AMENDMENTS 14 – 19**

While offering no specific comment as to the substance of the proposals here, we would note our belief that there have been so many changes in these sections of the guidelines over the past few years that they have become some of the most difficult to follow and apply. We recommend, therefore, no additional changes here at this time.

**AMENDMENT 20**

As regards the proposed changes to §§ 2S1.1 - 2S1.4, NACDL is most supportive of the removal of all opportunities for sentence manipulation that result from charging practices. We agree with the Commission's Working Group here that the money laundering statute has been used often by prosecutors to "up the ante" despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. While approving much of the contents of this proposal, we share some of the same concerns expressed by the Practitioner's Advisory Group and the ABA as regards the substitution of the fraud table as the standard measure here and as regards the factor manipulation potential in undercover/sting operations. Rather than repeat those most adequate remarks, I would merely make reference to same and note our basic agreement with the comments as written.

**AMENDMENT 23**

NACDL is supportive of this amendment which appears to significantly narrow the existing 2 level adjustment for "abuse of trust" so that it applies only to abuse of "special trust," a term accompanied with a definition that limits its application by stressing discretionary authority.

**AMENDMENT 24**

As noted above and in previous years' testimony, NACDL is strongly in favor of amending §5K1.1 to permit both the sentencing judge and the defendant to raise the issue of substantial assistance for consideration as a departure. While the concept addressed in this particular request for comment does not go far enough, it is clearly a step in the correct direction. In that latter regard, we believe that our basic position is better captured in AMENDMENTS 31 & 47 and commend those proposals for Commission adoption.

**AMENDMENTS 25 & 36**

NACDL has long sought to amend Rule 16 of the *Federal Rules of Criminal Procedure* to include the disclosure of sentencing relevant information and material. While we still believe that a change to the Rules is most appropriate, we support the recommended commentary here as suggested by the Commission and the Practitioner's Advisory Group as an effort to bring more "truth in sentencing."

**AMENDMENTS 27 & 28**

While NACDL believes that efforts to make the guidelines easier to use and apply are generally worthy of support, we are not convinced that the changes being proposed within these amendments are consequence neutral and otherwise benign. Before accepting such a long list of changes, we believe that more study and more data are needed.

**AMENDMENTS 29 & 30**

In line with our general comments about the need for the guidelines to place more emphasis on offender characteristics, we support the proposal of the Criminal Law Committee of the Judicial Conference of the United States to amend the introductory commentary to §5H1.1 so as to permit departures when those characteristics are present to an unusual degree and/or combined in ways important to the purposes of sentencing. We believe that that change is a step in the correct direction as would be other commentary tending to increase rather than restrict the court's ability to depart for these critically important characteristics.

**AMENDMENTS 32 & 33**

Consistent with our general position that the Commission should develop and implement some basic guidance as to an initial "in-out" decision before the calculation as to the amount of prison time is even addressed, we believe that these ABA proposals merit some study as a starting point or potential alternative vehicle for achieving some of the ends we seek. While we submit that the thrust of our position moves directly away from any reference to the sentencing table, given only the options suggested in these proposals, we would favor increasing the number of offense levels/criminal history categories cells where sentences other than imprisonment would be permitted. Similarly, we support the concept contained in the Federal Defenders proposal at AMENDMENT 52.

**AMENDMENT 40**

NACDL strongly supports and enthusiastically urges the Commission to lobby Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1. At the same time, we urge the Commission to similarly lobby Congress to modify or eliminate the provisions that equate the number of marijuana plants arbitrarily with certain weight equivalents.

**AMENDMENTS 53 – 56**

NACDL supports each of the amendments here as proposed by the Federal Defenders.

On behalf of the National Association of Criminal Defense Attorneys, I want to thank the Commission again for this opportunity to offer written comment and testimony on the set of guideline amendments and proposals. We look forward to working with the Commission in the future and pledge our best in the effort to enhance the defense bar's knowledge of and facility with the guidelines and their associated procedures.

(end)

U. S. SENTENCING COMMISSION

Public Hearing Testimony

March 22, 1993

2711 Spencer Rd.
Chevy Chase, Md.
20815

I am here today to have my voice heard regarding the proposed amendments of guidelines 2D1.1. The language of your proposed amendments should include the fact that the guidelines, as applied, do not reflect the intent of Congress with regard to illegal street drugs.

Congress specified that the total weight of any mixture or compound shall be used in determining a sentence level. However, the blanket application of this stipulation by the sentencing guidelines has failed to consider the intent of Congress and, therefore, resulted in penilizing inadvertently those not falling under that intent.

It would seem that Congress' intent in using the total weight is, in essence, a form of penalty enhancement for those who profit from the compounding and diluting of an illicit controlled substance with another(usually inert) substance. For example: if 100 grams of cocaine is mixed with another substance to yield a 1000 gram mixture, the final mixture is all sold as cocaine, and thus the original 100 grams yield a profit on 1000 grams.

The sentencing guidelines misapply the above rationale by including legally manufactured pharmaceutical, therapeutic agents. Medicinal pharmaceutical controlled substances are dispensed in dosages with a filler added to facilitate ingestion by the user, since the doses are usually too small to be taken alone. This is the result of a legitimate manufacturing process over which a defendant has no control. The size of the pills or capsules is arbitrary. A pill could have a 1 milligram dose in a 100 or 500 milligram total pill size. Furthermore, the purpose of the compounding is very obviously not the same as with street drugs, to enhance the profits from a given amount of an illegal substance. Therefore, in a case in which pharmaceutical controlled substances are involved, determining a sentence based upon the total weight of the tablets or capsules is illogical and not in keeping with Congress' intent regarding street drugs.

The following examples serve to illustrate the absurdity and injustice of such an application of the total weight rule to pharmaceutical agents.

In 1989, a West Virginia defendant was sentenced for selling 20,000 Tylox tablets. Tylox consists of 500 milligrams of Tylenol and 5 milligrams of Oxycodone, a narcotic. The total weight was 10,100 grams, of which 100 grams was narcotic. His sentence was calculated on the basis of the 100 grams of Oxycodone (which was converted to 50 grams of Heroin), and he received a level 20 baseline sentence. Had he been sentenced as in other cases, his sentence would have been based on converting 10,100 grams of Tylox to 5,050 grams of Heroin, i.e., 10,000 grams of Tylenol would have been converted to 5,000 grams of Heroin, surely a ridiculous proposition.

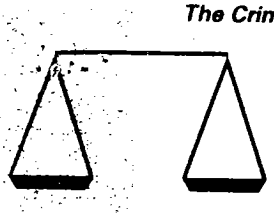
Another case involves a Maryland man who was also sentenced in 1989 on the basis of 66 tablets of Percodan. Percodan has 5 milligrams of Oxycodone and 550 milligrams of aspirin and filler. His sentencing memorandum erroneously claimed a total Oxycodone weight of (66 x 555 milligrams) 33.3 grams which was converted then to 16.5 grams of Heroin. His sentence was based on this calculation. In fact, the 66 pills had 310 milligrams of narcotic or 1/100 the claimed amount. These calculations and his sentence were never corrected.

Finally, a physician wrote prescriptions for two controlled substances, Hydromorphone and Dolophine (methadone). The Hydromorphone dosage was 4 milligrams and the Dolophine dosage was 10 milligrams. The tablets issued by the pharmacist, from the manufacturer, weighed 90 milligrams for the Hydromorphone, and 250 milligrams for the Dolophine. Sentencing was not based on the total prescription dosages of 175 grams but on the total pill weight multiplied by 2.5 for the Hydromorphone and 0.5 for the Dolophine to convert them to Heroin. The total weight after Heroin conversion was 8059 grams. From 175 grams to 8059 grams! It boggles the mind! There was no Heroin in this case, and the physician had no control over the pill size. The sentence penalized the defendant for something he did not do (manufacture the pill or dilute a narcotic for profit enhancement) and for something that did not exist(Heroin).

My only purpose for being here is to ask that the guidelines reflect the truth. The guidelines should be retroactively (to 1987) amended to correct this inappropriate application of the total weight rule so that individuals are not penalized for legalistic fiction after a process of legislative alchemy.

Thank you

*The Criminal Justice Policy Foundation*



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TESTIMONY OF

ERIC E. STERLING, PRESIDENT

THE CRIMINAL JUSTICE POLICY FOUNDATION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

ON PROPOSED GUIDELINE AMENDMENTS

FOR PUBLIC COMMENT

MARCH 22, 1993

Judge Wilkins, members of the Commission, thank you very much for permitting me to testify before you today regarding the proposed guideline amendments for public comment that the Commission published at the end of 1992.

Background

I am Eric E. Sterling, the President of The Criminal Justice Policy Foundation. The Foundation is a four year old educational organization that works with policymakers and the public to advance innovation in approaching the problems of the criminal justice system. Prior to joining the Foundation in 1989, I served as counsel to the Committee on the Judiciary at the U.S. House of Representatives for nine years. For eight years, as counsel to the Subcommittee on Crime, I was the principal staffer on the Judiciary Committee for drug enforcement, gun control, money laundering, organized crime, pornography, arson and explosives, and other matters. I played a major role in the development of many provisions of the Comprehensive Crime Control of 1984, the Anti-Drug Abuse Act of 1986, and the Anti-Drug Abuse Act of 1988, as well as other public laws.

I hope my experience as the Committee counsel who staffed the development of the mandatory minimum sentence amendments to the Controlled

Substances Act in the Anti-Drug Abuse Act of 1986 will be of value to the Commission in these hearings.

History of the Anti-Drug Abuse Act of 1986

The Controlled Substances Act sentencing provisions were initiated in the Subcommittee on Crime in early August 1986 in a climate in the Congress that some have characterized as frenzied. Speaker O'Neill returned from Boston after the July 4th district work period where he had been bombarded with constituent horror and outrage about the crack cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House, by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. The Speaker set a deadline for the conclusion of all Committee work on this bill as the start of the August recess -- five weeks away.

The development of this omnibus bill was extraordinary. Typically Members introduce bills which are referred to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill, and amendments are offered to it. For this omnibus bill much of this procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill.

And unfortunately for the Democrats, their attempt to preempt the drug and crime issue was easily rebuffed by the Republicans who simply raised the stakes by offering amendments with longer sentences, in favor of the death penalty, for elimination of the exclusionary rule, and so forth.

Background to the Mandatory Minimum Sentence Provisions

Recognizing the intensity of the climate of legislative haste, it is testimony to the integrity of the Chairman of the Subcommittee on Crime, William J. Hughes, that the Subcommittee attempted to develop a new sentencing scheme for drug offenses in a rational manner. The Subcommittee determined that it wanted to create incentives for the Department of Justice to direct its "most intense focus" on "major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs."[1] The Subcommittee directed staff to consult "with a number of DEA agents and prosecutors about the distribution patterns of drugs which if

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[1] H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, pp. 11-12.

possessed by an individual would likely be indicative of operating at such a high level."[2] The Subcommittee "determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping pcp (sic) in aluminum foil, and doing so in substantial street quantities."[3]

The concepts and details were developed during four meetings. The provisions regarding quantities of drugs were based, first upon calls to various individual law enforcement officers and reflected their personal experiences, and then upon adjustments to those quantities based on experiences in the various districts the Subcommittee members were from, rather than national standards, which tended to drive some of major level trafficker quantities in 841(b)(1)(A) down.

The Subcommittee did not make a determination about harmfulness of drugs, or more particularly develop a "harmfulness equivalent" concerning the quantities of drugs subject to the same level of punishment. Its punishment analysis was developed to direct prosecutorial resources to particular levels in the drug distribution bureaucracy, "major" traffickers, and "serious" traffickers. One problem with that analysis is that different drugs have differing distribution patterns. In the case of LSD, for example, the number of transactions between the chemist and the ultimate consumer is many fewer than the number of transactions between the heroin chemist and the heroin consumer. And it assumed that the high-level LSD distributor inflicts equivalent social harm as the high-level heroin, cocaine and PCP distributors.

The length of sentences originated without any advice or comment from the various agencies with relevant expertise, from the Judicial Conference, or from the public, **and without understanding of how it would affect the sentencing guideline structure under development by the Sentencing Commission.** The members were still operating in a mind-set of parole, and unfettered judicial discretion in sentencing.

The development of this bill was the sole instance during more than nine years with the Judiciary Committee that I did not see the usual procedure of hearings upon introduced bills followed. The terrible consequences of taking the approach of mandatory minimum sentences are now well known to this Commission, to the Judiciary, to the Bureau of Prisons, to the Bar, and to the nation at large.

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[2] Ibid. p. 12

[3] Ibid. p. 12

Recommendations

**AMENDMENT NO. 40**

Yes, the Commission should ask Congress to change the drug sentences.

**The Commission should regularly use its authority under 28 U.S.C 994(w) and 994(r) to analyze the grades and maximum penalties of offenses and make recommendations to Congress.**

Nobody is in a better position to make such recommendations than the commission. To achieve the purposes of the Commission in 28 U.S.C. 991(b) regarding certainty, fairness, avoiding unwarranted disparity, and "reflecting...advancement in knowledge of human behavior," **the invitation for comment is perhaps the most important proposal in this guideline amendment package, because it represents an inclination of the Commission to initiate correction of the legislative excesses of 1986.**

Regarding the 100:1 cocaine to crack ratio, it was originally a 50:1 ratio in the Crime Subcommittee's bill, H.R. 5394, and was arbitrarily doubled simply to symbolize redoubled congressional seriousness. Even the 50:1 ratio was too high. Cocaine had been the drug driving the violence in Florida that underlay the establishment of the Vice President's South Florida Task Force in 1982, and had long been regarded as a terribly serious component of the nation's drug problem. But it was the fearful image of crack in the popular consciousness that drove the legislative package. Some Members were warning that summer that 1000 new crack addicts were being created every day -- suggesting there would be a population of at least 3.6 million crack addicts at the end of the year. Yet by 1988, the estimate of the number of "frequent cocaine users" (use in the last week) was put at 862,000.[4] This number included the many snorters of cocaine, cocaine addicts of all descriptions, as well as the highly feared "crack" addicts. Many serious users of cocaine, upon using crack found it to be an intensely pleasurable, highly reinforcing, and deadly addictive drug. However, millions of Americans have in fact tried crack, they don't like it and don't use it.

The threshold quantities originally developed by the Subcommittee for the "serious level traffickers" who would be subject to the mandatory minimum of 5 years were one kilogram of cocaine and 20 grams of crack. The text of the "issue for comment" is incorrect in stating that the "legislative history of this section of the 1986 Crime Control Act (sic) indicates that the mandatory

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[4] National Drug Control Strategy, February 1991, p. 9. And by 1990, the Administration was proudly reporting that the number had gone down 23% to 662,000.

minimum was designed to target street level dealers who possess small quantities of cocaine base (crack)."[5] The Crime Subcommittee's target for prosecution by the 1986 amendment to 21 U.S.C.841(b)(1)(B)(iii) for trafficking in 5 grams or more of cocaine base (crack) was not "street-level dealers."[6] The target for investigation and prosecution were "*wholesale/major retail* level traffickers".[7] The "[q]uantities are based on the amounts that would be

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[5] Proposed Guideline Amendments for Public Comment, U.S. Sentencing Commission, Jan. 1993, p.63. The 1986 Act, the "Anti-Drug Abuse Act of 1986", included many titles that had their own short titles, but none of them were known as the 1986 Crime Control Act. In 1988, Congress passed the "Anti-Drug Abuse Act of 1988." Subtitle L of Title VI (the "Anti-Drug Abuse Amendments Act of 1988") of that Act amended the simple possession provisions of the Controlled Substances Act to provide for mandatory minimum sentences for the possession of crack. Generally the maximum penalty for the possession of a controlled substance is imprisonment for one year. However, for first offense possession of more than 5 grams of crack, a mandatory minimum of 5 years imprisonment up to a maximum of 20 years shall be imposed.

[6] "Legislative history" is a term frequently used, but it is not synonymous with legislative intent. In the case of this legislation, it is hard not to be confused by both the "legislative history" and the "legislative intent."

It is often hard to ascertain Congress' "legislative intent." In trying to understand a particular provision, one should distinguish the "legislative intent" of the members of the Subcommittee who actually wrote the provision, and the "legislative intent" expressed in the blizzard of press releases that accompanied the debate on legislation by members who most likely never read the bill. The intent of such members regarding this legislation, so clear and pure that it was pungent, was to "send a message" to the voters that they were tough on drugs and should therefore be re-elected.

The intent of the authors of the provisions is often expressed in the Committee's report, and was so expressed in the case of this legislation.

[7] H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, p. 17, emphasis in the original. The subhead used in the report to explain these penalties was *Serious Trafficker Penalties*.

possessed by persons operating at the retail supervisory/wholesale level of distribution of the particular drug."[8]

The Subcommittee was concerned about the violence of the street markets in which crack was being sold. The Subcommittee believed that, rather than the "buy and bust" strategy of arresting street level dealers, the approach should be to prosecute the managers of the street level traffic.[9]

The 20 grams of crack was the minimum believed to be in the possession of such a manager in the course of his work.

**The U.S. Sentencing Commission, in order to reduce unwarranted sentencing disparity, should request a review by the National Institute on Drug Abuse in consultation with the National Academy of Sciences of the drug quantity structure to determine dosages and quantify relative dangerousness or harmfulness.**

**The Drug Quantity Table in Part D of the Sentencing Guidelines as well as the quantitative levels for offenses in 21 U.S.C. 841 and other drug mandatory minimum sentences do not reflect a scientific measurement of relative harmfulness.** Congress, in its arbitrary selection of equivalent punishments for varying quantities, created the appearance that it had studied or understood relative harmfulness. The arbitrary 100 to 1 ratio between cocaine and crack reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug. This problem exists for all of the drugs listed on the table. The crude quantitative approach is a decades-old artifact of the way that drug enforcement agents have measured their cases.

Any fair sentencing scheme based on drug quantities should rest upon an accurate understanding of "quantity harmfulness" and have an equivalence across drugs. **This quantitative factoring could be in terms of the chemical or physical/psychological harmfulness of the drug, or perhaps it could be translated into the actual market value of the quantity of drugs. An innovative approach to eliminate sentencing disparity in this area that the commission could consider would be to follow the models used in theft, fraud and tax violations, and use the value of the illegal transactions as the basis for sentencing.** The "harm" would be seen in terms of how "big" the

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[8] Ibid. p. 17

[9] The "buy and bust" enforcement strategy has been found to be unsuccessful and counterproductive and has been abandoned by the police in New York City and Washington, D.C.

trafficker was, as measured by the dollar volume, not the quantity. Congress has used dollar value in creating the highest level offenses in the Continuing Criminal Enterprise offense, 21 U.S.C. 848(b)(2)B).

In looking at the statutory mandatory minimum in 21 U.S.C. 841(b)(1)A), for example, is there any "harmfulness" basis for treating 1 kg of heroin, 5 kg of cocaine, 50 gms of crack, 100 gms of PCP, 10 gms of LSD, 400 gms of fentanyl, or 1000 kg of marijuana as equivalent? If pure, how many doses of the drug do these quantities represent? How do the costs of these different quantities compare? Quantity-based sentences for drug offenses should be imposed on the basis of a genuine dangerousness or harmfulness factor.

* * *

[Amendment No. 40 was addressed out of order because of its saliency for sentencing reform.]

**AMENDMENT NO. 9**

This amendment is a good amendment in that it moderates the excesses of the 1986 Anti-Drug Abuse Act and focuses on the dangerous characteristics of an offender. It moves away from an excessive focus on weights regarding high-level offenders.

**AMENDMENT NO. 10**

This is an excellent amendment which will reduce unwarranted sentencing disparity.

The Los Angeles Times, in an article by Jim Newton, computed the sentences that now result under the guidelines by including the weight of the carrier.[10]

| Carrier | Weight of 100 doses | Guideline Range |
|---|---|---|
| Pure LSD | 5 milligrams | 10 - 16 months (Level 12) |
| Gelatin Capsule | 225 milligrams | 27 - 33 months (Level 18) |
| Blotter paper | 1.4 grams | 63 - 78 months (Level 26) |
| Sugar cubes | 227 grams | 188 - 235 months (Level 36) |

[10] Jim Newton, "Long LSD Prison Terms -- It's All in the Packaging," Los Angeles Times, p. 1, July 27, 1992. See also, Dennis Cauchon, "Band's followers handed stiff LSD sentences," USA Today, p. 11A, Dec. 17, 1992.

**The U.S. Sentencing Commission, pursuant to 28 U.S.C 994(r),** should recommend to Congress that it eliminate the "detectable amount" standard entirely, since it, in conjunction with mandatory minimums is the primary source of the worst "unwarranted sentencing disparity" in Federal law. The Commission might recommend to Congress that it repeal the entire quantitative structure in the area of controlled substances offenses and leave the sentencing enhancements to the Commission and the Sentencing Guidelines.

**AMENDMENT NO. 11**

This amendment more accurately reflects the level of business of a drug trafficker. The U.S. Drug Enforcement Administration in its G-DEP classification of high level drug traffickers limits the quantitative factor for determining the class of drug trafficker to the quantities which are handled on a monthly basis.

However, the level 32 quantities of controlled substances are not very substantial as major traffickers. To move to aggregation of all quantities at such a trigger will not provide the remedy the amendment seeks. Setting the aggregation level at 34 or 36 more closely reflects the levels of substantial traffickers.

**AMENDMENT NO. 12**

This amendment accurately reflects the boasting nature of drug trafficking negotiations, and prevents unfairness and unwarranted sentencing disparity from resulting from unrealistic claims that a defendant might make.

**AMENDMENT NO. 13**

This proposal is worthy, but may not go far enough. Where a government agent has set up a reverse sting sale for a discount price, the Judge should be permitted to consider not only the practical limits of the defendant's financial resources, but also the extent two which the agent's discount pricing may have boosted the size of the deal <u>within</u> the defendant's financial resources but beyond his original disposition -- i.e. to determine how much of the quantity to be sold was the defendant's idea and how much was the agent's idea, and to sentence only on the basis of the former.

**AMENDMENT NO. 47**

The government routinely encourages defendants to cooperate with it in the investigation of crime. A great many defendants, in fact, in the hope of sentence mitigation provide assistance. In course of such cooperation, some defendants have reservations about informing against family members or long-

time intimate associates. Such reservations can cause the government's attorneys and investigators enormous frustration. In other cases, personality conflict may arise, or the government may disbelieve some declarations or denials by the defendant.

It is in the interest of fairness in sentencing to permit the court to make its own independent determination about a defendant's "substantial assistance" to avoid unwarranted government withholding of a motion for departure from the guidelines on the ground of substantial assistance.

**AMENDMENT NO. 48**

With over twenty million Americans using marijuana and other cannabis products annually, there are obviously a great many persons violating the Controlled Substances Act. There are millions of Americans who are on the outer-most fringes of criminal enterprises that supply the American demand for cannabis. If their participation in the criminal conduct was truly minimal, it does not offend one's conscience that their potential incarceration be set at a maximum of level 16, or roughly two years. And if their participation were truly minor, then a maximum level of 22, or roughly 4 years, does not seem to be too low a maximum.

**AMENDMENT NO. 49**

This amendment would not include in the weight of a mixture or substance the uningestible materials mixed with a controlled substance to facilitate the smuggling of the substance such as mixing the drug with fiberglass and molding it into a suitcase. One could understand the desire of the government to seek extra punishment for an especially clever or hard-to-detect means to smuggle drugs into the country. That issue should be addressed directly, and not through a manipulation of the mixture or substance weights.

This amendment would eliminate unwarranted sentencing disparity. That such an amendment has become necessary reflects the degree of illogic that has invaded some discussions of drug quantities, and the degree of extremism attached to the term "mixture or substance containing a detectable amount of..."

**AMENDMENT NO. 50**

This is a very worthy amendment. Perhaps the greatest contemporary example of sentencing disparity is to sentence people to prison for long terms for the weight of the paper or sugar cubes on which LSD is "carried" rather than on the basis of the prohibited drug itself.

**AMENDMENT NO. 51**

This amendment, defining "cocaine base" as crack for the purposes of differentiating it from cocaine for sentencing purposes, accurately reflects the intent of the House Committee on the Judiciary when it used the cocaine base. In the Committee's report, it used the common term, "crack," when describing the types of offenders the new sentencing provision was designed to apply to.[11]

The Committee was aware of another meaning of cocaine base as an intermediate product in the processing of coca leaves into cocaine hydrochloride, but did not intend this definition or these penalties to be applied to criminal conduct such as the importation of that material.

**AMENDMENT NO. 63**

Without undertaking a scientific study of the relative dangerousness of drugs, these proposed amendments are unwarranted. These proposals reflect the tendency to punish more harshly anabolic steroids, the drug du jour. There is no question that there are serious risks in the abuse of anabolic steroids. But just how widespread and how severe are those risks? The claim of a former NFL star that he believes his brain cancer was caused by his use of anabolic steroids does not make it so, nor does it suggest that the a risk of brain cancer from such drug use is high.

This amendment may be warranted. But the Commission cannot adopt this amendment without risking increased sentencing disparity in the absence of a comprehensive examination of relative drug harmfulness.

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[11] H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, p. 12

U. S. Department of Justice

*Washington, D.C. 20530*

STATEMENT

OF

ROGER A. PAULEY, MEMBER (ex officio)

UNITED STATES SENTENCING COMMISSION

UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

MARCH 22, 1993

Mr. Chairman and Members of the Commission:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the sentencing guideline amendments the United States Sentencing Commission has recently proposed. In my statement today, I would like to highlight a few of the most important areas of concern raised by the proposed amendments. The Department has also provided a more comprehensive set of written comments on the amendments.

DEPARTMENT OF JUSTICE PROPOSALS -- COLLATERAL ATTACKS ON PRIOR CONVICTIONS

As the Commission is aware, the Department of Justice proposed amendments addressing several important areas of concern to law enforcement. These areas include increasing the penalties for anabolic steroids and certain other controlled substances, establishing a guideline for computer fraud and abuse, and addressing concerns about firearms sentences. We strongly urge the Commission to consider these, as well as our other, proposals.

One amendment of great importance to the Department and to the justice system involves the problem of collateral attacks on prior convictions as they relate to a defendant's criminal history under the sentencing guidelines, Amendment 57. Adoption of this amendment is extremely important because collateral attacks on prior convictions threaten to undermine the entire sentencing process. For example, one United States Attorney's Office reports that most career offenders in that district attack

prior convictions at sentencing and thereby delay the sentencing process. In some cases poorly documented prior State convictions that may have occurred years before must be considered by the federal sentencing court. Delving into the validity of facially valid prior convictions is overly burdensome to the sentencing process, which ought not be used as a substitute for appeals or habeas corpus. Except to the extent the Constitution or a statute requires otherwise, a defendant should be precluded from raising the alleged invalidity of prior convictions at sentencing.

The problem arises because the current commentary to guideline §4A1.2 states: "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." United States Sentencing Commission, Guidelines Manual (Nov. 1992). This language has been interpreted in some circuits as providing sentencing courts with discretion to inquire into the validity of prior convictions. United States v. Canales, 960 F.2d 1311 (5th Cir. 1992); United States v. Jakobetz, 955 F.2d 786, 805 (2d Cir. 1992) (dicta); United States v. Cornog, 945 F.2d 1504, 1511 (11th Cir. 1991); but see United States v. Roman, 960 F.2d 130 (11th Cir. 1992), opinion vacated and petition for rehearing en banc granted, 968 F.2d 11 (11th Cir. 1992). These courts have reached this result despite the contrary inference arguably arising from the Commission's commentary that sentences resulting from convictions that a defendant shows to have been previously

ruled constitutionally invalid are not to be counted. Application Note 6, §4A1.2.

The proposed amendment would delete the problematic language in the commentary to guideline §4A1.2 and clarify that the Commission does not intend to confer any right to attack collaterally at sentencing a prior conviction or sentence. The amendment recognizes, however, that other law may grant defendants the right to the collateral attack of prior convictions, e.g., 21 U.S.C. §851. This recognition obviously also includes any constitutional protection defendants may enjoy. See United States v. Vea-Gonzales, No. 91-30469 (9th Cir. February 22, 1993).

We urge the Commission to adopt Amendment 57 with one modification. We believe that the amendment (developed by the Commission staff) would be improved if it did not include the first sentence: "Whether a defendant at sentencing may collaterally attack a prior conviction or sentence is a procedural matter for court determination." This sentence, which is similar to the one that has led to the problematic court holdings, is likely to cause confusion and may be construed as inconsistent in part with the second sentence.

ACQUITTED CONDUCT (Amendments 1, 34, and 35)

The Department strenuously opposes the various published proposals to change the definition of relevant conduct in guideline §1B1.3 so that acquitted conduct may no longer be

considered in determining the guideline range. This change would constitute a dramatic departure from the constitutional standards courts have historically applied in both pre-guideline and guidelines cases and would reverse a long line of well-settled appellate decisions which permit judges to rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. It is also at odds with the Commission's fundamental commitment to a modified real offense system by preventing the court from sentencing the defendant on the basis of conduct which the court finds by a preponderance of evidence to have actually occurred.

Most courts of appeals have held that the Constitution does not preclude the use of acquitted conduct for sentencing purposes. United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); United States v. Ryan, 866 F.2d 604, 608-609 (3d Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); United Stats v. Fonner, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); United States v. Dawn, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990); United States v. Averi, 922 F.2d 765 (11th Cir,. 1991). These rulings are consistent with Supreme Court decisions allowing acquitted conduct to be introduced in evidence at a defendant's

subsequent trial, Dowling v. United States, 493 U.S. 342 (1990), and allowing civil forfeiture notwithstanding acquittal on the same charges underlying the forfeiture. United States v. 89 Firearms, 465 U.S. 354 (1984). The broader rules of evidence admissible at sentencing, as compared to trial, also militate against a bar to using acquitted conduct for sentencing purposes. There is surely no unfairness in sentencing a defendant based on additional evidence, *e.g.*, obtained from a search whose fruits could not be admitted at trial, that clearly shows that the defendant engaged in the conduct at issue.

There are, moreover, additional reasons why changing the present rules with respect to acquitted conduct would be unwise. First, the change would lead to an undue increase in litigation. Frequently, the effect of an acquittal is unclear because the basis of the jury's verdict cannot be definitively established. For example, suppose a defendant and a confederate are charged with selling drugs and the defendant with using a firearm during and in relation to that crime (18 U.S.C. §924(c)). The defendant is convicted of the drug charge but acquitted of the firearms offense. Should that mean that the defendant can assert the acquittal to successfully resist the government's attempt to apply the enhancement in guideline §2D1.1 for possessing the firearm? Not necessarily. The proof at trial may have been weak as to whether the firearm belonged to the defendant or to the confederate, also present in the room. The doubt may have been sufficient to cause the acquittal, but, if that was the basis

therefor, *not* to preclude an enhancement under the guidelines. In other cases, the verdicts may simply be inconsistent, for example, a case in which the defendant is convicted of aggravated bank robbery (18 U.S.C. §2113(d)) for placing life in jeopardy by using a firearm, but acquitted under 18 U.S.C. §924(c) for using the firearm to commit the robbery. Based on anecdotal information from the United States Attorneys, it is our belief that the number of inconsistent verdicts, particularly in drug and fraud prosecutions, is growing. In each of these situations, if the Commission were to bar the use of acquitted conduct in determining the guideline range, difficult litigation would arise over the effect of the acquittal -- an increased burden on the already highly complex sentencing process that we think is unjustified and that many courts, we suspect, would not welcome.

Second, a limitation on the use of acquitted conduct would likely lead to unwarranted charging and sentencing disparity, contrary to the goal of the Sentencing Reform Act, and would encourage more trials and sentencing hearings. Under the proposal, the court would remain obligated to consider conduct not charged in the indictment but within the ambit of relevant conduct, but could not consider that same conduct if it had been charged and resulted in acquittal. Often, the decision whether to bring a charge that later results in acquittal will be a close one, on which reasonable prosecutors would reach conflicting judgments. If the rule on acquitted conduct were changed as proposed, these reasonable but opposing charging decisions by

prosecutors would produce markedly different sentences. Moreover, the change would create a temptation for prosecutors to decline to bring charges that they fear could result in acquittal and wait to bring supporting facts to the court's attention at sentencing. Likewise, defendants, who are encouraged under the current definition of relevant conduct to enter pleas when charged with several counts with similar offenses will, if the proposed amendment is adopted, have a strong incentive to go to trial to try to defeat one or more of the multiple counts, thereby increasing the number of trials in the hard-pressed justice system.

For all of these reasons, we strongly urge the Commission to reject the superficially appealing but unsound proposals to limit the use of acquitted conduct.

LIMITATIONS ON THE IMPACT OF CONTROLLED SUBSTANCE QUANTITY ON OFFENSE LEVEL DETERMINATIONS (Amendments 8, 9, 39, 48, and 60)

The Commission has proposed several amendments aimed at limiting the impact of drug quantity on the determination of offense levels. While drug quantity may not be a perfect measure of harm, it reflects both the scope of the activity in which a defendant is involved and the resulting harm to society and, therefore, should be retained as an important measure of the appropriate sentence. Moreover, the Commission has decreased the impact of drug quantity on sentencing in large part with its 1992 amendment of the relevant conduct guideline. The effect of this

amendment in many cases is a narrower range of conduct for which a defendant is liable for sentencing guideline purposes -- that is, a smaller quantity of drugs -- than the scope of the conspiracy in which the defendant is involved.

While we believe that drug quantity is an important factor in sentencing and urge the Commission to make no amendments in this regard until it can determine the effect of the recent relevant conduct amendments, we recognize that the Commission may wish to address the view of critics that drug quantity as it now affects the determination of sentence still plays too great a role. Should the Commission determine that an amendment addressing drug quantity is needed, we would not oppose the adoption of a narrower version of Amendment 8.

Amendment 8 amends the drug trafficking guideline, §2D1.1, to provide that if a defendant qualifies for a mitigating role adjustment, the base offense level shall not be greater than level 32. It also amends the mitigating role guideline, §3B1.2, to describe more specifically the characteristics of a defendant subject to a mitigating role adjustment in sentence. Amendment 8, which places the cap at a level sufficient to accommodate a 10-year mandatory minimum sentence, would be acceptable to the Department if the following conditions are met.

(1) The proposed cap on the sentence should apply only to minimal, but not minor, participants. Providing an extra benefit to offenders at the highest offense levels should be limited to the least culpable among this group.

(2) If the Commission adopts the level 32 cap for minimal participants, it is essential that it also approve Amendment 60. This amendment, proposed by the Department, precludes a role reduction for drug defendants whose relevant conduct subject to the drug-trafficking guideline consists only of drug quantities in their actual possession. For example, a person who transports two kilograms of crack cocaine for a large drug enterprise trafficking in much greater quantities should not receive the benefit of a role reduction if his relevant conduct is limited to the two kilograms. Such a defendant's participation is not minor or minimal when viewed in light of his relevant conduct, which itself reflects a reduction for the defendant's role in the joint activity.

By barring a role reduction for such offenders, Amendment 60 would also prevent application of the level 32 cap. Thus, offenders who possess controlled substances in such large quantities that their offense level is above level 32 on the basis of the amounts they actually possess would neither receive a mitigating role reduction nor benefit from the proposed cap. This result is appropriate for offenders entrusted by drug organizations with large quantities of controlled substances. We recommend adoption of proposed amendment 60 rather than proposed Application Notes 6 and 7 in Amendment 8 to deal with this issue since

amendment 60 is clearer and more comprehensive in its approach.

Even if the Commission does not adopt the proposed cap for minor or minimal participants, it should adopt Amendment 60 since the principle that a defendant does not play a minor or minimal role when his relevant conduct is limited to the drugs in his possession is an important one under the current drug guideline scheme. One technical correction needed is that, as printed, amendment 60 incorrectly amends guideline §2B1.2, rather than §3B1.2.

(3) Another condition for our acquiescing to the adoption of Amendment 8 is that the Commission bar a defendant from receiving a mitigating role adjustment if he possessed or had ready access to a firearm or other dangerous weapon or if he engaged in assaultive or violent behavior. In addition, the mitigating role adjustment should be precluded for an offender who directed or induced another participant in this regard. Amendment 8 establishes this preclusion in a more limited form -- only for those who possess or have ready access to a firearm or who direct or induce another participant to possess a firearm.

(4) The final condition is that the Commission retain current Application Notes 2 and 4, which Amendment 8 proposes to delete from the commentary to guideline §3B1.2. Note 2 states the Commission's intent that the downward adjustment for a minimal participant be used infrequently.

Deletion of this language will be taken as a signal that the Commission intends a broadened application of the role reduction guideline, despite the more direct description of mitigating role that is proposed. Likewise, the Commission should preserve existing Application Note 4, which ordinarily bars a role reduction for a defendant who has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct.

Amendment 8, as modified, would address the concern that drug quantity drives sentencing to too great an extent while avoiding unnecessary and radical changes in the guidelines. We oppose Amendments 9, 39, and 48, which contain a number of objectionable features. The most notable is that Amendments 9 and 39 create a cap of level 36 for drug quantity applicable to all offenders, regardless of their role in the offense. Drug traffickers would have no disincentive to deal in huge quantities of drugs since they could do so with impunity for the excess above level 36 amounts. Amendment 39 also makes further adjustments to the drug quantity table that are problematic in their relationship with mandatory minimum provisions. Under the amendment, aimed at reducing sentences, amounts that would require imposition of a mandatory minimum would fall in a range that barely accommodates the mandatory minimum. By placing the guideline maximum at a level very close to the mandatory minimum, this scheme provides the courts with little discretion to set the

sentence within a reasonable range in recognition of factors not specified in the guidelines or to take into account the range of drug quantities subject to the same offense level. It also precludes reduction for mitigating role in the offense or acceptance of responsibility for those defendants whose drug quantities are at or just above the mandatory minimum amounts.

We are also particularly troubled by the proposed role-in-the-offense adjustments in Amendments 9, 39, and 48. For example, Amendment 9 proposes a 4-level reduction for a defendant who did not own or sell drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills. The effect of this proposal would be an automatic reduction for drug couriers, regardless of the measure of their relevant conduct. Drug couriers are essential to the operation of a drug-trafficking organization and play a central, rather than a minimal, role in the offense. The amendment is also contrary to Amendment 60, discussed earlier, which denies a mitigating role adjustment to defendants whose relevant conduct consists of the drugs in their actual possession. In addition, Amendment 39's proposed 6-level decrease for "significantly minimal" participants would lead to endless litigation over the differences between "significantly minimal" and "minimal" participants and would invite disparity. Creating another level of role in the offense is a complication the guidelines do not need. Finally, the proposed caps below level 32 in Amendment 48 for minor and minimal participants trafficking in substances

subject to mandatory minimum sentences are unacceptable. Our willingness to accept any cap is limited to its being set no lower than level 32 -- which is consistent with the 10-year mandatory minimum.

We favor Amendment 39's proposed increases in guideline §2D1.1 for the use of a firearm or other weapon and the defendant's leadership role in a large organization and believe that these increases would have validity under the current structure of guideline §2D1.1.

DRUG MIXTURES (Amendments 10 and 49)

Amendments 10 and 49 would amend the commentary to guideline §2D1.1 to address uningestible portions of drug mixtures. Amendment 10 would exclude for sentencing purposes "uningestible, unmarketable portions," while Amendment 49 would exclude "portions of a mixture that are uningestible or unmarketable." Both proposals would exclude materials that have to be separated from the controlled substance before the controlled substance can be used.

We do not object to the concept of excluding uningestible, unmarketable portions of a drug mixture but believe there is a need for clarification and further amendment. First, the opening statement of Application Note 1 provides that a mixture or substance for purposes of guideline §2D1.1 "has the same meaning as in 21 U.S.C. §841." The Commission is not in a position to make this assertion and then to provide a guideline definition

that the courts may or may not accept for purposes of application to the statute. The courts, for purposes of applying statutory penalties, may not agree with the Commission's determination of what portions of a mixture should be included or excluded. The Commission is in a position only to dictate the application of the sentencing guidelines, not the statutory penalties. This sentence should be deleted.

Next, the use of a suitcase to which cocaine is bonded, for example, reflects a sophisticated means to avoid detection. The Commission should provide a guideline enhancement to reflect this added culpability. An increase would provide uniformity in recognizing the added culpability of sophisticated means but would not make the sentence dependent upon the weight of the substance used in this endeavor.

In addition, the amendment should clearly provide that the exclusion applies only to drug mixtures which are both uningestible and unmarketable. If a mixture containing uningestible portions is, nevertheless, marketable under the expectation that the purchaser will perform a simple function to extract the controlled substance for use, the entire weight should be included. In this regard, the direction to exclude portions that have be separated from the controlled substance before use is inconsistent with the "uningestible, unmarketable" language and should be deleted. Similarly, portions that are not marketable, for example, because of their need for refrigeration,

should be included if they can be ingested. We recommend the following commentary to address these concerns:

> This exclusion applies only to mixtures which are both uningestible and unmarketable. Therefore, if a mixture is marketable but is not ingestible because, for example, of adulterants or other components of the mixture, the entire mixture will, nevertheless, be included for sentencing purposes.

We also recommend the addition of commentary to recognize that the weight of the controlled substance may be determined by extrapolating from the weight of a sample of the mixture from which the controlled substance has been extracted. Without this language, the courts may incorrectly infer a requirement that the entire quantity of the controlled substance be extracted -- an approach that would be overly burdensome to the Drug Enforcement Administration, which has to perform some extractions with the use of harmful solvents. Moreover, the commentary should state that once the controlled substance is extracted, it need not be in "pure" form. We suggest the addition of the following commentary:

> In calculating the sentencing weight of the controlled substance, the court may extrapolate the total quantity of the controlled substance based on the quantity extracted from a sample of the mixture. After exclusion of the uningestible, unmarketable portions, the substance included in the sentencing weight need not be the "pure" controlled

substance. Rather, any substances that are normally included with marketed mixtures of the controlled substance, and that were, therefore, likely to have been with the controlled substance before it was combined with the portions to be excluded, are included in the "mixture" for sentencing purposes.

Finally, we recommend specifying that LSD on blotter paper, sugar cubes, or other similar "carriers" are examples of mixtures not subject to the exclusion of uningestible and unmarketable portions. This amendment would prevent defense arguments that the amendment in question encompasses such LSD cases.

MONEY LAUNDERING (Amendment 20)

The Commission has proposed a sweeping amendment of the money laundering guidelines, §§2S1.1 through 2S1.4. The amendments would substantially lower the penalties for many money laundering offenses, even very pernicious ones, and send a dangerous signal that money laundering is merely an inconsequential extension of the unlawful activity that produces the dirty funds. This message is at odds with actions by Congress, which has treated money laundering as a serious offense that is wholly distinct from the underlying unlawful activity. Moreover, money laundering, subject to a 10- or 20-year penalty depending upon the offender's intent, is an offense that threatens our nation's financial institutions and, therefore, our economic well-being, by involving these institutions in

transactions rooted in unlawful conduct. The Department vigorously opposes the proposed amendments.

The amendment of guideline §2S1.1 would reduce the offense level for many money laundering offenses to a level equivalent to, or slightly above, the level applicable to a fraud offense involving the amount of money laundered. That is, money laundering would be treated in a manner generally consistent with fraud. This decrease would apply to both money laundering related to white collar offenses and money laundering related to a myriad of other serious offenses, such as arms violations, murder for hire, and other violent crimes. In many cases the amendment would also reduce the offense level for money laundering related to drug trafficking, which now starts at level 23 or 26, under guideline §2S1.1, and 22, under guideline §2S1.2, and increases depending on the amount of funds laundered. The only cases generally spared from reduction are those in which the money launderer committed the underlying unlawful activity and the offense level for that activity is equal to or greater than the currently applicable money laundering offense level.

In our view, the motivation for the suggested change in large part relates to "receipt and deposit" cases -- that is, cases in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a financial institution account identifiable to the person who committed the underlying offense. We believe that these cases are but a small

segment of the universe of money laundering and that recent caselaw developments, as well as internal Department of Justice prosecution guidelines, have cured many of the problems of the past. The overall approach of the money laundering sentencing guidelines should not be revised because of these cases, nor do we believe that other cases that have been cited as non-serious money laundering dictate sweeping amendments. However, we acknowledge that "receipt and deposit" cases, when correctly identified, may more appropriately be sentenced at a different level.

To this end, we have recently submitted a proposal that would carve out "receipt and deposit" cases from current treatment under guidelines §2S1.1 and 2S1.2 (copy attached). Under our proposal money laundering offenses for which the underlying activity did not involve controlled substances, a crime of violence, firearms, or certain other offenses would be sentenced at 8 levels above the level established by the fraud table in guideline §2F1.1 corresponding to the value of the funds. The proposal specifies further conditions: the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account that is clearly identifiable as belonging to the person who committed the specified unlawful activity. The principal reason for the limitation to "non-currency" proceeds is that currency is the most dangerous form of proceeds from the standpoint of enforcement of the money laundering laws since, once deposited

into an account with other funds, there is no ability to trace it back to the specified unlawful activity which generated it. Our proposed treatment of this class of cases is identical to the Commission's proposal relating to the class of cases subject to the most lenient treatment. However, our proposal preserves current offense levels for cases which do not fall within the exception, such as cases that involve further money laundering conduct. Thus, our proposal reduces the "shock" to the system that a wholesale, and unnecessary, revision of the money laundering guidelines would bring. We urge you to consider our proposed amendment, as well as the appendix to this statement, which sets forth more fully the reasons for our opposition to the proposed money laundering amendments.

The appendix also highlights our concerns regarding the proposed amendment of guidelines §§2S1.3 and 2S1.4, addressing transaction reporting and currency and monetary instrument reporting. The Department had submitted a proposal to harmonize disparate treatment of the various offenses that fall within these guidelines. The Commission's proposal, while it brings about harmony, produces substantial and inappropriate reductions in offense levels. Reporting requirements relating to financial transactions and the movement of currency and monetary instruments are critical to curbing money laundering and enabling investigators to trace unlawful proceeds. Proposals to reduce sentences in this area should be rejected as inconsistent with

the goal of deterrence of both reporting offenses and money laundering in general.

SUBSTANTIAL ASSISTANCE MOTIONS (Amendments 24, 31, and 47)

The Commission has proposed several amendments to policy statement §5K1.1 to eliminate the prerequisite of a government motion for departure below the applicable guideline range to reflect a defendant's substantial assistance in the investigation or prosecution of others. In addition, the Commission has invited comment whether to eliminate the requirement of a government motion in the case of a first offender, where no violence was associated with the offense.

We strongly oppose these amendments. Even if one agreed with the concept of allowing a defense motion over the objection of the prosecutor, amending the existing policy statement would be a mistake. As the Commission knows, Congress has provided by statute that a government motion to reduce a sentence based on cooperation is required for situations in which the cooperation occurs after sentence is imposed (Rule 35, F. R. Crim. P.) and where reduction would mean lowering the sentence below a mandatory minimum (18 U.S.C. §3553). It is difficult to imagine that Congress could have intended a system in which a government motion is required in these circumstances but not in the situation currently addressed by policy statement §5K1.1. Thus, in our view, the appropriate forum to consider this issue is Congress, not this Commission, since the Commission's policy

statement requiring a government motion is consistent with the Congressional scheme.

Moreover, on the merits the published proposals are unsound. For one thing, they will result in increased numbers of (if not indeed routine) requests by defendants for reduction in sentence and can, therefore, be expected unduly to burden the courts. Defense attorneys will feel pressured by future claims of ineffective assistance of counsel to file such motions and will accordingly argue for reduction in many unwarranted cases. In addition, no one disputes that the prosecutor is in the best position to determine whether a defendant has provided substantial assistance in investigating or prosecuting others. This is reflected by the fact that, under the terms of the proposed amendments, the court would still have to give substantial weight to the government's evaluation of the defendant's conduct from the standpoint of substantial assistance. In addition, we point out that the government has an incentive to seek substantial assistance reductions where warranted in order to encourage defendants to cooperate. It is not in prosecutors' long range interests to fail to file such motions where justified by the facts.

Although the current policy statement properly limits reduction of sentence based on a defendant's substantial assistance to cases in which the government has filed a substantial assistance motion, the prosecutor's discretion in filing such motions is not unlimited. The Supreme Court held in

Wade v. United States, 112 S.Ct. 1840 (1992), that federal district courts "have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive ... say, because of the defendant's race or religion." Id. at 1843-1844.

For all these reasons, we strongly urge the Commission to reject the proposed amendments to policy statement §5K1.1.

FRAUD AND THEFT (Amendments 5, 6, 7, 37, 38, 45, and 65)

The Commission has requested comments on whether adjustments should be made to the loss tables in the fraud and theft guidelines, and whether the loss tables provide appropriate and adequate punishment for the loss categories included. Several alternative approaches are provided for consideration.

A major change proposed in Amendment 5 would delete the "more than minimal planning" adjustment from the fraud and theft guidelines and the use of "sophisticated means" from the tax guidelines and replace them with a two-level increase in the loss tables. As we have stated in the past, the Department opposes elimination of "more than minimal planning" from the fraud and theft guidelines. In our experience, the extent of planning is an important indication of the seriousness of a crime. Particularly if a defendant is caught early in a fraud scheme before substantial losses are amassed, it may be impossible to establish a significant loss from the fraud, but eminently

feasible to show the extent of "planning". Losses are also extremely difficult to document in complex schemes to defraud and are thus unaccounted for in many cases because of defendants' successful efforts to hide the scope of illegal activity.

If the Commission decides to eliminate the enhancement for "more than minimal planning," the Department strongly favors the proposal to increase by two levels the base offense level of the fraud and theft guidelines. We would not oppose a related two-level decrease if the defendant proved the offense constituted a single, opportunistic act that did not involve "more than minimal planning".

We have substantial concerns about the proposed gradual increase in offense levels in the loss tables to replace "more than minimal planning". Since the proposed two-level adjustment for "more than minimal planning" does not actually occur until the losses are greater than $40,000, the proposal effectively lowers by two levels (in the $2,000 to $5,000 range) and one level (in the $5,000 to $40,000 range) the offense levels for many crimes in which the "more than minimal planning" adjustment had been previously applied, such as crimes which may have been discovered early and did not have a large dollar amount assigned to them, and those many "smaller" crimes that did involve "more than minimal planning".

In addition, we fail to see the logic of eliminating from the tax guidelines the use of "sophisticated means" to avoid discovery of the nature or extent of the fraud. We view the use

of offshore bank accounts, shell corporations, etc., as factors which can be easily identified and which greatly increase the seriousness of the crime and defendants' culpability warranting increased punishment. Rather than being eliminated, the use of "sophisticated means" should be retained in the tax guidelines and added to the fraud and theft guidelines.

The Department supports the proposal to increase the loss tables for the offense levels with "extremely high loss amounts". As we have testified before, this change is absolutely necessary to reflect Congressional intent in raising the maximum sentences for a number of fraud and theft offenses. We also favor making the increases in offense levels steeper as the amount of loss increases.

We also recommend that the offense level for fraud be calculated on the basis of the *higher* of the amount of gain or loss resulting from the offense. In many of the Department's fraud cases, there is no dollar loss associated with the crime, but there is a gain to the defendant, which should be considered in the calculation of the offense level.

In our experience, the use of dollar loss as a primary indicator of the seriousness of the offense often underestimates the extent of the crime and the damage to individuals and society. Defendants can do great harm without creating large dollar losses, and the same monetary loss to a bank or an elderly pensioner has a vastly different impact. There are numerous cases in which there is no dollar loss associated with the crime,

such as those involving false identification documents and fraud cases charging mislabeling, loan fraud, and other types of misrepresentations.

In many other cases it is difficult to quantify the losses. In food, drug, and medical fraud cases, monetary losses often do not reflect the potentially significant negative health risks caused by defendants such as pharmacists who distribute outdated, unapproved or ineffective drugs, or veterinarians who distribute drugs that leave harmful residue in food. In other cases losses may be impossible to prove, such as fraudulent schemes which involve poor records or an obscure paper trial but may affect many victims. Therefore, we strongly support the addition of specific offense characteristics to reflect harm other than dollar losses. The types of harm identified by the Commission in proposed Amendment 7 are appropriate and should be further refined and adopted. A general statement as in proposed Amendment 6 that an upward departure may be warranted if the sentence understates the actual harm, by itself, is not sufficient.

The guidelines do not adequately reflect the seriousness of fraud affecting multiple victims, such as telemarketing fraud. Rather than eliminating the enhancement in the fraud and theft guidelines proposed in Amendment 5 for cases involving more than one victim, we recommend adding specific offense characteristics that would increase the offense levels as the number of victims increases. This change recognizes the increased societal harm

that occurs when numerous people are victimized, and the significantly heavier burden on the criminal justice system in investigating and prosecuting the crime and establishing restitution for victims, as well as on business and commerce, such as in telemarketing cases, when large numbers of people resolve never to trust a telemarketer, legitimate or otherwise.

The Commission has asked for comments in Amendments 37 and 65 on whether the fraud guidelines should be amended to include the risk of loss as a factor in determining the guideline range when the amount of risk is greater than the amount of the actual or intended loss. The Department believes this proposal is a good idea to cover fraudulent loan application cases and other cases such as, for example, defendants who, in their role as individual sureties on government contracts, use fraudulent assets as security for payment and performance bonds, and thus present a substantial risk of loss if the government is forced to collect against the bonds for a contractor's default. Increasing the emphasis on risk of loss is also of crucial importance in environmental cases. The risk of loss should also encompass risks to the public health caused by schemes to market drugs, medical devices and foods which are capable of causing serious harm.

The Department strongly opposes lower sentences for defendants who did not personally profit from the crime as proposed in Amendment 38. Fraud is frequently made possible and prolonged by people participating in it if only to keep their

jobs. Downward departures for them are unwarranted. If a person decides to engage in criminal activity, he or she should not benefit at sentencing merely because the government is unable to identify the monetary incentive that led the defendant to commit the crime. The proposed amendment would lead to litigation over the wages and benefits of employees to learn if they profited financially from the offense, hardly a fit subject for a sentencing hearing.

TAX OFFENSES (Amendments 21 and 41)

We have not addressed in our testimony today the proposed changes to the tax guidelines, on which a representative of the Internal Revenue Service will be testifying. The Department supports the IRS's approach, and we have submitted a fairly extensive analysis of the proposed tax amendments in our written comments. However, if the Commission has any questions for the Department about the proposed tax guideline amendments, we are prepared to respond in writing to the Commission's inquiries.

DEPARTURES FOR A COMBINATION OF OFFENDER CHARACTERISTICS (Amendment 29)

Amendment 29 addresses offender characteristics that the Sentencing Commission has identified as not ordinarily relevant to determining whether a sentence should be outside the guidelines. Such factors include age, education, employment record, family ties, and military record. See United States

Sentencing Commission, Guidelines Manual, Chapter Five, Part H (Nov. 1992). The amendment proposes that such factors, although not ordinarily relevant to departure, may, nevertheless, be considered if they, "alone or in combination, are present to an unusual degree and are important to the sentencing purposes in the particular case." Since the factors enumerated may currently be considered as grounds for departure in extraordinary cases, the real impact of the proposal relates to cases in which the factors in question are present in combination with other factors. That is, the amendment proposes that factors the Commission has already identified as ordinarily irrelevant to departure become the basis for departure because of their cumulative effect.

We strongly oppose this amendment because it could seriously erode the goal of the Sentencing Reform Act of 1984 of reducing unwarranted sentencing disparity. The Commission has wisely identified a group of factors that likely would bring about a great deal of disparity if ordinarily relied on as bases for departure. For example, one sentencing judge may determine that a defendant's recent graduation from a university is a basis for a downward departure to a probationary sentence while another judge may find that a similar defendant's university degree and future opportunities render his unlawful conduct more blameworthy and, therefore, inconsistent with downward departure. Under the current policy statement education is not ordinarily a ground for departure, and both defendants would be subject to the same

guideline range. More importantly, both defendants would be subject to the same guideline range as an offender not fortunate enough to have received a higher education. However, the proposed amendment would allow the judge intent on departure to take into account such factors as the defendant's young age, his strong family ties, and some other factor, such as prior public service work -- in combination with his recent university graduation -- to order a downward departure even though no single factor would have provided a basis for it.

In short, the amendment invites disparity of exactly the sort the Sentencing Reform Act instructs the Commission to avoid: favorable treatment for offenders with higher socio-economic status. See 28 U.S.C. §994(d). The proposed "combination of factors" basis for departure is but a thinly veiled disguise for this favorable treatment. If the Commission addresses the effect of a combination of factors at all, it should adopt a contrary amendment to dispel the notion that a combination of irrelevant factors can somehow become relevant.

## APPENDIX

Money Laundering is an international crime which has reached epidemic proportions. In 1990, the G-7's Financial Action Task Force (FATF) estimated the United States' share of international drug proceeds to be $100 billion; other estimates put this figure at closer to $200 billion. The Federal Bureau of Investigation estimates that when drug money laundering is combined with other major types of money laundering, the figure for money laundered in the United States annually may be as high as $300 billion. The money laundering statutes were drafted with the intention of reaching the flow of proceeds from this whole spectrum of illegal activity, from narcotics offenses to white collar crime, to terrorism, organized crime and environmental crime.

Because this is the first time that the Commission has reviewed the money laundering guidelines, we believe that a full explanation of the consequences of the pending proposal is appropriate, in light of the drastic effect the proposal would have on sentences in money laundering prosecutions. The Commission's proposal (Amendment 20) would markedly reduce the base offense levels for laundering of white collar crime proceeds, in even its most pernicious forms, as well as for professional drug money launderers.[1]

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[1]While most of our discussion focuses on the non-narcotic area, it is important to note that the proposed amendment could significantly reduce sentences for some professional drug money launderers, who usually are not involved in the underlying drug offenses and therefore would not be sentenced under §2S1.1(a)(1) of the proposed amendment. This is the case in several of the recent Operation Polar Cap prosecutions. Such cases are the kind of offenses that § 1956 was aimed at, and are the cases which arguably should merit the strongest punishment under the guidelines.

The principal law enforcement agencies fighting money laundering -- the Federal Bureau of Investigation, the Drug Enforcement Administration, the Customs Service, the Internal Revenue Service, and the Postal Service, as well as the Financial Crimes Enforcement Network -- are in agreement that the United States has, proportionally, the worst money laundering problem in the world. The United States money laundering problem and response go beyond drugs to non-narcotic and white collar crime offenses.[2] Indeed, the United States leads the international law enforcement community in enforcement of all types of money laundering. Primarily through its participation in the FATF, the United States has emphasized to the domestic and international financial community the critical need for comprehensive money laundering enforcement, and has been in the forefront of an initiative to broaden the scope of anti-money laundering programs to include the proceeds of non-narcotic as well as narcotic offenses. Many other countries have anti-money laundering laws, but they often do not prohibit the laundering of proceeds of non-narcotic related crimes. Our initiative to broaden the scope of money laundering enforcement would be severely impacted by the message that our domestic enforcement aimed at white collar criminals is in retreat.

The Department of Justice strongly opposes Amendment 20. However, we acknowledge that a modification of the current

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[2]There are presently 103 predicate crimes constituting "specified unlawful activity." Of these, only ten are narcotic related.

guidelines may be appropriate to address a small class of money laundering cases popularly known as "receipt and deposit" cases, which seem to be the area of greatest concern under the current guidelines. Accordingly, the Department, by letter of March 2, 1993, forwarded to the Commission a proposed alternative amendment (also set forth as an attachment hereto), which we believe addresses this class of cases. We urge the Commission to adopt our alternative approach, rather than to completely rewrite the current guidelines, as proposed in Amendment 20.

The Department of Justice opposes the published proposal, drafted by the Commission Staff's Working Group on Money Laundering ("Staff"), on fundamental philosophical grounds. Our fundamental difference lies in the interpretation of the Congressional intent giving rise to the money laundering statutes. In our view, Congress created the money laundering statutes, set the maximum penalty at 20 years, and created the avenue of forfeiture, not merely to deal with what the Staff casts as "facilitating" activity, but to remedy <u>completely separate conduct requiring severe punishment</u>:

> The purposes of S. 2683, the Money Laundering Crimes Act of 1986, are: To create a Federal offense against money laundering; to authorize forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.

S. Rep. No. 433, 99th Cong., 2d Sess. 1 (1986). Congress said, in essence, that criminals are to be punished routinely for their

underlying criminal conduct, but if they further attempt to have use of their proceeds, they should expect to be punished even more severely, as a separate and distinct crime has been committed.

Moreover, contrary to the more lenient treatment for white collar criminals proposed in the Staff amendment, Congress did not create two money laundering statutes, one with harsh consequences for those who launder narcotic proceeds and one more lenient for white collar criminals. Congress created one statute, with penalties for the launderers of profit of specific white collar offenses as severe as those imposed on narcotic money launderers.[3] Over time Congress has added to the list of non-narcotic specified unlawful activity, has never subtracted, and continues to reach out for ways to strengthen money laundering enforcement in the white collar arena.[4] Indeed, this is in part a response to law enforcement reports which suggest that organized crime and drug trafficking organizations are inserting their narcotics proceeds into "legitimate" businesses

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[3]The present Sentencing Guidelines set the base offense level for § 1956 money laundering with the intent to promote specified unlawful activity at 23, and at 20 for all other intents. By contrast, the proposed amendment would drop the base offense level for non-narcotics related money laundering to 8 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds.

[4]As recently as October 1992, Congress added food stamp fraud, violations of the Foreign Corrupt Practices Act, and theft from the mail to the list of specified unlawful activity, and also amended § 1956 (and by reference, § 1957) to include transactions which involve the proceeds of kidnapping, robbery, extortion and bank fraud offenses which occur outside the United States.

and layering their assets with proceeds of subsequent white collar offenses, rendering the nature of the funds virtually indistinguishable as narcotics or non-narcotics related proceeds.

The theoretical basis for the Commission's proposed amendments was set forth in an October 1992 Staff Report, which stated that the Commission's initial decision to set high base offense levels for money laundering "was presumably based on the general conclusion that 18 U.S.C. §1956 would apply only to relatively serious offenses." See Staff of the Sentencing Commission, Report on Information Gathering and Initial Findings, at 17 (October 14, 1992) (Money Laundering Working Group) (hereinafter referred to as "Staff Report I"). According to the Staff report, the Commission, at that time "did not have the benefit of settled judicial interpretations of key terms because the applicable statutes had only recently been enacted . . . these statutes are very broad, and it appears they may be being applied somewhat differently than the Commission anticipated." Staff Report I at 16. Although the first part of this statement may be true, the now-settled judicial interpretations of the key terms, however broad, do not justify the arbitrary distinctions in money laundering conduct set forth in the proposed amendment nor the wholesale dismantling of the money laundering penalties to address anomalous fact patterns.[5]

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[5]Among the arbitrary distinctions drawn in the proposed amendment is the identification of "sophisticated" money laundering. The most pernicious forms of money laundering are accomplished by relatively unsophisticated means. For example, recent raids on the Cali Cartel, in Colombia, resulted in the

The Staff's philosophical view, evidenced by its use of language in Staff Report I, a subsequent report dated November 10, 1992, and in the Commentary to the proposed amendment, is that only §1956 concealment and promotion cast as reinvestment in future specified unlawful activity (SUA) are "actual" money laundering. All other statutory bases for prosecution are denigrated by the Staff proposal, which would provide little punishment beyond that imposed for the underlying offense.[6]

Indeed, in an ambitious attempt to merge the present §2S1.1 (which applies to §1956) and §2S1.2 (which applies to §1957), the proposal sets one level for money laundering and purports to provide enhancement for the §1956 intents. However, only two of the four §1956 intents are included -- promotion and concealment -- the rest of the 20-year offense is ignored.[7] In addition,

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discovery of bags full of postal money orders. Another seriously damaging method of money laundering is the use of electronic transfers. Neither of these methods can be said to be particularly "sophisticated." Moreover, we contend that the Commission Staff's attempt to define "sophisticated" will have to be modified in each amendment cycle.

[6]In addition, depending on the outcome of another proposed amendment -- to the fraud guideline (§2F1.1) -- which would delete the 2-point enhancement for "more than minimal planning" in favor of a new fraud table which factors in planning, the money laundering base offense levels may end up equal to an underlying fraud offense. If "more than minimal planning" is not incorporated into the table, "8 plus the number of offense levels from the table" is in many cases the same as the §2F1.1 fraud offense level, because as presently drafted, the 2-point enhancement is unavailable to the money laundering calculation.

[7]The four basic intents set forth in 18 U.S.C. § 1956 are:

> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or

the proposal enhances punishment for §1956(a)(2)(international transportation of illegal proceeds out of the country), but ignores the plain language or the statute which prohibits transportation in or out of the country.

The Department of Justice contends, therefore, that the proposal draws contours around §1956 -- with this and other distinctions that are merely arbitrary -- in a manner which Congress did not intend and which ignores the methodology of money laundering.

In our view, the basis for the Staff's conclusions is the flawed view that money laundering is "simply incidental" to the underlying offense which gives rise to the profit laundered. Staff Report I at 1. This view is based, we believe, on a misconstruction of the concept of "merger." By way of example, the classic merger problem is illustrated in United States v. Johnson, 971 F.2d 562 (10th Cir. 1992), a case in which money laundering charges were brought relating to the wire transfer of money from fraud victims to the defendant. The same wire transfers which gave rise to the money laundering charges also

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(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part --

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal Law.

formed the basis for wire fraud offenses which were charged substantively and as specified unlawful conduct. The Tenth Circuit held that the wire transfer of the money from victim to defendant was merely the completion of the underlying offense, and could not form the basis for money laundering charges, since the funds do not take on the character of "proceeds" until they are received by the defendant.[8]

It is our position that at the time the Staff reports were drafted, much of the charged conduct[9] which gave rise to its conclusion that money laundering is "incidental to" the underlying conduct consisted of "merged" transactions, which are now properly addressed in the case law and the Department of Justice prosecution guidelines. To the extent that we can agree that any financial transactions are "incidental to" the underlying offense, it is only in this category of "merged" transactions, which the case law makes clear do not constitute money laundering. To the extent that the Staff reports go further to suggest that all subsequent transactions in illegal proceeds are "incidental to" the underlying conduct, this conclusion is simply wrong.

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[8]The court in Johnson noted the distinction between the wire transfer scenario and the case where a defendant first obtained the funds and then deposited them himself. The court noted that the latter transaction would clearly have violated § 1957. This issue is discussed further, infra.

[9]The statistical, rather than analytical nature of the case analysis provided in the Staff reports does not reflect information necessary for proper analysis of the merger issue.

For example, Staff Report I cites three cases in support of its conclusion that the courts of appeals are interpreting the statutory requirement "intent to promote" in an overbroad manner. See Staff Report I at 9. One case cited, United States v. Johnson, is discussed above, and does not support the Staff's conclusion that judicial interpretation of "intent to promote" is overbroad. To the contrary, in finding that loan payments permitted the illegal enterprise to continue to maintain office space, the court also found, as discussed above, that only transactions subsequent to the crediting of wire transfers to the defendant's bank account could properly be charged as "reinvested" profit. 971 F.2d at 570.

Similarly, in United States v. Skinner, 946 F.2d 176 (2d Cir. 1991), another case cited in Staff Report I, the intent to promote was supported by defendant's transfer of drug proceeds to her supplier, in what amounted to payment on a line of credit. Although the facts of Skinner are somewhat anomalous, in that the defendant was paying for the very first in a series of contemplated shipments of drugs, it is clear that all later transfers of drug proceeds to her supplier for additional shipments would unquestionably qualify as reinvestment promotion in the manner contemplated by both Congress and the Commission.

The third and last case cited in Staff Report I, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a case which is intended to fall within the exception the Department of Justice herein proposes. In Montoya, a California state senator

was charged with promoting his acceptance of bribes based on his deposit of a check into his personal bank account. The Ninth Circuit held that this deposit promoted the carrying on of specified unlawful activity -- the bribe -- because "Montoya could not have made use of the funds without depositing the check." 945 F.2d at 1076. No other indicia of money laundering activity were found to be present. By virtue of the Court's interpretation of the conduct as promotion, in this case, the defendant was subject to the harshest of the sentencing guidelines. As set forth below, the Department of Justice's alternative amendment proposes to draw an exception for promotion cases such as Montoya, as well as other types of fact patterns more typically charged under 18 U.S.C. §1957, where there are no further indicia of money laundering activity beyond the deposit of the proceeds and where certain other elements are present. The excepted group of cases is treated in the Department of Justice alternative proposal at the base offense level proposed by the Staff.

In our view, a large portion of the fact patterns which are the focus of the Staff's proposed amendment have, since the time of its initial study, already been addressed and remedied. That is to say, a portion of the fact patterns examined fall into the "merger" category addressed by cases such as United States v. Johnson, and these cases can no longer be charged as a matter of law.

To provide uniform application in charging transactions chronologically close to the underlying conduct, the Department of Justice instituted internal prosecution guidelines, which took effect on October 1, 1992. The guidelines state, in pertinent part:

> Cases Involving Financial Crimes: In any case where the conduct to be charged as "specified unlawful activity" under §§1956 and 1957 consists primarily of one or more financial or fraud offenses, and where the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense, no indictment or complaint may be filed without prior consultation with the Money Laundering Section [of the Criminal Division].

U.S. Attorneys' Manual 9-105.000 (October 1, 1992).

We believe that the internal guidelines, and the developments in case law in the past year relating to white collar based money laundering, have already eliminated a large portion of the problems addressed by the Staff. However, the Staff reports also take issue with fact patterns commonly described as "receipt and deposit," as exemplified by the Montoya case.

In "receipt and deposit" cases, the funds received by the defendant arrive in the form of a check and once received are subsequently deposited into a bank account. This is a correct application of the money laundering statute. However, the Staff's analysis appears to take the view that such cases reflect transactions which are easier to trace and should not, therefore, be sentenced in the same category as other types of cases. This

conclusion is acceptable only in certain cases where no further indicia of money laundering are present, as explained below.

Most disturbing is the Staff's focus on the "receipt and deposit" fact patterns as justification for wholesale revision to the guidelines. We are willing to address "receipt and deposit" cases, by carving out an exception which leaves undisturbed the sentencing levels of "heartland" money laundering cases; we oppose most strongly the notion that all money laundering cases should be affected by what we believe to be a small subsection of fact patterns.

The Staff's position, briefly stated, is that "incidental" money laundering, including deposit of criminal profit into readily identifiable bank accounts, creates "little additional harm to society beyond that reflected in the underlying offense." Staff Report I at 1. The Department of Justice, joined by the Treasury Department, takes issue with this view, because the insertion of criminal profit into the banking stream, in and of itself, causes harm to society. Moreover, prosecution of offenses committed at what is in the law enforcement community referred to as "the placement stage" is critical, because the first placement of funds creates the most serious potential harm. Once money is inserted into the banking stream, it can be moved, concealed and/or reinvested with far less chance of detection.

The Treasury Department's Financial Crimes Enforcement Network (FinCEN), in a July 1992 report entitled "An Assessment of Narcotics Related Money Laundering" (hereinafter referred to

as the "FinCEN Report"), stated that the "placement stage" was the point at which the money laundering process is most vulnerable. Although the report focuses primarily on narcotics and currency, these observations have general application, including the emphasis placed on the danger of permitting launderers to move through the placement stage and into the "layering stage":

> In the layering stage, the launderer attempts to separate the proceeds from their illicit origin as much as possible by moving them through a complex series of financial transactions. The launderer hopes thereby to make the connection more difficult, if not impossible, to trace. With the placement stage completed successfully, the proceeds have been converted to a non-cash form and can therefore be more easily and rapidly manipulated. There are obviously a large number of options available for the launderer; however, the amount of layering used will usually depend on how quickly the profits need to return to their owner and on the "visibility" of original placement activity.

FinCEN Report at 23.

Among the options available to the launderer, once the illicit funds are placed into the banking stream, is use of the electronic communication network of banks to move the funds. This is the most serious danger in permitting the launderer -- whether his profit originates in narcotic-related or non-narcotic activity -- to insert his profit into the banking stream:

> The use of wire transfers is probably the most important technique used for layering illicit funds in terms of both the volume of money that can be moved and the extent to which transfers occur. The technique is preferred because launderers can get funds to their destination rapidly. Size of the transfer is usually not a constraint. The United States does not restrict the amounts that may be transferred electronically into or out of the country, nor does it require reporting of transactions between accounts or financial

> institutions. After the funds have been transferred several times, especially when done successively, tracing them back to the source is difficult. Transferring the funds through foreign countries electronically adds a further complication in that there are often no means for law enforcement to follow the trail quickly through the maze of foreign banking laws and regulations.

FinCEN Report at 24. None of this activity is possible until funds are inserted into the banking system. We contend, therefore, that dismissing the placement stage as "mere deposit" and concluding that deposit causes no harm to society is a serious mistake.

Even assuming, arguendo, that money laundering fact patterns demonstrate variant levels of conduct, we view it as illogical to set the level for all money laundering at the lowest possible level, as opposed to the approach in the present guideline, which focuses on high levels, in recognition of Congressional intent in the creation of a 20-year offense. The Staff justifies its recommendation to lower the levels on a statistical analysis of approximately 200 cases. Their analysis of this limited sample, even if accepted, reflects only 25 percent of the cases to be within the category it classifies as less serious cases. Lowering the base levels in all cases, based on 25 percent of the cases, is unjustified even on the assumption (which we dispute) that the Staff's statistical sampling is valid.

First, the statistical basis is questionable. The methodology for selection of cases is defendants actually sentenced under §2S1.1 and §2S1.2, in fiscal year 1991. However, in our view examination of reported cases or, for that matter,

indicted cases is insufficient. To be fair, the universe of cases under examination must include cases where plea negotiations resulted in pre-indictment resolution of these charging issues, as well as situations in which the early exercise of discretion (even at the investigative stage) reflects the recognition of the issues presented by the Staff.[10] Second, the 200 or so cases presented (in a statistical rather than analytical format) are not capable of interpretation of relevant facts. Both analyses must be performed to conclude that limits on the exercise of prosecutorial discretion are warranted.

Enforcement in the white collar money laundering area is relatively new, with many of the cases only now reaching the level of appellate review. However, the Criminal Division of the Justice Department has consulted in cases whose facts reveal that money laundering in white collar cases is no less pernicious nor unsophisticated than in the narcotic area.

In a case recently indicted in New England, the defendant set up an elaborate pyramid of fraudulent bank loans, constantly reinvesting the proceeds of successive false loan applications

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[10]We strongly take issue with the suggestion that any component of the Department of Justice has a policy of threatening money laundering prosecution in order to coerce pleas. Where the possibility of money laundering prosecution is discussed in the course of plea negotiations, all such discussions are grounded on the good faith belief that such prosecution has basis in fact and law. Department of Justice policy, under what is commonly called "The Thornburgh Memo," dictates charging decisions and plea bargaining practices consistent with the "most serious readily provable offense." See "Principles of Federal Prosecution," USAM 9-27.000. See also Bordenkircher v. Hayes, 434 U.S. 357 (1978).

into repayment on prior loans. The Government has charged money laundering under a promotion theory, alleging that the continuous reinvestment of proceeds permitted the defendant to build a larger and larger fund of illicit profit -- ultimately the defendant caused transfers totalling millions of dollars and seriously endangered the health of a savings bank -- and permitted him to keep increasing the fund with each successive loan, without detection, by satisfying the prior bad loans. Clearly this is a case requiring severe punishment, not merely based on the sum of all its pieces -- the fraudulent loans. Rather, the punishment should reflect the severity of the money laundering scheme which both nourished and obscured the operation.

Similarly, in a recently indicted case in the southwest, a real estate developer and his attorney are charged with defrauding the Federal Deposit Insurance Corporation (a judgment creditor by reason of the previous failure of a savings and loan) by transferring real estate belonging to the developer into his girlfriend's name, in anticipation of bankruptcy, and moving the funds through the use of various escrow accounts and cashier's checks to conceal its origin. Clearly, this activity, as well, goes well beyond the scope of activity "incidental to the underlying crime," and is activity Congress intended to reach with punishment beyond that of the underlying crime.

It is not true, therefore, that the money laundering statutes are "being applied somewhat differently than the

Commission anticipated" or to suggest that most white collar money laundering is merely a fragment of the underlying crime. Although the Staff may be able to cite anomalous fact patterns which reflect a variance of application, we believe that the recently promulgated money laundering guidelines evidence the Department's commitment to uniform application, particularly in the area of financial crimes.

In contrast to the pending proposal, the Department's alternative proposes to leave undisturbed the offense level for money laundering, except in certain cases defined by a strict set of parameters. The elements of the parameters are:

1) The specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, or a firearm or explosive: The lower guideline range is not available to defendants who launder the proceeds of these serious crimes. We do not view this limitation as controversial, in that it relates to a serious class of offenses.

2) The money laundering conduct was limited to deposit: We have drawn a bright line at the point of deposit, because we seek to address only that portion of the Staff's concerns which relates to fact patterns where the completion of the underlying offense and the commencement of money laundering are blurred -- no more, no less. That is to say, we do not agree with the Staff's suggestion that money laundering is a "facilitation"

crime or that it is merely a method for the final accomplishment of profit. Money laundering is a wholly separate crime.

This bright line approach also reflects our concern with a critical misunderstanding with respect to concealment. The defense bar has argued that any number of subsequent transfers should be given more lenient treatment, so long as they involve bank accounts which clearly relate to the defendant. This is more a tracing/ forfeiture concept, and ignores all but the "fictitious names" theory of concealment.

3) Deposit into an account which is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity: The Staff reports acknowledge that concealment, particularly through the use of fictitious names or nominee accounts, is the most egregious form of money laundering. There is insufficient recognition, however, of other pernicious forms of concealment employed by some defendants who use their own bank accounts. All forms of concealment must be ineligible for the exception. This issue is best explained by illustration:

In a recent case in the Northern District of Florida, the lead defendant pleaded guilty to concealing the movement of illegal proceeds through the fraudulent use of "consulting fees" to mask the transfer of the illegitimate profit. Co-defendants pleaded guilty to fraudulently obtaining public contracts (despite an earlier debarment of the lead defendant) through the use of nominee companies. The lead defendant received his profits from these contracts by creating a sham consulting

company in his wife's name and the fiction of "consulting fees." Although each transfer in the series could be traced to the defendant, the creation of the fictitious services was designed to conceal his ownership of the funds from the time they were received by companies covertly under his control and to provide a false "legitimate" cover for his illegal activities.

Similarly, in a case recently indicted in a midwestern district, the concealment charged relates to the creation of false "legitimate" business transactions to mask an illegal drug operation. In that case, the defendant had been enjoined from selling certain chemicals because the volume and manner in which he sold them indicated that they were being used for illicit purposes. He evaded the injunction and continued to sell the chemicals by fraudulently representing that his company had been sold to a family member. The fictitious "sale" of the business, and monthly payments made pursuant to the sham sale agreement, were designed to give an aura of legitimacy to payments of profit for illegally distributed precursor chemicals. The transactions were designed to conceal the defendant's ownership of the funds from the time they were received by the company covertly under his control.

In both cases, the defendants argue that there was no money laundering because the funds involved in the transactions in which the defendants engaged could be traced to their possession. This argument overlooks the case law which holds that concealment is not limited to the use of fictitious names and nominee

accounts. See, e.g., United States v. Lovett, 964 F.2d 1029 (10th Cir. 1992) (defendant's purchase of an automobile for the purpose of inducing his brother's silence was sufficient to establish concealment); United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991), cert. denied, 1992 U.S. LEXIS 4643 (1992) (son passes proceeds to father, who uses the funds to purchase land in his own name, then borrows against the property and passes loan proceeds back to son).

Thus, transferring money in the defendant's own name is not necessarily benign nor non-concealing, and the use of his own name should not open the door to an unlimited number of transfers. The exception we propose only extends to fact patterns where the first transfer after receipt (i.e., deposit) converts the funds to a more liquid form, completely available for use. The exception should only be available to defendants who: (1) deposit checks into the account of the person who committed the underlying offense, and (2) engage in no further transactions which constitute money laundering offenses.

4) Non-currency: We expect that some will take issue with our limitation of the exception to non-currency. It will be argued that the "mere deposit" of currency is the same as "mere deposit" of a check. Currency cases are different for the following reasons:

a) currency is the genesis of all money laundering enforcement, equivalent to the paramount concern with narcotics-related cases;

b) the problems relating to currency have induced the development of an entire body of statutes and regulations

which address the problem, prosecuted and administered with great vigor by the Departments of Justice and Treasury;

c) numerous studies on the public record (most notably the FinCEN Report, referenced above) discuss the critical nature of the "placement stage" of currency. The goal of laundering currency is to get it into the banking stream and financial community, both to make it appear legitimate and because once it is placed in the financial system, it is normally "gone" -- wire transferred to places unknown and untraceable as proceeds;

d) although the Department of Justice does not encourage charging concealment based solely on the use of currency, we do acknowledge the "self-concealing" nature of currency and the problems attendant thereto. Although bank records might otherwise permit tracing of the defendant's ownership of the funds (the Staff's purported concern), there is no ability to trace currency back to the specified unlawful activity; and

e) there can be no question of merger where currency has been received. Unlike checks, which must ultimately be negotiated at a financial institution before the underlying funds can be accessed, currency is already in a useable form, and any subsequent use of the currency is a completely separate transaction after it is received.

5) The use of a domestic financial institution: We believe, consistent with the Staff reports, that the use of foreign banks and foreign bank accounts is an offense characteristic undeserving of lenient treatment.

6) First-party money launderer: The exception is limited to offenders who deposit their own proceeds; it is not intended to extend to the "professional money launderer" (a third party).[11] Again, this is to ensure that the exception only

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[11]The Commentary to our proposed alternative discusses the third-party depositor, such as a spouse, who, knowing that the funds were derived from unlawful activity, willfully deposits the funds into the banking stream, but does so using an account identifiable as belonging to the person(s) who committed the specified unlawful activity. If the individual engages in no further money laundering conduct (i.e., all subsequent transactions

applies to the small-time offender who commits a crime (which, if all other elements of the exception are established, will likely be the gravamen of the offense) and puts the money in the bank. If the defendant induces a third party to deposit the money into an account not belonging to the defendant, a layer of concealment (a nominee account) has been added and the defendant should not be entitled to the exception. Moreover, the defendant has involved another individual in his scheme. However innocent the third party might be, this does not entitle the original offender to more lenient treatment. Similarly, the third party with knowledge sufficient to establish money laundering is not entitled to lenient treatment if that person knowingly agreed to lend his or her identity to unlawfully derived funds.

Put in terms of the Staff's expressed concerns, the exception is only available to those who deposit the funds "incidental to" the underlying offense. This, by definition, does not include the third party who, with knowledge sufficient to establish money laundering, joins in after the underlying offense is complete, for the purpose of giving his or her name to the proceeds.

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do not indicate an intent which would violate § 1956; are "for legitimate purposes" in amounts under $10,000, and therefore do not violate § 1957; and do not violate Title 31 currency reporting requirement) and all the other elements of the exception are present, such an individual is eligible for the lower offense level.

Similarly, in the corporate setting, an employee who, for the benefit of a corporate defendant, causes the corporation to deposit ill-gotten gains into an account clearly identifiable as belonging to the corporation, will be eligible for the exception.

In conclusion, therefore, if the Commission believes that there has been a sufficient showing to warrant a change in the guidelines to address the small category of cases identified as problematic, we believe that the Department's proposed amendment is far preferable to the pending proposal. Rather than a wholesale restructuring of the guidelines to address a limited number of cases, the Department's proposal addresses the problem directly by adding a special instruction to be followed in these cases. Further, our proposal retains the present guideline levels which properly reflect the serious nature of money laundering offenses, while allowing for a lower guideline level in the limited category of less egregious cases.

The Proposed Amendments to §§2S1.3, 2S1.4

Finally, we wish to address the proposed amendments to §2S1.3 and §2S1.4, relating to currency reporting requirements. Published along with the Commission's proposal is an alternative amendment previously submitted by the Department of Justice. The structures of the two proposals are similar with respect to harmonizing the guidelines treatment of violations involving various currency transaction reports required by law (i.e., the Currency Transaction Report (CTR), the Currency and Monetary Instrument Report (CMIR), and IRS Form 8300), because the three types of reports are similar in purpose, and comparable violations involving currency reporting should be treated similarly. The proposals disagree, however, on the issue of appropriate base offense levels.

Under the current guidelines, the base offense level is 13 for CTR (reports by financial institutions of currency transactions in excess of $10,000) and Form 8300 (reports filed by trades and businesses) violations, when either is coupled with structuring and/or misrepresentation (5 where there is no such additional act). The base offense level is 9 for CMIR offenses (reports of transportation of currency in excess of $10,000 in or out of the United States).[12] Section 2S1.4 was created in 1991 in order to treat CMIR offenses differently:

> [T]his amendment creates an additional offense guideline (§2S1.4) for offenses involving Currency and Monetary Instrument Reports (CMIR). Currently, such offenses are covered by §2S1.3, which deals with all currency transaction reporting requirements. CMIR violations are committed by individuals who, when entering or leaving the country, knowingly conceal $10,000 or more in cash or bearer instruments on their persons or in their personal effects and knowingly fail to file the report required by the U.S. Customs Service. Such criminal conduct is sufficiently different from the other offenses covered by §2S1.3 to merit treatment in a separate guideline.

However, the separate treatment was aimed at the following circumstance, which was deemed to be peculiar to border crossing offenses. At the time of the 1991 amendment, there was a split in the Circuits over how to apply §2S1.3 in the CMIR context, because the usual fact pattern involved a failure to file a CMIR and a negative response to the routine inquiry of the Customs official as to whether there was something to declare. Some of the Circuits held that the negative response was part and parcel

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[12]Both sections call for an enhancement of 4 levels where the defendant "knew or believed the funds were criminally derived."

of the non-filing (therefore, a base offense level of 5); other Circuits held that the negative response was a misrepresentation (therefore, a base offense level of 13). The amendment was intended to resolve the dispute by creating a separate guideline (§2S1.4) setting the base level at 9.

We have proposed that the CTR, Form 8300, and CMIR offenses be brought back under one heading in the Sentencing Guidelines (a proposed new guideline is attached hereto), setting the base offense level at 9 for willful failure to file, and preserving the base offense level of 13 for structuring or filing a form containing a material misrepresentation or false statement. An application note is proposed to resolve the CMIR issue, which sets the base level at 9 for the mere denial of reportable assets, in response to routine questioning at a border crossing. The level 5 would remain to cover all other willful violations of regulations (no change).

We believe that the Staff's proposal to lower the penalties overall signals a serious retreat in the area of currency enforcement -- an area too closely linked with narcotics trafficking to merit more lenient treatment at this time. Currency has traditionally been, and continues to be, the medium of narcotics profit. For all the reasons set forth above with respect to currency enforcement, we find the arguments put forth

by the Staff to be unpersuasive. Therefore, we respectfully oppose the Commission's proposed amendments.

Attachments

DEPARTMENT OF JUSTICE PROPOSAL

Section 2S1.1 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money Laundering

(1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if—

(A) the defendant was convicted under 18 U.S.C. §1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A);

(B) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive; and

(C) the money laundering conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

The Commentary to §2S1.1 is amended by inserting the following at the end thereof:

"The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the count of conviction for money laundering must have been for a violation of 18 U.S.C. §1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A), relating to an intent to promote specified unlawful activity. If the defendant was also convicted under one of the other provisions of section 1956 for the same conduct, the reduced offense level provided by subsection (c) does not apply. Next, the underlying unlawful activity must not have involved a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, firearm, or an explosive. Finally, the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account, and the account must be clearly identifiable as belonging to the person(s) who committed the specified unlawful activity. For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in subsection (c)(1)(C) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of the same course of conduct or common scheme or plan as the ffense of conviction and which themselves independently

establish any money laundering offense. The withdrawal of proceeds does not constitute money laundering conduct unless carried out in a manner that would violate a money laundering statute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and other transactions in an amount over $10,000). Therefore, the withdrawal of the proceeds for legitimate purposes, such as the payment of living expenses, in a manner that does not constitute money laundering conduct is consistent with application of the reduced offense level of subsection (c). However, if there are indicia of further money laundering activity by the defendant involving the proceeds deposited into the account, the higher offense levels provided in subsections (a) and (b) apply."

Section 2S1.2 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money Laundering

(1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if--

(A) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a

controlled substance or precursor chemical, a firearm, or an explosive; and

(B) the money laundering conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

The Commentary to §2S1.2 is amended by inserting the following at the end thereof:

"The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the underlying unlawful activity must not have involved a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive. Next, the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account, and the account must be clearly identifiable as belonging to the person(s) who committed the specified unlawful activity. For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's

account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in subsection (c)(1)(B) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of the same course of conduct or common scheme or plan as the offense of conviction and which themselves independently establish any money laundering offense. The withdrawal of proceeds does not constitute money laundering conduct unless carried out in a manner that would violate a money laundering statute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and other transactions in an amount over $10,000). Therefore, the withdrawal of the proceeds for legitimate purposes, such as the payment of living expenses, in a manner that does not constitute money laundering conduct is consistent with application of the reduced offense level of subsection (c). However, if there are indicia of further money laundering activity by the defendant involving the proceeds deposited into the account, the higher offense levels provided in subsections (a) and (b) apply."

Proposed Guideline (Changes appear in bold.):

§2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) knowingly filed, or caused another to file, a report containing materially false statements; or

(2) **9, for a willful failure to file; or**

(3) 5, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.

(2) **If the defendant knew or believed that the funds were intended to be used to promote criminal activity, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.**

(3) If the base offense level is from (a)(1) or **(a)(2)** above and the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

(c) Special Instruction for Fines -- Organizations

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*Commentary*

*Statutory Provisions: 26 U.S.C. §§ 7203 and 7206 (if a willful violation of 26 U.S.C. § 6050I or in connection with a return required under 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316,*

*5322, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).*

* * * * *

*Background:*

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*A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. A base offense level of 9 is provided for willful failure to file the required reports, and for the mere denial of reportable assets in response to routine questioning at a border crossing. A lower alternative of 5 is provided in all other cases.*

§2S1.4 IS DELETED

§2T1.3. Fraud and False Statements Under Penalty of Perjury

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*Statutory Provision: 26 U.S.C. § 7206(1), (3), (4), and (5) (except in connection with a return required under 26 U.S.C. § 6050I). For additional statutory provision(s), see Appendix A (Statutory Index).*

§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

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*Statutory Provision: 26 U.S.C. §7206(2) (except in connection with a return required under 26 U.S.C. § 6050I).*

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U. S. Department of Justice

*Criminal Division*

*Washington, D.C. 20530*

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
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MAR 15 1993

Dear Judge Wilkins:

The following sets forth additional comments of the Department of Justice, beyond those included in our written testimony for presentation before the Sentencing Commission at the hearing on March 22, regarding published proposed amendments to the sentencing guidelines.

TAX OFFENSES (Amendments 5, 21, 41, 42 and 43)

The Department has two main objectives with regard to the tax guidelines during the 1993 guideline amendment cycle: (1) an increase in the offense levels for tax offenses to alleviate the detrimental impact on criminal tax cases of the 1992 amendments to the Sentencing Table (Chapter 5, Part A); and (2) simplification of the Chapter 2, Part T guidelines, including a single definition of "tax loss". The 1993 amendment package contains three proposals which impact on these objectives -- proposed Amendments 5 and 21 (Commission proposals) and proposed Amendment 41 (developed by the Internal Revenue Service (IRS)). We favor the proposal of the IRS. However, with some modifications, our objectives could be met by the Commission's proposals.

The recent changes in the Sentencing Table drastically affect the Federal Tax Enforcement Program. Unlike other statutory requirements, the provisions of the Internal Revenue Code touch virtually every individual and business in the country. In order to encourage compliance with the internal revenue laws by all taxpayers, criminal tax prosecutions must be directed at all income, occupations, businesses, and geographic locations. However, because of limited resources, only a small number of tax violations can be prosecuted. The great majority of these prosecutions must result in sentences of some form of incarceration, even if only for short periods of time, in order to deter those in all categories of tax offenders from violating the internal revenue laws. The recent changes to the Sentencing

Table could result in a significant number of tax violators not being sentenced to terms of imprisonment and, thus, greatly reduce or entirely eliminate the deterrent value of tax prosecutions.

In addition to problems posed by the changes to the Sentencing Table, we continue to experience problems in the courts in determining the "tax loss" for sentencing purposes. Since the advent of the guidelines, the core of sentencing in criminal tax cases has been the concept of "tax loss." However, rather than a single definition, "tax loss" is defined differently in various provisions of Chapter 2, Part T of the guidelines. These variations in the definition of "tax loss", as well as cross-references between the definitions within the guidelines, have caused confusion and difficulties in application of the tax guidelines. [1]

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[1] Difficulty in applying the concept of "tax loss" has arisen in a number of different contexts. Areas of confusion involving "tax loss" include: (1) whether the determination of base offense level under §2T1.3 requires proof of an "actual tax loss" (compare United States v. Schmidt, 935 F.2d 1440, 1450-1451 (4th Cir. 1991) with United States v. Hirschfeld, 964 F.2d 318, 324-325 (4th Cir. 1992); see also, United States v. Telemaque, 934 F.2d 169 (8th Cir. 1991); United States v. Krause, 786 F.Supp. 1151, 1152-1158 (E.D.N.Y. 1992)); (2) language in §2T1.3, which, on its face, requires that "the offense was committed in order to facilitate evasion of a tax" in order to use the tax loss table (see United States v. Krause, 786 F.Supp. at 1156-1157); (3) in Spies-evasion prosecutions under 26 U.S.C. §7201, refusing to use the tax loss as defined in §2T1.3 (i.e., 28% of greater of understatement of gross income and taxable income) on the ground that there is no "understatement" where no return is filed (United States v. Warren L. Pickett, (W.D. Pa. 1991) (unreported district court decision)); (4) in Klein-conspiracy prosecutions, construing the "as applicable" language contained in §2T1.9(a)(1) to mean that the Government must show that either §2T1.1 or §2T1.3 is applicable to the offense in order to use "tax loss" in calculating base offense level, rather than utilizing the alternative base offense level of 10 pursuant to §2T1.9(a)(2) (United States v. Schmidt, 935 F.2d at 1450-1451); and, (5) in cases involving previously assessed, but unpaid, taxes, whether "tax loss" means the assessed tax or only the "hidden assets" which form the basis for the false statement involved (compare United States v. Brimberry, 961 F.2d 1286, 1292 (7th Cir. 1992) (unambiguous, explicit definition of "tax loss" under §2T1.3 and §2T1.1 as the amount of tax owed to the Government) with United States v. David W. Maestas, (D. N.M. 1991) (unreported district court determination finding tax loss to be only what Government could not execute against because of defendant's concealment rather than greater amount defendant either evaded or attempted to evade).

We endorse the IRS proposal as the best available option to obtain our objectives. The IRS-proposed amendments to the tax offense guidelines comprehensively address both of these problems. [2]

The IRS proposal shifts the focus of the sentencing scheme from one primarily designed to punish according to the magnitude of the loss caused by the violator to one designed both to punish and to draw tax violators back into the system. The proposal attempts to accomplish this by setting minimum offense levels for virtually all significant criminal tax offenses. The offense level is then increased by specific amounts for tax losses over $10,000. The minimum offense levels are not arbitrary, but were selected because they would insure some form of incarceration under the current Sentencing Table for the great majority of tax violators and, at the same time, make it possible for most violators to qualify for a probationary sentence by accepting responsibility. The intent is to use the guidelines to encourage convicted tax violators to accept responsibility for their violations and to do so by filing required tax returns and paying all due taxes and penalties. In this way, the guidelines will not only punish those who violate the internal revenue laws but will also encourage their return to the self-reporting tax system. At the same time, the guidelines should go far toward eliminating any possibility that an unrepentant taxpayer will be able to make a mockery of the system by receiving a sentence of probation without being required to file tax returns and pay all taxes due.

Concededly, this is a novel approach and one which differs from the approach used in sentencing under the Fraud and Theft Tables, as well as from the approach currently used in sentencing tax offenses. Tax fraud, however, is different from other forms of fraud and theft directed against the government. Virtually everyone in the country comes in contact with the internal revenue laws in one form or another. Consequently, almost anyone has the opportunity to cheat the government out of tax revenue. Deterrence, therefore, takes on added importance in the tax area. Moreover, a defendant who has engaged in some form of fraud against or theft from the government generally does not owe any continuing duty to the government. A tax violator, on the other hand, will normally owe a continuing duty of filing returns and paying taxes. Getting that violator back into the system by encouraging the filing of returns and the payment of taxes significantly increases the chances that the defendant will comply with those duties in the future. To the extent the tax

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[2] The proposal also provides a new guideline to cover violations of the omnibus clause of 26 U.S.C. §7212(a).

sentencing scheme can be utilized to achieve that objective, differences in the sentencing schemes are clearly justified.

The IRS proposal also provides for both a comprehensive definition of tax loss and a significant consolidation of the tax guidelines. This aspect of the proposal should not only reduce definitional confusion, but also facilitate practical use of the tax guidelines by consolidating redundant language and reducing the requisite "flipping around" within the tax guidelines depending on the statute involved.

Tax loss computations should be simpler and more uniform under this approach. Defining "tax loss" to be the loss that was the object of the evasion or fraud, and explaining that the amount of loss that would have resulted had the scheme or fraud succeeded is properly considered the amount of loss that was the object of the scheme or fraud, should eliminate those cases where defendants attempt to downplay the seriousness of their violations by arguing that they did not really intend to cause a tax loss or a tax loss of the magnitude that could have resulted from the successful completion of the scheme. In addition, explicitly stating, as does the IRS proposal, that the success or failure of a tax evasion or fraud scheme is irrelevant to the calculation of "tax loss" will eliminate windfalls to those defendants whose schemes are discovered prior to the time the government has suffered any actual loss. Moreover, the proposal anticipates and eliminates the need for future amendment of the definition by providing in its examples for use of the "applicable tax rate," rather a specified rate (i.e., 28% (or 34% for corporations) as is now the case, in calculating the "tax loss".

We do believe, however, that two changes in the IRS proposal are advisable. First, we recommend that the tax loss definition contained in the first three sentences of Application Note 1 be moved to guideline language. This should insure that there are no questions as to the meaning of the "tax loss" term used in the guidelines. Second, we recommend that the top range of the "tax loss" specific offense characteristic increase in the IRS proposed §2T1.1(b)(1) be enlarged to include several additional specific ranges of tax loss beyond $800,000. The inclusion of additional ranges at the upper end of the "tax loss" scale is consistent not only with the existing guideline framework, which includes, at §2T4.1, seven additional specific tax loss ranges beyond $800,000 but also with proposals to enhance the top-level ranges in other loss-based areas of the guidelines as well. We are increasingly seeing massive tax fraud schemes, particularly in the motor fuel excise tax priority enforcement area, involving multi-million dollar tax losses. We believe that the IRS's top range of $800,000 does not extend far enough.

The Commission's proposed Amendments 5 and 21 are not acceptable in their present form. However, with appropriate modification, they could provide the basis for an acceptable solution. For example, the Commission's proposed Amendment 5 provides loss table modifications and elimination of the "more than minimal planning" specific offense characteristic for the robbery and fraud guidelines. Correspondingly, the Commission proposes a conforming modification to the tax loss table in §2T4.1 which produces higher offense levels for lower tax losses. Standing alone, the conforming modification of the tax loss table is acceptable to the Department. The change serves to alleviate the detrimental impact of the 1992 amendments on criminal tax cases.

The unacceptable aspect of the Commission's proposal is the elimination of the "sophisticated means" specific offense adjustment in the tax guidelines. The proposal states that the elimination of this specific offense characteristic is consistent with the proposed elimination of "more than minimal planning" in the robbery and theft guidelines. Quite simply, we believe that "sophisticated means" is something more than "more than minimal planning" and is an appropriate specific offense characteristic to differentiate more sophisticated schemes from garden-variety tax cases. By eliminating it, we lose some ability to distinguish between less serious and more serious offenses in a manner inconsistent with other existing and proposed guidelines. For example, the proposed elimination, for consistency sake, of the "sophisticated means" adjustment in tax cases is utterly inconsistent with the Commission's proposal for a "sophisticated efforts" adjustment in its proposed money laundering changes. Moreover, the elimination of the "sophisticated means" enhancement in tax cases will mean that the use of foreign bank accounts will no longer enhance sentences in tax cases, although it may well enhance sentences in fraud cases pursuant to §2F1.1(b)(5) (minimum offense level of 12 if fraud "offense involved use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct"). The impact of this proposal will be felt especially in our non-tax loss driven cases, which often are quite sophisticated and difficult to unravel. These cases will be sentenced at the alternative offense level (currently ranging between level 5 and level 10 for the most frequently prosecuted tax violations), rather than the level determined by the amount of the "tax loss", without the possibility of an enhancement for sophisticated means or something similar.

The Commission's proposed Amendment 21 is its attempt to address the issues of simplification and consolidation within the tax guidelines, including a unified tax loss definition. However, the proposal is a diluted version of a proposal it made last year, which the Department supported with suggested modifications. Not only is this year's proposal substantially

weaker than last year's effort, but it also reflects few of the suggestions which the Department made during the last amendment cycle. The Commission's consolidated "tax loss" definition does contain the welcome change (also found in the IRS's proposal) that tax loss is the amount that would have resulted had the offense been successfully completed. However, we prefer that the formulation contain, as does the IRS's proposal, a further statement that success or failure of a scheme is irrelevant to tax loss determinations. We also do not understand why the Commission, in that part of its amendment directed to calculation of the tax loss, changed from the "applicable tax rate" language of last year's proposal to the specific percentage amounts (i.e., 28% and 34%) in this year's proposal. As we have earlier noted, use of "applicable tax rate" should give a closer approximation of "tax loss" if tax rates change and should be less difficult to administer.

With respect to the determination of tax loss, we are concerned that the rebuttable presumptions set forth in the Commission's proposal are not sufficient to cover the range of tax cases (e.g., improper refund claim where income is over-reported) and would suggest, in lieu thereof, that the six examples contained in the IRS's proposed Amendment 41 for loss calculations be substituted. These six examples better cover the universe of criminal tax situations than does the Commission's proposal. Substitution of the examples from the IRS proposal also alleviates the problem in the Commission's proposal whereby a defendant, in a failure-to-file return situation, can control the amount of loss through the payment of the taxes prior to sentencing. This blatantly favors more well-off taxpayers and undermines the guidelines' purpose of sentencing uniformity.

As a related change, we would suggest that the Commission consider renumbering the tax guidelines to eliminate the gaps that will ensue from the deletion of §2T1.2, §2T1.3, and §2T1.5.

The proposed change to §2T1.4, involving the creation of one two-level specific offense characteristic by combining the specific offense characteristics now found at §2T1.4(b)(1) and §2T1.4(b)(2) will adversely affect some of our cases, but the number of cases affected will be small and we can accept the proposed amendment. While combining two of the current specific offense characteristics, the Commission's proposal is careful to continue to limit the inapplicability of the §3B1.3 (Abuse of Position of Trust or Use of Special Skill) adjustment to only the second prong of the proposed specific offense characteristic (two-level adjustment if the defendant was in the business of preparing or assisting in the preparation of tax returns). In this way, the §3B1.3 adjustment will continue to be available when the defendant committed the offense as part of a pattern or scheme from which the defendant derived a substantial portion of his income.

The Commission's proposal also seeks to clarify the circumstances under which the specific offense characteristics of §2T1.9 apply and the relationship between the loss calculation under §2T1.4 and §2T1.9. We have no objections to these proposals, but believe that some other changes are necessary.

First, we would recommend that the Commission delete the phrase "as applicable" from §2T1.9(a)(1). That phrase has caused confusion as sentencing courts have struggled to determine whether §2T1.1 (Tax Evasion) or §2T1.3 (Fraud and False Statements Under Penalty of Perjury) applies. In some situations, the view has been expressed that neither guideline applies and use of a base offense level of 10 is appropriate.

In fact, use of the phrase "as applicable" is inappropriate as neither of the offenses covered by §2T1.1 (26 U.S.C. §7201) and §2T1.3 (26 U.S.C. §7203) (or §2T1.4 (26 U.S.C. §7206(2)) as proposed in the Commission's proposed amendment) is applicable to the type of conspiracy covered by §2T1.9. That guideline covers conspiracies to defraud the United States by impeding and impairing the Internal Revenue Service. The object of such a conspiracy is not the violation of a particular statutory provision, such as 26 U.S.C. §7201, 26 U.S.C. §7203, or 26 U.S.C. §7206(2). (Indeed, if the object of a conspiracy is to violate a particular provision of the Internal Revenue Code, sentence is properly imposed under §2X1.1.) Consequently, to direct a court to determine whether §2T1.1, §2T1.3, or §2T1.4 applies is to require it to engage in a hopeless exercise. The most a sentencing court should be directed to do is to select a guideline which covers conduct most nearly approximating the harm which would have resulted had the conspirators succeeded in impeding and impairing the Internal Revenue Service. Language should be added to the commentary to §2T1.9 to guide the sentencing court in this regard. The deletion of the "as applicable" language and the insertion of additional commentary language will make clear that a court is not required to find that any particular guideline applies in order to refer to a guideline for calculation of the base offense level under §2T1.9.

We also suggest that the phrase "fraudulent tax <u>schemes</u>" be added to proposed Commentary Application Note 4 after "the marketing of fraudulent tax shelters." Not all fraudulent tax schemes <u>are</u> tax shelters and "schemes", in our view, is a broader and more appropriate term.

<u>NEGOTIATED AMOUNTS OF CONTROLLED SUBSTANCES</u> (Amendment 12)

We oppose Amendment 12, which would amend the commentary to guideline §2D1.1 to provide that where the defendant "was not reasonably capable of producing, <u>or</u> otherwise did not intend to produce" (emphasis added) the negotiated amount, the court should exclude the amount that falls within this description from the

guideline calculation. The current language excludes amounts the defendant "did not intent to produce and was not reasonable capable of producing." (Emphasis added.) If a defendant was reasonably capable of producing a quantity under negotiation, this quantity should be included. His claim of lack of intent should not prevail over evidence of the amount negotiated and the defendant's capability of producing that amount. Likewise, a defendant's lack of ability to produce an amount at the moment of negotiation should not block inclusion of that negotiated amount if there is sufficient evidence of intent to produce it.

POSSESSION OF FIREARMS IN A SCHOOL ZONE OR FEDERAL FACILITY (Amendment 19)

The Commission has requested comment on the adequacy of the offense levels under guideline §2K2.5 for the possession or discharge of firearms in a school zone or a federal facility. By letter of November 30, 1992, the Department specifically sought increases in this guideline.

Under guideline §2K2.5 the base offense level is 6, with a 2-level enhancement for the unlawful possession of a firearm in a school zone or a federal court facility. This offense level may result in a sentence that is not commensurate with the offender's activities since offense level 8 allows for a sentence of "straight" probation. There simply is no legitimate reason for a person convicted under the school zone statute, 18 U.S.C. §922(q), to have a firearm on school property since the statute provides numerous exceptions from application of the prohibition. Moreover, possession of a firearm in a federal facility, particularly a court facility, is a dangerous offense, given the threat to our system of justice such possession poses.

We recommend that the Commission include additional specific offense characteristics, such as an increase if the firearm (or other weapon in the case of possession in a federal facility) is brandished, discharged, or otherwise used. An enhancement should be included if the firearm is loaded or the offender is also in possession of ammunition in a school zone or federal facility. Under these circumstances the unlawful weapon possession presents increased danger. These enhancements are more effective than grounds for departure (as recognized in Application Note 4) and would assure stiffer sentences for offenders who present an increased danger to children and government personnel.

The Commission has also requested comment on the manner in which guideline §2K2.5 addresses the statutory requirement that the violation of the school-zone statute result in a consecutive sentence. We believe that Application Note 3 does not reflect the statutory mandate of consecutive sentencing. See 18 U.S.C. §924(a)(4). A defendant convicted of both the school-zone provision and the offense of being a felon in possession of a

firearm would face the same sentencing guideline range as a defendant convicted only of the second offense. Under the application note the judge would simply determine which portion of the sentence to allocate to the school-zone provision as a "consecutive sentence." This approach is a contrived one that meets neither the letter nor spirit of the statutory mandate.

STANDARDS FOR ACCEPTANCE OF PLEA AGREEMENTS (Amendments 25 and 36)

The Department strongly opposes these amendments which would add commentary to guideline §6B1.2 recommending that the government disclose to the defendant during plea discussions (option 1) or prior to a rule 11 colloquy (option 2) information known to the government that is relevant to the application of the guidelines. This proposal seems to be little more than a poorly disguised attempt to use plea negotiations to discover the details of the government's case.

This proposal would place a great burden on the system to make sure the defendant can correctly determine what his sentence will be. It would likely engender a plethora of litigation of claims by defendants that the government did not "fully" disclose relevant information in its possession. The amendments also raise the additional issue of the nature and scope of information the government should disclose; for example, whether information pertaining to an ongoing investigation would need to be disclosed that might subsequently result in the defendant's loss calculation being increased. Moreover, the defendant will already have access to the pertinent information through normal discovery.

Requiring that defendants be able to calculate a probable sentence invites additional litigation as to whether the sentence was correctly predicted and additional collateral attacks on plea voluntariness.

CARJACKING (Amendment 26)

Amendment 26 invites comments on the appropriate guideline for the recently enacted federal carjacking statute. We believe that guideline §2B3.1 should be made applicable to carjacking. This guideline, aimed at robbery in general, incorporates factors relevant to carjacking, such as bodily injury, abduction, and the nature of the use of a firearm. (The defendant must possess a firearm for the statute to apply). In addition, a cross-reference to the murder guideline, §2A1.1, should be added for cases in which death results. We also support increases in the theft guidelines for offenses involving stolen vehicles to reflect the increase in the maximum imposable sentence from five to ten years' imprisonment.

CRIMINAL ENTERPRISE AND RACKETEERING

BRIBERY AND GRATUITIES (Amendment 27(G))

We recommend against this proposal to merge the two guidelines for bribery and gratuities affecting employee benefit plans and labor unions, respectively. The proposal carries the risk that persons applying the merged guideline will confuse the different specific offense characteristics for the two existing guidelines (§§ 2E5.1 and 2E5.6). The gratuity offenses for the two predicate crimes in the merged guideline section also differ substantially as to the elements of proof.

Section 2E5.1 increases the base offense level by two levels with respect to defendants who are fiduciaries of benefit plans. Section 2E5.6 has no similar increase for fiduciaries of labor organizations. The two types of organizations are frequently confused when the benefit plan is sponsored by a labor organization. The confusion would be compounded by the cross-application of the proposed guideline to reporting crimes which facilitate or conceal a bribe or gratuity involving a benefit plan (§2E5.3(a)(2)) or a labor organization (§2E5.5(a)(2)).

The gratuity portions of the union-related crime at §2E5.6 are offenses which proscribe the payment and receipt of things of value by persons holding particular positions described in the statute and do not require that the payment or receipt be tied to the recipient's actions, duties or decisions as an officer or employee of a labor organization or as a labor representative of employees. 29 U.S.C. §186(a)(1), (a)(2) and (b)(1). On the other hand, the benefit plan-related gratuity requires that the thing of value be received "because of" the recipient's actions, decisions or duties in relation to a benefit plan matter. 18 U.S.C. §1954.

In the event that the proposal is adopted over our objection, the discussion of "graft," which applies only to the section 1954 gratuities, should be omitted from the Commentary. That is, the paragraph in §2E5.1 captioned "Background" would be further amended by deleting the following clause:

> . . . as opposed to graft, where the prohibited payment is given because of a person's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift.

THEFT (Amendment 27(H))

This amendment consolidates guideline §§2E5.2 and 2E5.4 for theft from benefit plans and labor unions, respectively, into the larceny guideline at §2B1.1. However, it fails to carry the "Application Note" in the consolidated sections to the larceny

guideline's Commentary. Instead, the proposed amendment transfers the Application Note's instruction to apply the adjustment for abuse of position of trust (§3B1.3) in the case of benefit plan fiduciaries and union officials to the Commentary in §3B1.3 as an "illustration." No other crimes are "illustrated" in such manner in §3B1.3. However, §2B1.1 already includes an enhancement based on harm to a "financial institution" which is defined in Application Note 9 as including unions and organizations providing "pension, disability, or other benefits . . . to large numbers of persons." The application notes for abuse of benefit plan and labor union positions of trust are more likely to be found and heeded in §2B1.1.

Therefore, we recommend that each "Application Note" in the Commentary to §§2E5.2 and 2E5.4 be transferred to the Commentary of §2B1.1 as new "Application Note 14."

We further recommend that the statutory citation for these frequently used statutes, whose guidelines are being deleted from Part 2E, be listed in the Commentary to §2B1.1 following the term "Statutory Provisions:" by inserting "664," after the term "659," and by inserting "29 U.S.C. §501(c)" after the term "2317."

REPORTING CRIMES (Amendment 27(I))

This proposed amendment consolidates the two guidelines for reporting crimes involving employee benefit plans and labor organizations into a single guideline. However, the proposals fail to amend the cross-references in §2E5.3(a)(2) and to preserve the cross-reference in §2E5.5(a)(2) for reporting crimes which facilitate or conceal a theft or embezzlement or an offense involving a bribe or gratuity. The proposals also fail to amend Appendix A (Statutory Index).

Therefore, we recommend that §2E5.3(a)(2) be amended to read as follows:

> If the offense was committed to facilitate or conceal a theft or embezzlement, apply §2B1.1. If the offense was committed to facilitate or conceal an offense involving a bribe or gratuity pertaining to an employee benefit plan or labor organization, apply §2E5.1 and §2E5.6 as applicable.

The Commentary to §2E5.3 captioned "Statutory Provision: 18 U.S.C. § 1027" should be deleted and the following Commentary inserted: "Statutory Provisions: 18 U.S.C. § 1027, 29 U.S.C. §§ 439, 461, 1131."

Appendix A (Statutory Index) should be amended at the line beginning "18 U.S.C. § 1027," "29 U.S.C. § 439," and "29 U.S.C. § 461" by deleting "2E5.5" and inserting "2E5.3" at the end of each line.

Appendix A (Statutory Index) should be amended by deleting the lines beginning "29 U.S.C. § 431," "29 U.S.C. § 432," and "29 U.S.C. § 433" in their entirety. The penalty for these statutes is 29 U.S.C. § 439.

ADDITIONAL PROPOSALS (Amendments 27(I))

Appendix A (Statutory Index) does not currently list crimes which are analogous to the labor racketeering offenses described above.

The misdemeanor for the willful failure to maintain records and file reports required by the Employee Retirement Income Security Act (ERISA) which is codified at 29 U.S.C. §1131 is not listed in Appendix A. We believe that the offense should be consolidated within the proposed record keeping and reporting guideline at §2E5.3, as amended.

Moreover, the misdemeanor for the willful deprivation of a union member's right to democratic participation in the affairs of a labor organization by means of actual or threatened violence (29 U.S.C. §530) is not included in Appendix A. However, the analogous misdemeanor for the willful deprivation of employee benefit plan participants' rights by means of actual or threatened violence (29 U.S.C. §1141) is assigned by Appendix A to guideline §2B3.2 (extortion by force or threat of injury).

Therefore, we recommend that Appendix A (Statutory Index) be amended before the line beginning "29 U.S.C. § 1141" by inserting the following two new lines: "29 U.S.C. § 530" followed by "2B3.2" and "29 U.S.C. § 1131" followed by "2E5.3."

CONFORMING AMENDMENTS - FRAUD AND THEFT (Amendment 28(G))

This amendment attempts to make the definition of loss in the theft guideline consistent with the language currently in the fraud guidelines. The Department has found that issues related to recovery under §2F1.1, particularly in the area of consumer fraud, which were made relevant by the 1991 changes to the commentary, are more difficult to resolve than the basic question of how much was spent for the fraudulent item. That is, when consumers purchase fraudulent products (juice with sugar and undeclared chemicals in it, cars with turned-back odometers, drugs not made in conformity with regulatory requirements), it is easy to determine what the cost of the item was. However, determining the "loss" now that credit for value received is granted raises difficult issues regarding the value of something that is not what it is supposed to be, and is generally something for which there is no market (these products exist only due to fraud). Thus, in deciding whether to conform guideline 2B to 2F, the Commission should not assume that 2F is easy to apply in its current form. It is not. Therefore, we do not support the

proposed consolidation and urge the Commission to further evaluate the appropriateness of the current approach for determining loss.

ANTITRUST OFFENSES (Amendment 28(I))

The Commission has requested comments on several conforming changes pertaining to the interaction of Chapter Two (offense conduct) and Chapter Eight (organizations). It proposes to amend guideline §2R1.1 so that both individual and organizational complementary bidders would be assigned a volume of commerce equal to the greater of the affected volume of commerce done by the individual or organization or the largest contract on which a complementary bid was submitted. While the Department has no objection to the general thrust of this amendment -- imputing a volume of commerce to individual complementary bidders in the same manner that a volume of commerce is assigned to organizational complementary bidders -- we do believe that the proposal can and should be improved.

The language adopted by the Commission in 1991 to impute a volume of commerce to complementary organizational bidders has a possible hole in its coverage. While the usual form of a bid-rigging conspiracy is for one company to submit a winning bid while others submit complementary bids, there are also conspiracies in which one or more companies agree with the selected winning bidder not to submit bids at all. An agreement not to submit a bid has the same anti-competitive effect and is every bit as unlawful as an agreement to submit an artificially high or low bid. The Commission discusses both types of bid-rigging agreements in identical terms in Application Note 6 to §2R1.1. The language in the guideline, however, only explicitly addresses cases in which an organization "submitted" one or more complementary bids. While there is every reason to apply the same rule concerning imputed volumes of commerce to agreements not to submit bids -- and while the Department is prepared to argue based on Application Note 6 that the Commission intended that both complementary bidders and defendants that agreed not to bid be treated in the same manner --the current language, which would be used again in the proposed amendment to §2R1.1(b)(2), should be clarified on this point. The proposed amendment should also be revised to conform to the language used in the first sentence of the paragraph to which it is being added and which provides that the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him "or his principal" in the goods or services affected by the violation.

Therefore, we recommend that the language of the proposed amendment to §2R1.1 be amended to read:

"In a bid-rigging case in which an individual participant or his principal, or an organization, submitted one or more complementary bids or agreed not to submit one or more bids, use as the individual's or the organization's volume of commerce the greater of (A) the volume of commerce done by the individual or his principal, or by the organization, in the goods or services that were affected by the violation, or (B) the largest contract on which the individual or his principal, or the organization, submitted a complementary bid or agreed not to bid in connection with the bid-rigging conspiracy.".

This issue should also be addressed in Application Note 6. The note will need to be amended in some manner -- even if the Commission does no more than adopt the language that it has proposed -- inasmuch as it currently states that complementary bidders have a zero volume of commerce with no mention of the attribution rules that the Commission has already promulgated for organizations and proposes to expand to individuals. For example, a new third sentence could be added to Application Note 6--whether or not the new guideline language we suggest above is adopted by the Commission--as follows: "For this reason, the Commission has adopted rules that impute to individuals and organizations a volume of commerce equal to the largest contract on which an individual or his principal, or an organization, submitted a complementary bid or agreed not to submit a bid.".

Finally, should the Commission agree to address this issue either through new guideline language or new commentary (or, preferably, both), and assuming that the Commission agrees that it intended its 1991 change regarding organizational complementary bidders to apply to agreements not to bid as well, the Commission should state explicitly that any 1993 changes in this area as they relate to organizations are clarifying rather than substantive in nature. Otherwise, we will face a two-year period during which organizational defendants that agreed not to submit bids will argue that they have a zero volume of commerce and no $100,000 minimum fine.

FIRST OFFENDERS (Amendment 32)

Amendment 32 invites comment on whether the Commission should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense, either by creating a new ground for departure or by increasing the number of offense levels in Zone A of Criminal History Category I.

We strenuously object to this amendment. First, the Commission just last year considered alternatives to incarceration at great length and made adjustments to the

guidelines. Further change at this time is unwarranted since the effect of last year's amendments, which became effective only a few months ago, cannot be assessed.

On the merits, the proposal is extremely troublesome. It would lead to a great deal of disparity in sentencing if handled by way of departure. If implemented through additional offense levels added to Zone A, the maximum terms of imprisonment would have to decline in order to avoid excessive ranges. See 28 U.S.C. §994((b)(2), which establishes ranges in which the maximum may not exceed the minimum by more than the greater of 25 percent or six months. Offenses the Commission had previously identified as more serious than Zone A offenses would have reduced ranges for all offenders in order to address concerns regarding first offenders. The Commission just lowered the terms of imprisonment for offense levels 7 and 8.

Finally, the effect of this amendment, like amendment 52 discussed below, would be to provide favorable treatment to white-collar offenders. Its impact on antitrust violators would be significant since it would undercut the increased offense levels for antitrust offenses established in 1991. The amendment would also have a negative impact on tax law enforcement since the vast majority of tax cases involve first offenders. The effect on federal tax enforcement, which depends to a great extent on the deterrent effect of imprisonment for tax violators in order to insure compliance with the internal revenue laws, would be devastating.

COCAINE BASE/POWDERED COCAINE QUANTITIES (Amendment 40)

The notion that offenses involving equal quantities of cocaine base and powdered cocaine should be subject to the same penalties, as suggested in Amendment 40, ignores the original basis for the distinction in the law currently. Congress established different quantities for a number of particularly dangerous controlled substances, including cocaine base and powered cocaine, on the understanding that quantities of some substances posed greater risks than equal amounts of other substances, whether based on dosage unit, addictive qualities, or other factors. Whether Congress arrived at the best possible ratio in all cases is subject to debate and study. However, we see no greater basis, without significantly further study, to equate cocaine base and powered cocaine than to equate other distinct substances.

The suggestion that racial disparity resulting from the current scheme should be a basis for equating cocaine base and powdered cocaine quantities under the guidelines is inconsistent with the statutory mandate that the Commission assure the neutrality of the guidelines on racial grounds. 28 U.S.C. §994(d). Under the current scheme racial neutrality is achieved

because offenders of all racial groups who unlawfully traffick in cocaine base face the same guideline range, all else being equal. The view that guidelines for different offenses should be compared on the basis of racial impact would mean that any time one racial group engaged in a particular type of offense in disproportionate numbers, as compared to a related offense, the guidelines should be adjusted to address this so-called racial disparity, regardless of the relative seriousness of the two offenses. Thus, if whites had a propensity to commit burglary of a residence (base offense level 17) and blacks to commit burglary of other structures (base offense level 12) in disproportionate numbers, the offense levels for the two offenses would have to be harmonized to rid the system of this form of perceived disparity, despite the added danger one offense poses over the other. The guidelines would cease to become neutral as to the race of the offender.

Finally, a guideline change to equate cocaine base and powdered cocaine, without a corresponding statutory change, would cause the guidelines to be superseded by relevant mandatory minima in many cases. If these changes were made only for offense levels above or below the relevant mandatory minima, as suggested in the request for comment, the guidleines would produce great cliffs.

GROUPING RULES (Amendments 42 and 43)

These amendments to the grouping rules were proposed by the Internal Revenue Service and are designed to alleviate the problem of so-called "free" crimes in the sentencing calculus. In the tax area, this situation most often arises when tax crimes are grouped with drug violations. If the income giving rise to the tax violation is generated by drug activity and exceeds $10,000 in any one year (which it usually does), there is a two-level specific offense characteristic increase in the offense level for the tax violation and the offenses are grouped under §3D1.2(c). If the offense level for the drug offense exceeds that for the tax violation, the offense level for the tax violation has no effect on the ultimate sentence. The IRS proposed Amendment 42 has two alternative ways of dealing with this problem. We support the proposed amendment and prefer the first option, which would increase the offense level of the group two levels in all cases such as the one outlined above. The second option would affect only money laundering and drug violations.

Proposed Amendment 43 would insure that any offense, including, of course, tax offenses, would always have a definite effect on the final offense level calculation. It would do this by amending §3D1.4 to provide that groups which are nine or more levels less serious than the most serious group would be assigned one-half unit, rather than be totally disregarded, as is

currently the case under §3D1.4. We also favor this proposed amendment.

LSD CARRIERS (Amendment 50)

This amendment would exclude from mixtures or substances containing LSD the carrier substance, such as blotter paper. We oppose this amendment as inconsistent with the statutory scheme. If the Commission adopted this amendment, many offenders would face mandatory minimum sentences that far exceeded the sentence that would otherwise apply under the guidelines, since the mandatory minimum would be based on the weight of both the LSD and the carrier. See Chapman v. United States, 111 S. Ct. 1919 (1991). The current approach of including the carrier substance is appropriate since the carrier medium is a necessity of retail distribution.

COCAINE BASE DEFINITION (Amendment 51)

Amendment 51 excludes from the term "cocaine base" any form of the substance other than what is commonly referred to as "crack." Most courts have agreed that chemical composition, rather than physical form, determines the identity of cocaine base for statutory purposes. There is no basis for a different definition under the guidelines. Establishing one would only bring about inconsistency with mandatory minimum provisions of law.

REQUIRED PROBATION (Amendment 52)

This amendment would require a sentence of probation without confinement conditions if the applicable guideline range were in Zone A, unless the court made a finding that a sentence of imprisonment were required to achieve the purposes of sentencing set forth in the Sentencing Reform Act. If the defendant were in Zone B, the amendment would require the court to impose the minimum confinement condition permitted unless the court made a finding that a greater confinement condition were required to achieve these purposes.

We vehemently object to this amendment. First, as explained with regard to amendment 32, the Commission just last year considered alternatives to incarceration at great length and made adjustments to the guidelines. Moreover, the proposal is unwise on the merits. The sentencing Reform Act did not aim to eliminate all judicial discretion, but rather provided for sentencing ranges within which judges could exercise their discretion. Discretion within these ranges allows judges to take into account a variety of factors of importance to the sentencing process but, since limited to a given range, the discretion necessarily is exercised in a manner that serves the purposes of reasonable uniformity in sentencing. An amendment which

eliminates this last measure of discretion is not consistent with the goals of sentencing reform.

The amendment would have the effect of keeping white-collar defendants out of prison since many white-collar offenses are subject to low offense levels. Tax and some antitrust offenders would particularly benefit from this proposal. In fact, the proposal would substantially increase the likelihood that the majority of tax violators would not serve any time in confinement. The threat of imprisonment can be a powerful deterrent for white-collar offenders. The Commission should not thwart this important goal.

CAREER OFFENDERS (Amendment 55)

Amendment 55 would eliminate the current table in the career offender guideline, §4B1.1, that places the guideline sentence at or near the statutory maximum, and would provide instead that a career offender be sentenced at the top of the applicable guideline range for Criminal History Category VI for the offense level that otherwise applies. The effect of this amendment would be to substitute the highest guideline sentence applicable to a particular offense level for a sentence close to the statutory maximum for the offense.

We strenuously object to this amendment because it violates the statutory directive that a career offender be sentenced "at or near the maximum term authorized." 28 U.S.C. §994(h). As the Commission recognizes in the commentary to the career offender guideline, the relevant legislative history reflects that "the maximum term authorized" means the statutory maximum. S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983). The Commission should reject this amendment as inconsistent with the Sentencing Reform Act.

RETROACTIVITY (Amendment 56)

Amendment 56 would include last year's amendment to the guideline on acceptance of responsibility, §3E1.1, which provides a third level of reduction in certain circumstances, in the retroactivity policy statement, §1B1.10. Providing for the retroactive application of this amendment can be expected to result in a flood of defense motions for reduced sentence. The courts would then have to consider the nature of the defendant's acceptance of responsibility to determine whether the added requirements of guideline §3E1.1 for the third level of reduction had been met. The factual information necessary for this determination may be old or unavailable. Providing for the retroactivity of the third level of acceptance of responsibility could be truly disastrous for the courts.

We also oppose the proposed amendment of the retroactivity policy statement to authorize the courts to sentence retroactively for reduction in ranges even when an amendment is not specifically listed in the policy statement. This proposal would also cause a flood of unfounded motions for reduced sentence. It would have the effect of making it very difficult for the Commission ever to reduce a guideline range because of the opportunity such a reduction would provide to defendants to seek reduced sentences.

Sincerely,

Roger A. Pauley

Roger A. Pauley
Member (ex officio)
United States Sentencing Commission

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March 16, 1993

VIA TELECOPY AND FEDERAL EXPRESS

Mr. Michael Courlander
Public Information Specialist
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Re: Proposed Sentencing Guideline Amendments for Public Comment - 1993 Amendment Cycle

Dear Mr. Courlander:

I am writing on behalf of the Criminal Law Committee of the Federal Bar Association's Philadelphia Chapter. Our Committee consists of federal criminal law practitioners in the Eastern District of Pennsylvania. The Committee has reviewed the proposed guideline amendments for public comment published in the December 31, 1992 edition of the Federal Register. This letter constitutes our comments on the proposed amendments. The Committee has not undertaken to comment on all of the proposed amendments. Rather, we have selected only a few on which to submit comments. They are as follows:

1. Amendment No. 20 - Money Laundering.

The Committee strongly supports the proposed amendment to U.S.S.G. §§ 2S1.1 through 2S1.4 applicable to money laundering offenses. The amendment would tie the base offense level for money laundering violations more closely to the underlying conduct that is the source of the illegal proceeds.

This represents a significant improvement in the money laundering guidelines. Our Committee is aware of cases in this District and elsewhere in which the money laundering guidelines have allowed the government to obtain a

significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. An example in our District is United States v. Brian M. Maier, Criminal No. 91-00235, (E.D. Pa.). This was a fairly simple fraud scheme in which the "loss" within the meaning of U.S.S.G. § 2F1.1 was between $40,000 and $70,000. The total offense level for the mail fraud offense was 13, which yielded a guideline prison range of 12-18 months. However, by adding a violation of 18 U.S.C. § 1957, based solely on the defendant's removal of some of the fraud proceeds from the bank account into which they had been deposited, the government successfully increased the total offense level to 19 and the corresponding guideline prison range to 30-37 months. The Commission's October 14, 1992 Working Group Report on Money Laundering has apparently identified numerous other examples nationwide of this form of "count manipulation." The money laundering charges in these cases often involve "monetary transactions" normally not thought of as sophisticated "money laundering."

With the government's increasing emphasis on forfeiture, the number of cases in which violations of 18 U.S.C. §§ 1956 and 1957 are added to fraud and other charges will only increase. This is because violations of 18 U.S.C. §§ 1956 and 1957 are among those for which civil and criminal forfeitures are authorized under 18 U.S.C. §§ 981 and 982, even though forfeiture may not be available as a remedy for the underlying offense.

Proposed Amendment No. 20 is a significant step toward elimination of the unfair treatment that can result from manipulation of money laundering charges. One concern we have arises from proposed § 2S1.1(a). This provision requires that in non-drug cases the greater of the following base offense levels be applied: (a) the offense level for the underlying offense from which the funds were derived; or (b) eight plus the number of offense levels from the table in § 2F1.1 corresponding to the value of the funds. The offense level for fraud offenses is six. Thus, in fraud cases in which the government adds a money laundering charge, the base offense level under § 2S1.1(a) will always be two levels higher (i.e., the difference between eight and six), simply because the government has added the money laundering charge.

The Committee believes this is inappropriate. In many ordinary fraud cases, the conduct giving rise to a violation of 18 U.S.C. §§ 1956 or 1957 does not, in any meaningful way, make the defendant more culpable or deserving of punishment than the defendant who happens not engage in a "monetary transaction" within the meaning of §§ 1956 and 1957. Accordingly, the Committee recommends that § 2S1.1(a)(3) be changed to read: "six

plus the number of offense levels..." instead of "eight plus the number of offense levels..." Offenses involving relatively sophisticated "monetary transactions" can properly be dealt with through the specific offense characteristics set forth in proposed § 2S1.1(b).

2. Amendment No. 5 - Fraud, Theft and Tax - More than Minimal Planning/Use of Sophisticated Means.

This amendment would eliminate "more than minimal planning" as a specific offense characteristic under §§ 2B1.1(b)(5), 2B1.2(b)(4)(B) and 2F1.1(b)(2) and use of "sophisticated means...to impede discovery of the nature or extent of the offense" as a specific offense characteristic in tax cases under §§ 2T1.1-2T1.4. Instead, the amendment would modify the loss tables under the applicable guidelines to incorporate gradually an increase for "more than minimal planning" and use of "sophisticated means."

The Committee strongly opposes this approach. The underlying premise apparently is that offenses involving a certain amount of "loss" necessarily involve these specific offense characteristics. Therefore, they should be uniformly applied through appropriate increases in the loss tables. Thus, for example, offenses involving a "loss" in excess of $40,000 will have offense levels two levels higher than under the 1992 guidelines.

The Committee believes this premise is seriously flawed. Monetary "loss" does not measure in any meaningful way the degree of planning or sophistication involved in a particular offense. A theft or fraud involving a loss of $100,000 can often be as simple as a similar offense involving only a few thousand dollars. Good examples are cases in the Eastern District of Pennsylvania in which the government prosecutes relatives of deceased Social Security beneficiaries for receiving and cashing social security checks after the payee's death. These cases usually involve little or no planning. The relative is often surprised to learn that the government continues forwarding Social Security checks, even after the payee's death. The theft continues, and the "loss" increases, as long as the government continues to forward the checks and the relative cashes them. The amounts can often exceed $40,000. Nevertheless, few would argue seriously that such offenses involve any significant degree of planning or sophistication. There are countless other examples of theft and fraud offenses in which the "loss" may be relatively high and the degree of planning relatively low.

For this reason, the Committee believes the preferred approach to these specific offense characteristics is one

suggested in the "additional issues for comment" accompanying Amendment No. 5. Specifically, the Committee recommends that the Commission change the specific offense characteristic from "more than minimal planning" to one of "extensive or sophisticated planning." This approach would tend to eliminate a disparity which the Committee believes now exists. Section 1B1.1's emphasis on "repeated acts," along with the examples given in Application Note 1, have lead courts to conclude that the "more than minimal planning adjustment" has a relatively low threshold. As a result, individuals engaged in elaborate and sophisticated fraud schemes receive the same treatment as the individual whose planning may be "more than minimal," but is far from extensive or sophisticated. A guideline that defines the planning necessary to establish the enhancement as "extensive or sophisticated planning" would still require subjective interpretation by the courts. However, such an approach would more fairly differentiate those defendants who deserve an upward adjustment based on the degree of planning from those who do not.

The Commission should, at the very least, eliminate the references to "repeated acts." Individuals who engage in repeated acts of fraud or theft are adequately dealt with through increases in the loss tables, because repeated acts almost always result in higher loss.

3. Amendment No. 23 - U.S.S.G. § 3B1.3 - Abuse of Position of Trust.

This amendment would change this role in the offense adjustment to "abuse of position of special trust." The definition of "special trust" makes clear that the two-level upward adjustment in offense level is intended only for individuals in positions of "public or private trust characterized by professional or managerial discretion." The definition further clarifies that the adjustment is not intended for employees whose responsibilities are primarily administerial in nature."

This amendment would substantially improve the operation of this guideline. Under the current guideline, the two level upward adjustment has been applied, even when the abuse of trust involved is little more than a breach of an employee's fiduciary duty to the employer. A good example is United States v. Milligan, 958 F.2d 345 (11th Cir. 1992), in which the court upheld the application of § 3B1.3 to a United States Post Office window clerk convicted of misappropriation and embezzlement of postal funds. The Committee strongly recommends that this adjustment apply only to individuals, who, because of their higher level positions, have significantly more responsibility than the ordinary employee. The amendment goes a long way

towards accomplishing this objective, and the Committee therefore strongly supports it.

4. Amendment Nos. 24, 31, and 47 - U.S.S.G. § 5K1.1 - Substantial Assistance to the Authorities.

The Committee believes amendment 24 is a step in the right direction in that it would allow the district court to make the ultimate determination, in a limited number of cases, of whether or not a defendant has provided substantial assistance in the investigation or prosecution of another person warranting a downward departure. However, the Commission should go further by allowing the district court to make this determination, regardless of whether or not the defendant is a non-violent first offender. Accordingly, the Committee prefers the recommendations by the American Bar Association in proposed Amendment No. 31 and the legislative sub-committee of the Federal Defenders in proposed Amendment No. 47.

Following the Supreme Court's decision in Wade v United States, 112 S. Ct. 1840 (1992), defendants have very limited opportunity to challenge the government's refusal to file a substantial assistance motion under § 5K1.1. The Committee maintains that, as with all other determinations under the guidelines, the district court, not the government, should make the final determination on whether or not a defendant has provided substantial assistance. As a practical matter, the government will, in most cases, be highly influential in the district court's determination. In those cases where the parties disagree, defendants should be entitled to their day in court, just as they are now on the many factual and legal disputes arising under the guidelines. Access to a judicial determination of the issue should not turn on the defendant's criminal history or offense characteristics.

The government would still be protected in two ways. First, as is mentioned above, it will likely be the most influential voice on the substantial assistance question at sentencing. Second, it can appeal an adverse determination.

Finally, this issue implicates very directly the appearance of justice. Under the current regime, both defendants and the public-at-large can legitimately question the fairness of a sentencing system that allows the defendant's adversary to make unilaterally such an important determination in the sentencing process. Elimination of the requirement for the government motion would solve this problem (at least to the extent mandatory minimums are not involved) by making the substantial assistance determination no different than any other sentencing determination, that is, one ultimately for the district court.

5. Amendment Nos. 8-10, 50 - Drug Offenses.

Amendment No. 8 would provide a ceiling of offense level 32 in the drug trafficking guideline (§ 2D1.1) for defendants who qualify for a mitigating role adjustment under § 3B1.2. Additionally, it would revise the commentary to § 3B1.2 to describe more clearly cases in which the mitigating role adjustment is warranted.

These amendments constitute much needed reforms. As the Commission's synopsis of the proposed amendment suggests, existing drug guidelines have tended to overpunish certain lower level defendants in jointly undertaken activity because the sentence is driven primarily by the quantity of drugs involved in the offense. This problem has been particularly acute in the Eastern District of Pennsylvania, which has seen an increased emphasis in recent years on what are referred to as "neighborhood" drug cases. These have consisted of as many as thirty or forty defendants in one indictment. Typically, certain lower level participants have been sentenced on the basis of extremely high drug quantities because of the manner in which the relevant conduct guideline (§ 1B1.3) has been applied.

The proposed revisions to the commentary to § 3B1.2 (along with prior clarifications of the relevant conduct guideline) will improve the situation. They will help clarify the participants in jointly undertaken activity for whom the mitigating role adjustment is intended. The absence of more expansive commentary and the emphasis upon the defendant's lack of knowledge or understanding of the scope and structure of the enterprise have caused district courts to be unduly restrictive in their application of the mitigating role adjustment. The Committee strongly endorses the Commission's identification of the non-exhaustive list of characteristics identified in proposed Application Note 5 that are ordinarily associated with the mitigating role.

With regard to Application Note 7 pertaining to transporters of contraband, the Committee opposes option 3. This would prohibit any mitigating role adjustment for that quantity of contraband the defendant transported. This seems unfair to the defendant who, on the facts of a particular case, might otherwise have a strong claim that he or she qualifies for the mitigating role adjustment. As for options one and two, the Committee prefers option one because it is more flexible and easier to understand.

The Committee also endorses Amendment 9, which would restore the upper limit of the drug quantity table to level 36. Prior increases in the upper limit to level 42 reflected an undue

emphasis on quantity in determining the overall sentence. Moreover, the Committee recommends that the Commission consider further reductions in the quantity table's upper limit, along with an increased emphasis on specific aggravating offense characteristics such as the ones identified in Amendment 9.

Finally, the Committee endorses proposed amendments 10 and 50 pertaining to the definition of "mixture or substance" under § 2D1.1, Application Note 1, and the appropriate method of determining the relevant quantity in cases involving LSD.

6. Amendment No. 2 - Use of Guidelines Manual in Effect on Date of Sentencing (§ 1B1.11).

This amendment reinforces the Commission's so-called "one book rule," and extends it to multiple count cases in which the effective date of guideline revision(s) occur between offenses of conviction. The Committee opposes this amendment. The "one book rule," in our view, violates the Sentencing Reform Act. Specifically, section 3553 of Title 18, United States Code, requires the sentencing court to apply the guidelines "in effect on the date the defendant is sentenced." If the application of a particular guideline in effect on the day of sentencing would violate the ex post facto clause of the United States Constitution, then the district court must resort to the guideline in effect at the commission of the offense. It does not follow, however, that the entire guidelines manual in effect at the time of the offense must also be applied. Rather, under Section 3553, the court must continue to apply all other guidelines in effect at the time of sentencing, as long as their application does not violate the ex post facto clause.

7. Amendments 29 - Specific Offender Characteristics

The Committee strongly supports this proposed amendment by the Criminal Law Committee of the Judicial Conference of the United States. It would reinforce an important point. While a particular offender characteristic may ordinarily be irrelevant in determining whether a sentence should be outside the applicable guideline range, the presence of such a characteristic to an extraordinary degree (and therefore to a degree not adequately taken into consideration by the Sentencing Commission) is an appropriate reason for departure from the guidelines.

More importantly, the amendment would clarify that even though any one offender characteristic may not be present to a degree sufficient to support a departure, two or more characteristics may be present in combination to an extent that warrants a departure. This is consistent with the language of 18 U.S.C. § 3553(b), which contemplates departures based upon an

aggravating or mitigating "circumstance." Moreover, the proposed amendment will better enable district courts to accomplish the statutory sentencing goals identified in section 3553(a).

Amendment 32 calls for the Commission to invite comment on whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense and, if so, whether this should be accomplished either by: (A) providing an additional ground for departure in Chapter 5, Part K; or, (B) increasing the number of offense levels in Zone A in criminal history category 1. The Committee endorses such an amendment. There are still far too many cases involving such offenders where the guidelines require a sentence of imprisonment. The Committee believes that the recent amendments increasing the number of offense levels in Zone A in Criminal History Category I from six to eight constituted a significant improvement. However, the Commission should undertake to identify through a separate ground for departure in Chapter 5, Part K, the relevant factors that would support departures for first-time, non-violent offenders.

Thank you for the opportunity to comment on these important sentencing issues.

Very truly yours,

James M. Becker

JMB/mf/800

cc: Stanford Shmukler, Esquire
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March 10, 1993

THE UNITED STATES SENTENCING COMMISSION
WASHINGTON, D.C.

My name is John S. Beresford. I am a recently retired psychiatrist residing in Toronto, Canada, and a U.S. citizen. One of my projects in retirement has been a non-profit organization that aims to help the children of parents sentenced to imprisonment for possession of illicit drugs. During my inquiries I have met with instances where families have been broken up, both parents sentenced to imprisonment, and dependent children left in foster care with no prospects of seeing the parents released for periods of 10, 20 and up to 40 years. There are obviously serious repercussions to a child's development and subsequently to societal attitudes and behavior when pre-teen and teen-aged children are left to deal with the emotional problem caused by the loss of a previously secure environment and parenting, with the incarceration of both parents for not just short but protracted periods of time. (See below.)

The organization I have helped to found looks for people to assist the dependents of prisoners, their function being to serve as go-betweens in such very difficult matters as escort-visiting at institutions perhaps 1000 miles away. Officials at the John Howard Society here in Toronto have been encouraging, seeing that there are no statistics and no follow-up on children from double-incarceration families.

In the United States the focus has been on the dependents of families where the parents have been sentenced to prison for illicit drug possession. For various reasons the worst cases turn out to be those where the involvement has been with LSD. This presentation is limited to concerns that arise in connection with the sentencing provisions that apply to the LSD-offender. The contention is that as the present sentencing provisions stand, the law is administered unfairly. As will be explained below, the carrier-weight provision, through an oversight, deprives an LSD-offender of his (and her) liberty through the operation of arbitrary and capricious factors. Moreover, the length of sentence-terms imposed under the carrier-weight provision is unreasonably harsh compared with the length of prison sentence imposed when the substance LSD is distributed in a powder form or by some method that does not involve the use of blotting paper. Further, there is anecdotal evidence which suggests that arrests for trafficking in LSD lead to charges against both parents of a two-parent family more often than is the case where a stimulant or narcotic drug is the substance involved. In short, the child of the LSD-offender is particularly at risk for losing contact with two parents for excessively long (and arbitrarily determined) periods of time.

A. FACTORS RELATED TO INCALCULABLE WEIGHT

In questioning the logic of the carrier-weight provision, attention has to be given to the particular mode of distribution that applies to LSD, namely the blotting paper route. Slips of blotting paper are frequently impregnated with drops of LSD, each circle on the paper "carrying" a certain dose, conventionally 100 micrograms. By the decision of Congress, individuals are liable to be penalized for possession of the "carrier" paper as well as the substance "carried" where LSD is the substance involved. What Congress did not stipulate, however, due no doubt to a failure to take into account the nature of this method of distributing LSD, was that offenders should be punished for possessing or trafficking in not only a precise amount of LSD but an imprecise amount of moisture and perhaps other contaminants that can result from handling blotting paper strips under varied and unpredictable conditions.

1. Moisture and adulterants: I am drawing your attention to the fact that laboratory determinations of the weight of blotting paper, LSD, atmospheric water, sweat and other substances that have been deposited and absorbed as a result of handling are like to vary from laboratory to laboratory, and conceivably by substantial amounts. Each major city in the U.S., I am told, has a laboratory where the weight of an illicit substance (and its carrier) can be determined. Please consider this. A laboratory in a coastal area, such as Maine, where the climate is moist, is liable to register a weight of a given slip of blotting paper in excess of the weight that would have been registered if this same slip of paper had been weighed in a dry environment, say in the State of Nevada. Therefore, a judge in sentencing a convicted individual will find himself unwittingly imposing a sentence based on calculations not provided for by Congress and -- again unwittingly -- acting arbitrarily.

In addition to the incalculable factor of absorbed moisture, due to the fact that blotting paper is inherently a highly absorbant substance, there is the matter of sweat gland and other impurities which have been deposited in varying amounts during the process of handling. There is reason to suppose that some of this non-paper and non-LSD material may derive from the agent who has effected an arrest. In that case, a prison sentence term can be in part determined by a factor that has nothing whatever to do with the person of the prisoner who has been arrested.

2. Arbitrariness arising from non-standard paper size: Under the recent Supreme Court decision bearing on the carrier weight issue, an opinion was given that the carrier weight provision relating to LSD offences was not unconstitutional. It was said to be Congress' intention to punish LSD offenders severely. While accepting this decision, it is possible to object that judges are being drawn into pronouncing arbitrary sentences with regard to the width of the border surrounding any particular sample of blotting paper treated with LSD in a manner Congress did not specify. It is not as if strips of blotting paper come in standard sizes, like, say, playing cards. It appears there are grounds for instructing judges to take into account only that weight of blotting paper that does conform to some standard set of dimensions, and to disregard the weight of paper that might constitute an extravagantly wide margin. But of course there is no such standard size, and no instruction given to the technician

at a laboratory to trim a sample to a particular size.

I believe the Commission has the right to recommend that judges not be put in the position of imposing sentences that have been erroneously determined, outside the stated intention of Congress, with regard to either:

(a) extraneous moisture and other unspecified substances, or
(b) non-standard margin size, or both.

B. HARSHNESS OF PUNISHMENT

This will be well known to members of the Commission already, but is worth inserting here as a reminder. The question of undue harshness arises from the disparity between the sentence mandated for an LSD-related offence where LSD has been distributed in powder or some other form and when the same weight of LSD has been distributed in the form in which it is "carried" on heavy blotting paper. Among the cases that have come to my attention is that of a 35 year old woman sentenced for the possession of 16 slips of blotting paper impregnated with a total of 1600 "doses" of LSD. For a fairly serious offence of this kind the sentence might ordinarily have been a 5 year prison term. Because of the weight of the paper serving as "carrier," the actual term to which she was sentenced was 24 years. A Federal prisoner, she is eligible to no parole. This individual commented to me, in a letter, that she had calculated the weight of cocaine she would have had to have in her possession to draw a comparable sentence. The figure she arrived at was 150 kilograms. It is understood that the Commission may have reservations about the extent to which it can intervene, if it should wish to intervene, in the matter of instructing judges with regard to the carrier weight provision. Nevertheless, I submit that in view of the extraordinary disparity between LSD sentences and sentences for crimes involving other drugs, and the presumption that the disparity may be attributed to the effect of the carrier weight provision, and the understanding that the carrier weight regulations contain built-in means for improper sentencing, outside the stated intentions of Congress, the Commission may wish to declare a moratorium on carrier-weight sentencing. That decision would be justified on the basis that no one at present can tell what proportion of a carrier weight sentence is within the bounds stipulated by Congress, and how much falls outside. A moratorium would relieve judges of the burden of making capricious decisions, pending a clarification of the issue by Congress.

C. THE PROBLEM OF DOUBLE-PARENT SENTENCING

The argument here likewise falls outside the scope with which the Commission is concerned directly, but is worth inserting to complete the picture. The issue has greater sociological and psychological consequences than legal ones. From my own research in practice and from anedotal evidence supplied by colleagues it appears that so-called psychedelic drugs, among which LSD is included, provide for a higher conviction rate of two members of a family, wife and husband or parents living common-law, than illicit drugs belonging to the narcotic or stimulant classes, for example cocaine. The pattern of trafficking in LSD may differ from the pattern

characteristic of other illicit drug distribution. The individual involved in LSD distribution is evidently not so likely to be involved for money. There are no big profits in the LSD trade, in contrast to the case with cocaine and opiates. The LSD user is rather more likely to be involved in a friends-and-family network. This does not mitigate the offence. But it does render the offenders more liable to be arrested along with their marriage partners and so come to concern our organization. In the case of the woman mentioned about who is serving a 24 year prison term for possession with intent to sell of 16 blotter strips of LSD, the husband was sentenced to 40 years for the same offence. The couple have left two children behind, 11 and 13, who are among those we have been trying to help. Abolition of the carrier weight provision would make a large diffference in this type of case.

D. RETROACTIVE REVIEW

Common sense and a concern for justice indicates the need for a system of review boards to consider the cases of those prisoners who currently are serving terms for LSD offences that have been determined by the carrier weight provision. A further element of arbitrariness and capriciousness would be perpetrated if future sentences were not based on this provision while past cases were allowed to stand without review. It is submitted that individuals who have completed the length of sentence that would have been imposed without the influence of the carrier weight provision but whose sentences continue because of the provision be entitled to release. There are, it has been estimated, tens of thousands of prisoners in the U.S. who would be entitled to release under this condition.

E. SUMMARY

On the grounds stated it is submitted that the Commission consider a recommendation to Congress which would eliminate the carrier weight provision as it applies to LSD. Too many elements of the arbritrary and capricious are inherent in the provision to make it fair that judges should be subject to its requirements. Citizens have the right to not be subject to a law which, however innocently, cannot fail to result in inequity. The LSD offender is particularly vulnerable to multiple arrest of family members, owing to the "non-commercial" nature of the trade in LSD. Tragic consequences fall to the lot of children in such cases. Should the Commission decide in favor of this recommendation, it follows naturally that a system of review boards be established for the case of those already serving sentences.

John S. Beresford.

John S. Beresford, M.D.

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

Honorable Commissioners

My son, a first time offender who was 19 years old at the time of his arrest, is now in Sheridan Federal Correctional Institution and is about to turn 22. He has 8.5 years remaining on his sentence. He was convicted of possessing LSD.

The LSD was on blotter paper, resulting in a sentence 8 years longer than would have been given for having the same number of doses in crystal form. Had the drug been on sugar cubes the sentence would have been twice as long again.

Imposing different lengths of sentences to different first time offenders for possessing the same number of doses of LSD is clearly not in keeping with the precepts of our judicial system.

Because mandatory minimum sentences have removed the judges ability to recognize and rectify inequities in sentencing, my son and many like him, are receiving unfair, unjust and disparate sentences in which the punishment does not fit the crime.

I beg you to correct this situation by supporting proposal #50.

Douglas R. Thrasher
3800 Dade Drive
Annandale, va.22003

FAMM

Families Against Mandatory Minimums

FOUNDATION

March 15, 1993

Public Information
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002

Dear Commissioners:

On behalf of the 13,300 members of Families Against Mandatory Minimums (FAMM,) I urge you to adopt the following proposed amendments: 8, 9, 10, 11, 12, 25, 29, 31, 35 (option 1), 39, 40, 50, 51, 52, 56.

Each of these amendments would result in fairer sentencing for nonviolent, offenders. FAMM also supports many of the Issues for Comment offered in the proposed amendments.

Issue for Comment #13: We have received many letters from inmates whose offense level was raised due to the artificially low price set by the undercover agents. 2D1.1 should be amended to correct this abuse.

Issue for Comment #24: The Court should definitely be allowed to present its own motion for substantial assistance 5K1.1, regardless of whether the Government presents such a motion. This departure should not be limited to first offenders only. Substantial assistance is currently granted to multiple offenders by the Government in order to catch lower level offenders. Why should the Government be the only body able to offer that motion to first or multiple offenders? Amendment 31 correctly addresses this question.

Issue for Comment #32: Nonviolent, first offenders, should be considered for alternatives to incarceration. This should be accomplished by increasing the number of offense levels in Criminal History Category I.

I commend the Sentencing Commission for considering so many sensible amendments to the guidelines. I hope the Commission will keep in mind that the American public wants justice to make sense. It doesn't make sense to sentence someone for offenses acquitted; it doesn't make sense to distinguish between crack and powder cocaine when one must have powder cocaine in order to make crack, and it is racially discriminatory; it doesn't make sense to sentence someone for undigestible compounds; ultimately, it doesn't make sense to pack our prisons for years with nonviolent, offender.

Sincerely,

Julie Stewart

Julie Stewart
President

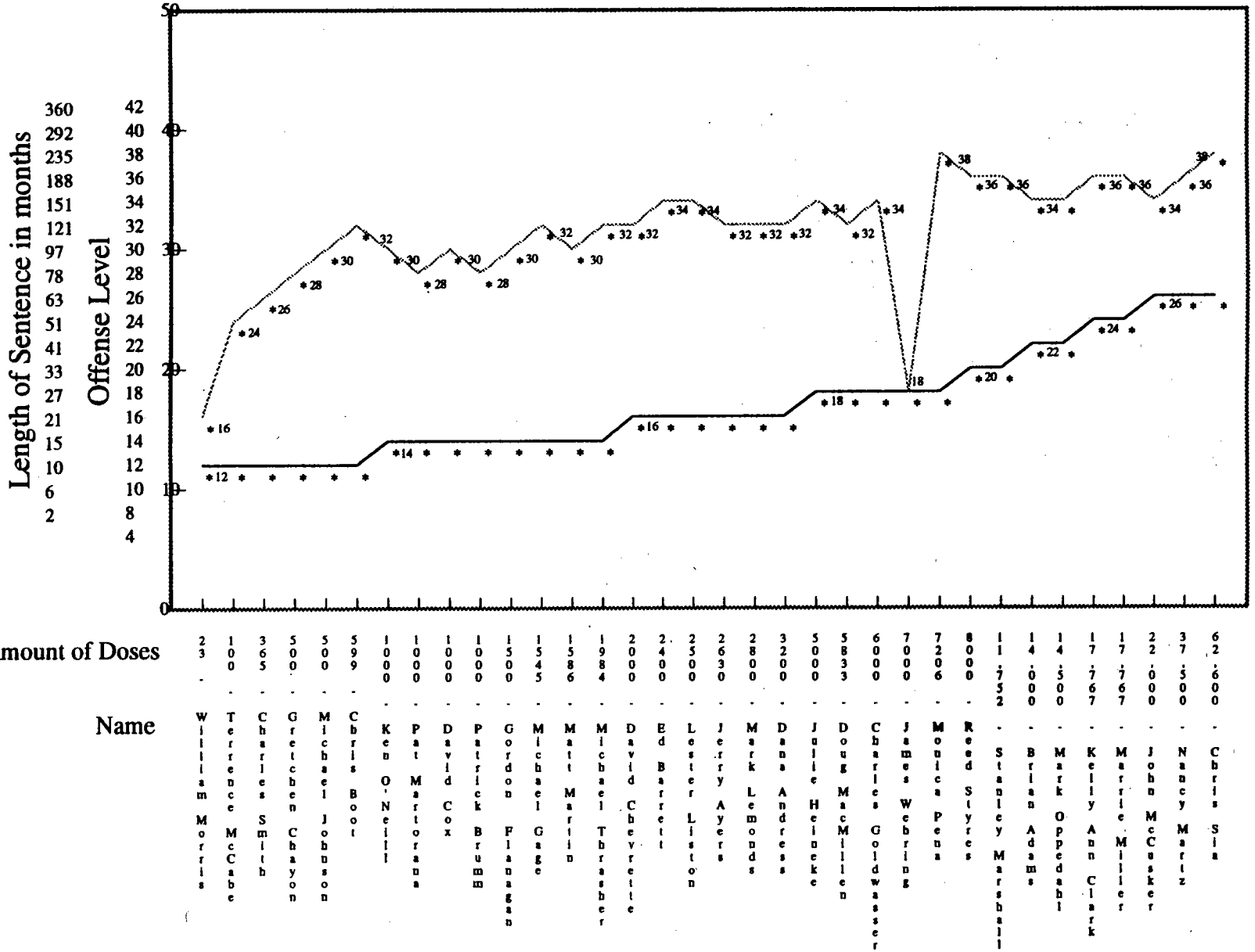
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Offe ...evel W/ Carrier

Offense Level W/ Dosage Equivalency
(@ .05 mg)

# Criminal History Category I



STATEMENT OF

NKECHI TAIFA
LEGISLATIVE COUNSEL

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

ON

PROPOSED GUIDELINE AMENDMENTS FOR PUBLIC COMMENT

MARCH 22, 1993

The American Civil Liberties Union (ACLU) appreciates this opportunity to comment upon several proposed amendments to the guidelines, policy statements, and commentary in the Guidelines Manual.

The American Civil Liberties Union is a nonpartisan organization of over 275,000 members 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 due process and equal protection of the law, as well as the right of freedom of association and freedom from disproportionate punishment, are upheld wherever threatened.

The principal purpose of the United States Sentencing Commission (Commission) "is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." United States Sentencing Commission, Guidelines Manual, § 3E1.1 (Nov. 1992), p. 1.

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984), provides for the development of guidelines that will further the basic purpose of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

As part of its statutory mission to monitor sentencing

practices in the federal courts, the Commission underscored the dynamism of the guideline-writing process, describing it as "evolutionary", with the expectation and anticipation that "continuing search, experience, and analysis will result in modifications and revisions to the guidelines ..." Id. p.2.

The Executive Branch and the Congress have increasingly responded to public pressure to "get tough on crime" through enacting legislation that creates new federal criminal offenses. Thus, emerging criminal law is not just in the purview of state courts -- now federal courts have broader jurisdiction. This trend of federalizing criminal law has decreased access to the federal courts for civil cases (especially civil rights cases) and has created a patchwork quilt of laws for which punishment is often inconsistent and, in our view, extreme. It is incumbent that this Commission not simply rationalize federal crime policies which, for the most part, have been sensationalized, but rather ensure that civil liberties are not compromised in the process.

Our comments will be specifically directed in support of drug trafficking amendments which seek to achieve consistency in drug sentencing (amendments 10, 49, 50); in favor of eradicating the distinction between powder and crack cocaine (amendments 40, 51); in opposition to increased sentences for "gang-related crime" (amendment 66); and in opposition to imposing a guideline level for the recently enacted carjacking statute (amendment 26).

Although the focus of our comments is narrowed for the purpose of this testimony, we are also in general agreement with the

concepts embodied in the following proposed amendments to the guidelines:

Amendment 25, 36: recommendation that the government disclose to the defendant information relevant to the application of the guidelines prior to the entry of a guilty plea;

Amendments 24, 29, 30, 31, 47: language clarifying and increasing the court's ability to depart tailored to individual circumstances and offender characteristics;

Amendments 1, 35: prohibiting use of acquitted conduct in determining guideline offense level;

Amendments 32, 52: imposition of sentences other than imprisonment;

Amendment 56: retroactivity of amended guideline range and ability to reduce a sentence not listed if consistent with the purposes of sentencing.

DISCUSSION

Drug Trafficking: Amendments 10, 49, 50.

With respect to the category of drug trafficking, we support a number of closely related amendments which seek to ensure consistency in drug sentencing. Amendment 10 resolves the split among circuits by providing that the term "mixture or substance" does not include uningestible, unmarketable portions of drug mixture. Amendment 49 clarifies that the weight used to determine the offense level should not include the weight of substances involved in the manufacturing process or substances to which the

drug is bonded. Amendment 50 separates the weight of the carrier from the actual weight of LSD to determine offense level.

Because a defendant's sentence pursuant to the guidelines is calibrated to the specific weight of the substance, it is essential that the substance be appropriately defined. To include noningestible portions of a substance in the calculation of drug quantity for sentencing purposes would be unjust. A differential effect would occur solely based on the weight of different carriers. There has been no showing, however, that the extra weight is related to increased culpability.

In Chapman v. United States, 111 S. Ct. 1919 (1991) the Court acknowledged that the sentences for selling a specific quantity of LSD could differ by over 2000 percent solely on the method of marketing: that is, the sentence for the sale of LSD in liquid form -- the least diluted form -- would be 10 - 16 months. However, since LSD is more widely distributed using a blotter paper carrier or on sugar cubes, the weight of the substance significantly increases as the result of the introduction of such uningestible and unmarketable components. Thus, the sentences of the people at the lower end of the chain of distribution who handle the drug in a more diluted form skyrockets: with blotter paper, the weight of the substance triples and the sentence would increase to 63 - 78 months; with sugar cubes, the weight would spiral tremendously and the penalty would leap to 188 - 235 months. The ACLU maintains that such a sentence, being disproportionate to the crime, is unconscionable and constitutionally suspect.

Pursuant to the sentencing guidelines, the penalty for distributing exactly the same amount of drugs -- 100 doses -- could range from 10 months to almost 20 years, causing the defendant to receive 19 additional years simply because of the manner of delivery of the drug. Ironically, it is typically the drug kingpin who is able to sell the drug in liquid form -- the purest form, thus receiving the lighter sentence. The people at the lower end of the drug trafficking scheme, who are usually young and poor, would unfairly be made to bare the brunt of punishment for participation in the drug economy.

Although the majority in the Chapman case held that such an arbitrary scheme of punishment was not violative of the Constitution, the dissent correctly observed that the ruling "will necessarily produce sentences so anomalous that they will undermine the very uniformity that Congress sought to achieve when it adopted the Sentencing Guidelines."[1] If we want a consistent and rational sentencing scheme that sends unambiguous messages to drug dealers, such sentencing disparity must be corrected wherever it appears in the drug laws. The adoption of these amendments would be a first step towards the implementation of a rational drug sentencing scheme which carries on the mission of the Sentencing Reform Act -- the elimination of unwarranted sentencing disparity.

**Crack v. Powder Cocaine**: Amendments 40, 51.

Amendment 51 clarifies that the term "cocaine base" means

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[1] Chapman v. United States, 114 L Ed.2d 524, 540 (1991).

"crack." Amendment 40 asks for comment regarding whether the Commission should ask Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1.[2] The ACLU supports these amendments.

Pursuant to this Commission's preliminary report detailing statistics of race and drug types, a disproportionate impact by race is clearly demonstrated. The Commission's final sample consisted of 4122 cases filed between April 1 and July 31, 1992, and is representative of all drug cases received for FY 1992. With respect to cocaine base (crack) and cocaine powder, the study concluded that 92.6% of Black defendants were sentenced for crack as compared with 4.7% of White defendants. On the other hand, 45.2% White defendants were sentenced for cocaine as compared with 29.7% Black. With respect to simple possession only, 100.0% of the defendants sentenced for crack were Black, as compared with 0.0 of Whites. As for simple possession of cocaine, 61.8% sentenced were White, as compared with 20.6% Black. See U.S. Sentencing Commission, Monitoring Data Files, April 1 - July 31, 1992. These statistics raise grave concerns as to the racial distinctions between the punishment for powder and crack cocaine established by the 100 to 1 quantity ratio.

The available evidence indicates that cocaine base is used

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[2] One gram of cocaine base (crack) carries the same penalty as 100 grams of cocaine powder for the purpose of determining an individual's base offense level under the Sentencing Guidelines.

principally by African Americans, while cocaine powder is used primarily by Caucasians. The overwhelming number of prosecutions in this country are for crack rather than cocaine powder, with the result being a vast disproportionate number of African Americans prosecuted for use of crack. The resulting disparate sentencing scheme dramatically impacts in a negative fashion on African Americans, who are subject to long mandatory minimum sentences for simple possession of small amounts of cocaine base while those first time offenders convicted of possession of a much larger amount of cocaine powder are subject to minimal sentences.

For example, an offender with no prior record must be sentenced to five years for possession of five grams of crack. In contrast, a defendant convicted of first possession of 4.9 grams of crack or any amount of heroin or other controlled substance is by statute subject to a maximum sentence of one year. The much harsher treatment of a form of cocaine more likely to be possessed by Blacks than that meted out for possession of another form of cocaine that is likely to be used by Whites, implicates fundamental equal protection concerns.

Although the five year minimum for possession of five grams of crack does not explicitly establish a classification based on race, the usage of crack is overwhelmingly attributed to Blacks, while powder is primarily used by Whites. There is no medical/scientific distinction between these forms of cocaine, and no objective scientific data to suggest that crack is more

addictive than powder.[3] Thus, it would appear that the statute's grossly disproportionate treatment of cocaine base does establish a de facto classification based on race or, at the least, represents a facially neutral statute applied in a racially discriminatory manner. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In 1988, the state of Minnesota enacted a law that increased the penalty for possession of crack. While the possession of three grams of powder cocaine carried a penalty of five years in prison and/or a fine of $10,000, under the new law possession of three grams of crack cocaine carried a penalty of twenty years in prison and/or a $250,000 fine. In challenging the constitutionality of the law, statistics were presented to the court which showed that 92.3% of all persons convicted of possession of crack in 1988 were Black, while 85.1% of all persons convicted of possession of powder cocaine in that year were White. In finding for the defendants, the court ruled that the statute violated the equal protection clause of the 14th amendment as well as a comparable provision of the Minnesota constitution. Minnesota v. Russell, Hennepin County District Court, December 27, 1990.

On appeal, the Minnesota Supreme Court upheld the lower court's decision and invalidated the disproportionate treatment of cocaine base and cocaine powder under the equal protection

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[3] See Proffer of Dr. George Schwartz, attached to Defendant's Motion to Declare Provisions of 21 U.S.C. § 844(a) Unconstitutional, U.S. v. Maske, Cr. No. 92-0132-01 (TFH) (D.D.C.), exhibit A.

provisions of the State constitution. State v. Russell, 477 N.W. 886 (Minn. 1991). In examining the distinction between crack and powder, the Court stated that an intermediate level review was appropriate "where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired equal protection." Id. at 889. The court then held that equal protection was violated because of the "lack of a genuine and substantial" basis for the distinction, rejecting the State's argument that the crack/cocaine classification served to facilitate prosecution of "street level" dealers or that such disparate treatment was necessary because of the alleged more addictive and dangerous nature of cocaine base.

With the exception of the Minnesota Supreme Court, all courts to date have rejected unconstitutionality arguments advanced by critics of the distinction in sentencing between crack and powder cocaine. Although the 8th Circuit in U.S. v. Simmons[4] declared the 100-to-1 sentencing ratio rationally related to Congress' objective of protecting public welfare and several circuits have made similar rulings, creating a separate set of tougher sentences for low income people of color is unjust, regardless of federal court interpretations. It is instructive to note, however, that the court in Simmons stated that it was "bound by precedent" to reject arguments that the sentencing scheme was constitutionally

[4] 964 F.2d 763 (1992).

disproportionate. It stated that were it writing from a "clean slate", it might have accepted as valid that the 100:1 ratio constituted disproportionate punishment. Id. at 767.

The ACLU submits that Congress' decision to distinguish between cocaine powder and cocaine base is arbitrary and irrational and the substantially higher term for possession of crack discriminates on the basis of race in violation of the due process clause, the equal protection clause and the Eighth Amendment's prohibition against cruel and unusual punishment. Gang-related Crime: Amendment 66

The Commission requests comment on two issues: 1) whether the guidelines should provide for a 4-level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang; and 2) whether a "criminal gang" should be defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses.

We all want to reduce crime in urban communities, but adding years to a convicted defendant's felony sentence for membership in a "criminal gang" is the wrong way to achieve results.

a. Violation of First Amendment Right to Free Association

The First Amendment guarantees freedom of association. It protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the

group or to the truth, popularity, or social utility of the ideas and beliefs which are offered. NAACP v. Button, 371 U.S. 415 (1963). It is not accurate to assume that every single member of every "gang" is involved in criminal or drug-related activities. The motivations for joining a gang are complex and often involve issues of acceptance, trust, and responsibility. It is incorrect to classify away a whole segment of our youth because of their economic circumstances, their color, and/or where they live.

The mixture of criminal and non-criminal activities resulting from gangs demands more exacting governmental definition. For example, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1986) discusses the mixture of criminal and non-criminal activities as follows:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages ... Moreover, in Noto v. U.S. the Court emphasized that this intent must be judged "according to the strictest law," for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other unprotected purposes which he does not necessarily share."

Id. at 919, quoting Noto, 367 U.S. 290 at 299-300.

b. Vague Definition of Criminal Gang

An additional infirmity in the proposed amendment is its vagueness of terms. As our courts consistently recognize, vague

language not only deprives potential offenders of notice with regard to unlawful conduct, its effect is to open the door to arbitrary police enforcement. Under the proposed amendment, this problem is particularly acute with regard to the definition of "criminal gang". For example, the suggested language fails to specify how it is to be ascertained who a "gang member" is. Also, just what is the definition of a "serious drug offense"?
It is insufficient to define a "criminal gang" as "a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses." The absence of standards for making such a determination of guilt is repugnant to both our criminal justice system and to the values inherent in a free democracy.

Moreover, the definition of "criminal gang" is simultaneously too inclusive and too exclusive. The statute may be used against peaceful striking workers, whose peers may have been involved in violent activities. On the other hand, the law would not apply to inside traders or S & L swindlers, who nevertheless are engaged in "criminal" behavior (because the definition specifies violent or drug crimes). Like the crack/powder distinction, this sentencing change will be used against poor people of color while allowing wealthy, White criminals to escape enhanced penalties. Ominously, the vague definition is broad enough to include other political and union "gangs" who may be fighting for social change.

c. Inability to Ascertain Membership

Prosecutors cannot determine, with any accuracy, whether or not a defendant is or was a member of a gang, and thus subject to the penalty enhancement. The L.A. County district attorney released a report on gangs in May 1992. In the report, it was alleged that half of all Black males in the region, between the ages of 21 and 24, were involved in gang activity. According to the police, only 8.5% of Latino men and one half of 1% of Caucasian men in that age group show up in the gang database. Critics of the police in the Black community argue that African American men are being categorized as gang members because of their race, class, neighborhood, and/or the clothes that they wear, not as a result of their conduct.

In Farber v. Rochford, 407 F. Supp. 529 (1975), the District Court in Illinois ruled that an anti-loitering city ordinance targeting specific segments of the population was unconstitutional. The ordinance targeted people "known to be" drunkards, prostitutes, etc. The court ridiculed this language at length -- who would "know," the community, the police, the people themselves?

> Reputation and general knowledge have no certain relation whatsoever to actual condition ... The law enforcement authorities are entitled to punish acts, but not reputation. This law is unconstitutional, as it seeks to punish an individual for what he is reputed to be, regardless of what he actually is.

Id., at 532, quoting People v. Belcastro, 356 Ill. 144 (1934).

Moreover, vagueness of statutory language gives police officers uncontrolled power to arbitrarily select individuals for arrest and jeopardizes the rights of members of unpopular or

controversial groups.. Id., p. 533. See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Grayned v. Rockford, 408 U.S. 104 (1972).

It is not possible for the police or prosecutors to know with any certainty whether an individual on trial is a member of a gang, whether he or she is peripheral or central to alleged criminal activities, or whether the person just "hangs out" with gang members.

It has been our experience that vague laws vesting broad discretion in police officers have inevitably resulted in sweeping within their enforcement large numbers of law-abiding persons who are not the targets of the legislative bodies that pass these laws. This clearly was the result of the efforts of the Chicago Police Department in the early 1980's when as many as a quarter of a million Chicagoans a year were swept off the streets in an effort to stop gang activity. The ACLU successfully attacked those arrests in federal court.

The thousands of persons from communities of color who contacted the ACLU to complain about the "sweep arrests" of the 1980's were decent, law-abiding people whose only "crime" was to be young, a person of color, and being present in gang-infested neighborhoods.

Finally, we are particularly concerned with the potential effect of these vague provisions. Vague statutes are typically applied in a discriminatory manner, and have an overwhelmingly detrimental effect upon the poor and upon communities of color.

Because we will all be the losers if the rights guaranteed by our Constitution are eviscerated in the midst of combatting crime, we oppose the proposed amendment and recommend its complete rejection by the Commission.

Carjacking: Amendment 26

Towards the end of the 102nd Congress, Congress approved a bill making armed carjacking a federal crime punishable by up to 15 years in prison or a life sentence if death occurs. Although vehicular theft is a serious problem, prior to the death of Maryland resident Pam Basu, carjacking was not a federal crime. After her death, however, a full scale assault on carjacking became a national priority. Carjacking, however, is simply a new name for an old crime -- robbery. Carjacking represents a tiny percentage of either auto theft or armed robbery, the two crime categories that most police departments issue it under. It is much more frequent in cities than in suburbs. A few notorious cases have occurred in the suburbs, however, and motorists died, and suddenly an old crime became a national priority with a new federal law.

Billy Davis, spokesperson for the Chicago Police Department stated, "We don't even like to say carjacking... it's robbery and its been going on for a long time. There's a lot of hype going on right now." New York Times, 12-9-92, "Carjacking: New Name for Old Crime." Deputy Inspector Charles DeRienzo of the New York City Police Department's Auto Crime Division agreed: "It's a crime that has been happening for many many years. But carjacking is a name that just rolls off the tongue and sounds good." Id.

In most states, penalties of up to 10, 20 and more years of imprisonment often apply to crimes of armed robbery or armed assault. Pursuant to the sentencing guidelines, robbery has a base offense level of 20; i.e. from 33 - 87 months. If a firearm was discharged, a seven level increase is mandated, i.e. 70 - 162 months, with other level increases dependent upon the specific offense characteristics. In conclusion, carjacking is nothing more than robbery, armed or otherwise, and sufficient penalties exist for such crimes.

Conclusion

We request that this Commission adopt those amendments which seek to eliminate distinctions which undermine concepts of due process and equal protection and reject those amendments which abridge fundamental constitutional rights. We implore the Commission to perform its task of revising guidelines to recognize that the "war" on drugs and crime need not be a "war" on the Bill of Rights.

We thank the Commission for this opportunity to comment.

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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.

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 Shapiro

## 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.

**TESTIMONY ON PROPOSED AMENDMENTS TO §§ 2S1.1 THROUGH 2S1.4 OF THE SENTENCING GUIDELINES**

**DAVID O. STEWART**
**ROPES & GRAY**
**Washington, D.C.**

**Before the United States Sentencing Commission**

**March 22, 1993**

The proposed amendments to the guidelines for money laundering offenses announce the critical principle of "tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds." 57 Fed. Reg. 62832, 62839 (Dec. 31, 1992). This principle would correct a major distortion in sentencing under current guidelines for money laundering, which can readily be manipulated by prosecutors to achieve sharply different sentences for similarly-situated defendants. The manipulation involves adding money laundering charges under 18 U.S.C. §§ 1956 and 1957 to cases that do not fit any reasonable definition of money laundering. This is reflected in money laundering convictions based on (i) garden-variety fraud allegations, United States v. Lovett, 964 F.2d 1029 (10th Cir.), cert. denied, 113 S.Ct. 169 (1992), United States v. Johnson, 971 F.2d 562 (10th Cir. 1992), (ii) bankruptcy fraud, United States v. Levine, 970 F.2d 681 (10th Cir. 1992), (iii) bank fraud, United States v. Kelley, 929 F.2d 582 (10th Cir.), cert. denied, 112 S.Ct. 341 (1991); United States v. Hollis, 971 F.2d 1441 (10th Cir. 1992), petition for cert. filed (Dec. 30, 1992), (iv) pension fraud, United States v. Cusumano, 943 F.2d 305 (3rd

Cir. 1991), cert. denied, 112 S.Ct. 881 (1992), (v) political corruption, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), and (vi) fraud on federal programs, United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991), cert. denied, 112 S.Ct. 3037 (1992); United States v. Henry, No. 3:91-00095 (M.D. Tenn).

As prosecutors candidly admit, money laundering charges are added to such cases solely because the current guidelines establish dramatically higher sentences for money laundering counts than for related fraud charges. The Money Laundering Working Group of this Commission confirmed this pattern in a recent study. In a sample of 24 non-drug cases with additional money laundering charges, 23 defendants faced sharply higher sentences because money laundering counts were included:

| Increased Guideline Levels Due to Money Laundering Count | No. of Cases |
|---|---|
| + 21 levels | 1 |
| + 16 levels | 2 |
| + 15 levels | 1 |
| + 14 levels | 1 |
| + 11 levels | 4 |
| + 9 levels | 5 |
| + 8 levels | 1 |
| + 6 levels | 2 |
| + 5 levels | 5 |
| + 1-4 levels | 2 |

In this sample, the money laundering charges created an average increase of 9 offense levels for sentencing. In most cases, that means that at least two additional years in prison. Whether the defendant faces that additional prison time now turns largely on the prosecutor's discretion to add money laundering counts to other, substantive charges.

The proposed amendment to § 2S1.1 recognizes this inappropriate distortion of the guidelines and begins to address it. This is an important step to reduce unjustified disparity in punishment and unintended prosecutorial power over investigative targets. Although the proposed amendment correctly diagnoses the problem, however, its solution needs more work. In particular, the Commission should reconsider the use of the fraud tables of § 2F1.1 to set money laundering sentences.

Under the proposed amendment to § 2S1.1, most money laundering sentences would be calculated based on the offense levels specified in the fraud table in § 2F1.1, plus 12 offense levels for a drug-related offense and 8 offense levels for non-drug-related offenses. The base offense level from the fraud table is based on the "value of the funds" involved in the offense.

As a practical matter, this amendment will preserve the current distortion in sentencing and prosecution in non-drug

cases. (Because guideline levels are so high in drug cases, there is no significant disparity for drug cases under proposed § 2S1.1.) The Money Laundering Working Group found that in non-drug cases, a money laundering count would increase offense levels by an average of 9 offense levels; the proposed amendment would institutionalize a differential of at least 8 offense levels between fraud and money laundering sentences. Indeed, that differential can be 10 or 12 offense levels if sentence enhancements apply for "special offense characteristics" under the proposed § 2S1.1(b). The differential often will be even larger, though, because of the distinction between "loss" under the fraud guidelines and "value of funds" under the money laundering guidelines.

For example, a scheme to overcharge the federal Medicare program may involve receipt of payments totalling $750,000, of which only $100,000 represents actual overcharges. Under the fraud guideline, the "loss" to the victim (the Medicare program) is $100,000, or offense level 6 before enhancement. But under § 2S1.1 the "value of funds" involved in the money laundering offense will be $750,000, or a level 10 when measured by the fraud table, plus the 8-level increase under § 2S1.1(a)(3), plus "specific-offense characteristic enhancements" of up to four offense levels. The gulf between the offense level for the underlying fraud (6 plus enhancements) and that for the money laundering charge (from 18 to 22) is both huge and contrary to

the Commission's professed goal of "tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds."

Under the proposed amendments, the continuing disparity between money laundering sentences and those for non-drug underlying offenses flows from the ill-advised reliance on the fraud table for determining money laundering sentences. The courts have stressed the error of equating money laundering with theft or fraud for sentencing purposes. In United States v. Johnson, supra, the Tenth Circuit declined to group money laundering and fraud offenses because the former concern "the value of funds" while the latter concern "loss." (971 F.2d at 576).

> Although both offense levels are determined from a calculation involving an amount of money, the harm being measured by each is significantly different in character. "Loss" is used throughout the guidelines as a measure of the net harm resulting from theft and property crimes. . . . In any given case, the "loss" may or may not be the same as the total amount of funds involved in the fraudulent scheme. See U.S.S.G. § 2F1.1 comment (n. 7-10). A determination of loss requires an assessment of the impact of the fraud on the individual victims. Section 2S1.1, on the other hand, is not based on the amount of the loss. It is based on the value of the funds involved in the laundering transaction. The harm from such a transaction does not generally fall upon an individual but falls upon society in general. Thus, the measure of harm under § 2S1.1 is the total amount of funds involved.

For the reasons identified by the Johnson court, the fraud table is not appropriate for determining money laundering sentences. To the extent the fraud table is based on the concept of loss, it simply does not fit the value-of-funds measure for money laundering. Cf. United States v. Kopp, 951 F.2d 521, 535 (3d Cir. 1991) ("loss" under theft guidelines differs from fraud "loss" under § 2F1.1).

The Commission also should address specifically the disparity problem in government "sting" cases, in which government agents represent that funds are the product of specific illegal activity. For defendants in sting cases, the money laundering guidelines should tie the sentence to the underlying offense described by the government agents.

In order to achieve its stated goal of tying money laundering sentences more closely to the sentences for the underlying offenses, § 2S1.1 should be revised in three respects. First, the sentence for non-drug offenses should not exceed the sentence for the underlying offense; that change will eliminate the current powerful incentive for prosecutors to add, or threaten to add, money laundering charges to non-drug, white-collar cases. Second, the previous table for § 2S1.1 should be reviewed or revised to avoid the further disparity caused by using the fraud tables under §§ 2S1.1(a) and 2S1.1(a). Third, the guidelines should provide that the money laundering sentence

in sting cases shall not exceed the sentence for the crimes that supposedly generated the funds at issue.

# US Sentencing Commission
# Hearing on Guidelines

## Testimony
## of
## Charles H. Morley

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U.S. SENTENCING COMMISSION
HEARINGS ON SENTENCING GUIDELINES

TESTIMONY OF CHARLES H. MORLEY
ON
MONEY LAUNDERING GUIDELINES

March 22, 1993

## Introduction

I am here today to offer my comments with respect to the Sentencing Commission's consideration of the sentencing guidelines for money laundering and currency reporting offenses. As the Commissioners can see from my attached Curriculum Vitae (Attachment 1), I have been working with these issues since at least 1979.

For the last seven and one half years I have been in private practice as a consultant to attorneys, law enforcement officials, prosecutors, and foreign governments on the subjects of money laundering, financial investigative techniques, and currency reporting laws. I am an associate member of the American Bar Association, and I am active in the Money Laundering Subcommittee of the ABA's White Collar Crime Committee (Criminal Justice Section).

In late 1992, the co-chairs of the Money Laundering Subcommittee asked me to join the Sentencing Guidelines Working Group. As a member of the working group, I drafted several monographs which explained the types of activities that are common to money laundering (Attachment 2). I also drafted my suggestions for revising the guidelines (Attachment 2). The Commission staff considered these monographs and suggestions in their deliberations of the money laundering portion of the guidelines revision.

I appear today before the Commission in my capacity as an expert on the subjects of money laundering and the currency reporting laws and regulations. I urge the Commission to approve the proposed revised guidelines 2S1.1 and 2S1.2 intact. In the words of the staff report, the revised guidelines establish offense characteristics which reflect "greater sensitivity to such factors as sophistication of the money laundering conduct." I believe the proposed guidelines do an excellent job of accomplishing this important revision. On the other hand, I believe the Commission should consider lowering the offense levels for the currency reporting guidelines (2S1.3 and 2S1.4) to level 6 to bring them in conformity with proposed guideline 2S1.2. I believe level 6 would more realistically reflect the seriousness of these offenses.

## The Scope of the Problem

I would like to commend the Commission's staff for their excellent work. They thoroughly researched the sentencing practices under the statutes, and solicited a wide range of sources for information, assistance, and opinions.

The Sentencing Commission had specific expectations when they adopted U.S.S.G. 2S1.1

> "The Commission expected that U.S.S.G. 2S1.1 would be applied in cases in which financial transactions 'encouraged or facilitated the commission of further crimes,' and to offenses that were 'intended to...conceal the nature of the proceeds or avoid a transaction reporting requirement.'"
>
> ....
>
> "Thus, it appears that the base offense levels in 2S1.1 may reflect a view that 18 U.S.C. 1956 would generally be applied primarily to 'traditional,' and perhaps large-scale, professional money launderers."

However, the staff found that prosecutors have stretched the guidelines far beyond the Commission's expectations.

> "The statutory phrase 'to promote the carrying on of specified unlawful activity' has not been limited to offenses in which the defendant 'encouraged' or 'facilitated' the commission of further crimes, as the Commission indicated in commentary that it expected."
>
> ....
>
> "Offenses that technically qualify as 'money laundering' are frequently simply incidental to, or component parts of, an underlying crime..."

This prosecutorial over-reaching of the Commission's intentions has creating widespread anomalous charging and sentencing practices.

> "Despite the fact that this 'money laundering' conduct may reflect little additional harm to society beyond that reflected in the underlying offense, practitioners assert that, due to the operation of the guidelines, when a money laundering count is charged the sentence can be significantly higher than it would have been if the underlying offense were charged alone."

The staff report provides ample evidence that this has indeed been the case.

The government has prosecuted "incidental" conduct under 18 U.S.C. 1956 using the theory that such incidental conduct encourages or facilitates the commission of further crimes. Take for example corporate officers White and Black, both of whom are bribing foreign officials in order to secure lucrative contracts. White illegally takes funds from his corporation by wiring funds to his own bank account. He does not attempt to otherwise conceal the funds. He then uses the funds to make the bribe payments.

Black on the other hand sets up a number of sham foreign corporations in various offshore secrecy haven countries. He funnels payments through this intricate web in such a way as to make the disbursements appear legitimate to the company and its auditors. He later converts the payments to cash which he then passes under the table to the foreign officials.

Here we have two corporate officers engaged in the same two predicate offenses to the money laundering statutes: wire fraud and violations of the Foreign Corrupt Practices Act. White, admittedly not too bright, has simply misappropriated corporate funds to make the payments. Black on the other hand has constructed a complicated web of offshore transactions that may never be discovered. Yet under the current guidelines, both White and Black could receive the same sentence for their money laundering activities. The guidelines consider White's "incidental" laundering of the funds (his wiring them to his own bank account), as serious as Black's highly sophisticated, and nearly impenetrable laundering network.

As the staff so aptly put it in their report, "*this kind of outcome...conflicts with just punishment principles and gives undue weight to charging decisions.*"

## Concealment
## The Key Element of Money Laundering

I believe the root of the problem arises from the conflict between the guidelines and the universally accepted definition of money laundering. Money laundering is the attempt to hide the source or ownership of money. Concealment is an integral part of the money laundering process.

The laundering of currency (the most common type of laundering found today) is a three step process: placement, layering, and integration.

**Placement** occurs when currency is "placed" into a financial institution.

**Layering** is the process of moving the placed funds among many financial institutions, often in the names of various companies and often in different countries.

**Integration** is the process of returning the funds to "legitimate" use in such a manner that they appear to be from legal sources.

Concealment is an integral part of each of these steps, and is the ultimate goal of the entire process. Yet as the staff's report and the above example indicate, the current guidelines do *not* necessarily take concealment into account.

The staff report shows that in almost 40% of the cases surveyed, the defendant charged with money laundering had **not** taken any steps to conceal or disguise the proceeds of criminal conduct. Of the 60% that, as the staff states, "...could be said to meet the test of 'traditional' money laundering activity," only one third engaged in "any meaningful degree of complexity or sophistication." According to the staff, "the Commission's selection of relatively high alternative base offense levels (20 and 23) was presumably based on the general conclusion that 18 U.S.C.1956 would apply to relatively serious offenses." *Yet only 20% of the cases brought under the current guidelines actually involve these types of offenses.*

Unfortunately the government's ability to prosecute this "incidental" activity as laundering has resulted in a dramatic skewing of sentences.

The report shows that a similar sentencing disparity has arisen from the guidelines for currency reporting violations. This is particularly evident in the guidelines for structuring currency transactions. According to the report, 68% of the persons sentenced for structuring neither knew nor believed they were dealing with criminally derived funds. Yet under the guidelines, these defendants could receive the same sentence as a person recruited as a so-called Smurf for a major laundering organization.

The courts have recognized this disparity, as they have granted downward departures in 24.1% of the monetary reporting cases surveyed.

## Take the Guidelines Out of the Driver's Seat

The Commission staff unequivocally states that the sentencing disparity created by the current guidelines "...conflicts with just punishment principles and gives undue weight to charging decisions." I agree.

Some would argue that the revised guidelines take the punishment out of money laundering offenses. This simply is not true. The proposed guidelines punish both "incidental" laundering and laundering under 18 U.S.C. 1957. Thus the proposed guidelines would still punish laundering that does not involve, in the staff's words, "traditional laundering activities." However the punishment for this less serious laundering would be more directly linked to the punishment for the underlying offense. The proposed guidelines reserve enhancement for those who actively conceal transactions, who engage in sophisticated laundering activities, and for those who launder the proceeds of illegal drug transactions.

There is a key distinction between the current guidelines and proposed guideline 2S1.1. The facts show that the current guidelines punish "incidental" conduct with the same severity as they punish sophisticated laundering. Proposed guideline 2S1.1 assures that the offense levels match the seriousness of the conduct. The proposed guideline provides the criminal justice system with a far more realistic result.

In a similar vein, the proposed guidelines take a much more realistic approach to structuring. Defendants who structure transactions with the intent to evade the reporting requirements are still punished, even if they do not know or believe they are using funds derived from unlawful activity. Proposed guideline 2S1.2 enhances the sentence for those who act with reckless disregard as to the source of the funds. They enhance the sentence further for those who know or believe the funds are proceeds of unlawful activity. These distinctions that give rise to sentence enhancement are a much more realistic approach to matching the punishment to the seriousness of the offense.

Unfortunately, I do not believe proposed guideline 2S1.3 achieves the same result. I believe a base offense level of 6 for 2S1.3 and 2S1.4 is a much more realistic approach to these violations. As with structuring violations, defendants who intend to evade these requirements are still punished. Those who do so with the belief or knowledge that the funds are derived from unlawful activity would receive enhanced sentences.

Unfortunately the current guidelines have made it very attractive for prosecutors to charge these offenses in order to elicit greater sentences for incidental conduct, non-willful conduct, or conduct by a defendant who does not know or believe he/she is dealing with proceeds of unlawful activity.

As the staff has correctly concluded, the punishment dictated by the current guidelines exert an undue influence over prosecutors' charging decisions.

## A Classless Approach to Sentencing

The staff report indicates that a class distinction has arisen under the current guidelines. The staff found that about 70% of all cases involving laundering counts involve drug money. Yet in some cases, the government charged money laundering rather than drug offenses in order to reach a *lower* guideline sentence. The money laundering offense level was higher than the underlying conduct in only 52.5% of the drug cases.

This contrasts sharply with the 25% of cases classified as non-drug cases. In these cases, the money laundering offense level was higher than the underlying conduct in 96% of the cases. In both types of cases, the disparities ranged from minor to very large. In one case the money laundering guideline was 21 levels above that of the underlying offense. Other evidence already cited indicates these disparities may have more to do with the type of underlying offense rather than seriousness or sophistication of the laundering conduct. Prosecutors have charged drug defendants with money laundering to reduce their potential sentences. On the other hand they have used money laundering counts to increase the potential sentence faced by non-drug defendants.

The proposed guidelines make no such class distinction. Sentencing is a function of the laundering conduct, not the nature of the underlying offense.

I recently heard the argument that the proposed guidelines are an attempt to lessen the penalties faced by white collar defendants. From my perspective I can say this is categorically untrue. At the time I offered my suggestions to the Commission staff, I was unaware that they had prepared a report. I was also unaware of the degree to which existing cases reflected such disparities in sentencing. I based my recommendations solely upon my belief that the Commission could modify the guidelines to reflect more realistically the various degrees of sophistication in money laundering. As I stated early in this paper, I believe the proposed guidelines achieve that objective.

I have also heard the argument that these revisions are premature, that we should give the Justice Department's new money laundering policies time to work. But the Justice Department policies do not address the fact that the sentencing guidelines do not match the severity of the laundering or currency reporting violation. I therefore fail to see how waiting for the effect of these policies will make any difference as to the disparities and inequities present in the existing sentencing guidelines. While I applaud the Department's new policies as being long overdue, they do not address the problem at issue here.

## Conclusion

I view money laundering in the abstract, whether the laundering involves drug proceeds, the fruits of wire fraud, or structuring currency transactions to evade the currency reporting requirements. I believe proposed guidelines 2S1.1 and 2S1.2 correctly and fairly match the severity of penalties to the seriousness of the laundering activity, without regard to who does the laundering. These proposed guidelines correctly link the penalties to the underlying offense, but provide for incremental enhancements where appropriate.

Sections 2S1.3 and 2S1.4 should achieve the same result. I therefore urge the Commission to amend these guidelines and provide for a base offense level of 6, with appropriate enhancement language for those who believed or knew the funds involved were proceeds of unlawful activity.

By adopting the revised money laundering and structuring guidelines and making appropriate adjustments to the currency reporting guidelines, we will achieve the goals of Congress and the Commission: To severely punish those who would engage in sophisticated laundering activities, or the laundering of drug proceeds. To continue under the current money laundering sentencing guidelines is to ignore the realities of money laundering while continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants.

- C H M -

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# CHARLES H. MORLEY

## THE MORLEY GROUP
## (1985 - PRESENT)

### FINANCIAL INVESTIGATIONS, CONSULTING, AND TRAINING

Sampling of cases

Investigations include: Bank Secrecy Act civil and criminal investigations; re-insurance fraud against major insurer; money laundering investigations; criminal tax cases; limited partnership fraud; Medicaid fraud risk assessment; commercial fraud; locating hidden or laundered assets; civil & criminal forfeiture cases; and bank fraud.

Complete data base management and spread sheet analysis of financial data

### GOVERNMENT CONSULTING

Central Intelligence Agency/Gama Corporation (1990)

Participated in a strategic analysis session dealing with the current and future programs in international drug money interdiction. The 29 participants were drawn from senior levels of government and the banking industry.

U.S. Information Agency/State Department, International Narcotics Matters (1990-91)

Retained as a consultant with U.S.I.A./State Department to advise senior foreign government officials and private sector leaders on issues involving narcotics money laundering.

Countries Visited: Venezuela, The Bahamas, Costa Rica, Colombia, Ecuador, Paraguay, Brazil, and Argentina.

Government Officials Briefed Included: Presidential, Legislative and Judicial Commissions; Legislators; Supreme Court Justices and staffs; Attorneys General and prosecutors; senior federal and regional law enforcement officials; Central Bank Directors and staffs; bank examination staffs; and senior military officials.

Private Sector Briefings Included: Senior bank executives; bank security officers; banking associations; industry leaders; and trade associations.

Broadcast World-Net program on money laundering to Latin America and Nigeria.

### VIDEO PRODUCTIONS

DEA Financial Investigations Course

*Computer Systems, Business Organizations & Attorney Coordination (1988)*
*Searching Public Records (1988)*
*Tracing Financial Transactions Through Banks (1989)*
*Tracing Stock & Commodity Transactions (1990)*
*Investigating Money Laundering (1990)*
*Using Indirect Methods of Proof (1990)*

*Seizure and Forfeiture of Assets (1990)*

The DEA series consists of multiple, half hour video scripts for the Drug Enforcement Administration's advanced Financial Investigations course.

*Blue Skies and Black Money (1986)*

A dramatization of money laundering, produced for the federal government.

*Opération Buckstop (1986)*

An enforcement video on money laundering produced for the U.S. Customs Service.

U.S. Secret Service (In Process)

An enforcement video on money laundering and forfeiture.

## PAPERS PRESENTED OR PUBLISHED

*The Bank Secrecy Act*
Bank Administration Institute (1986 Seminar)
The Institute for Strategy Development (1986 Seminar)

*Bank Secrecy Act Compliance and the Money Laundering Control Act*
National Assn of Criminal Defense Lawyers (1987 Seminar)
U.S. League of Savings Associations (1987 Seminar)
Bank Administration Institute (1987 Seminar)
Federal Financial Institutions Examination Council (1987 Training class)

*The Illegal Use of Offshore Shell Banks*
Federal Financial Institutions Examination Council (1987 Training class)

*The Role of Wire Transfers in Money Laundering*
Monograph and testimony presented to the U. S. Senate Banking Committee (1989)

*The New Treasury Targeting Regulations, No Room For Error*
Article for *The Journal of Bank Accounting And Auditing* (1990)

*Suspicious Banking Transactions*
Article for *Money Laundering Alert (1990)*

*What the Feds Look For (And How to Find It First)*
Executive Enterprises, Inc. (1990)

*Protecting A Secured Interest From Government Forfeiture*
Article for *The Journal of Bank Accounting And Auditing (1990)*

*The Financial Institution's Guide to Suspicious Transactions*
Monograph for the 1990 ABA/ABA Money Laundering Conference (1990)

*Chasing The Drug Dollars (How Financial Investigations Are Snaring the Drug Lords)*
Feature Article for U.S. Information Agency World-wide Distribution (1991)

*Recent Developments in International Financial Fraud and Suggested Preventative Techniques*
Banker's Association of the Bahamas and the Central Bank of the Bahamas (1992 Training class)

## BOOKS PUBLISHED

*Tracing Transactions Through Financial Institutions*
Written for the Police Executive Research Forum (1987)

*Financial Investigations Check List* and *Quick Reference Guide*
Written for the U.S. Department of Justice, Executive Office of Asset Forfeiture (1992)

*Financial Investigations Source Book* and *Quick Guide*
Published for the Morley Group, Ltd., to be sold to local and state enforcement officials (1992)

## OTHER SERVICES

Money Laundering/Bank Secrecy Act Compliance Systems

Designing/reviewing financial institution compliance, training, and internal control systems. Analyzing financial institution potential exposure to money laundering/Bank Secrecy Act violations.

Financial Investigations Training

Designing financial investigation training systems. Conducting training for domestic and foreign government law enforcement and banking agencies.

Clients include: Police Executive Research Forum (1987 - present); U. S. Customs Service (1992); National Association of Attorneys General (1991 - present); Institute of Internal Auditors (1992); Venezuelan Bankers Association (1992); South Carolina Bank Fraud Working Group (1992); NY District Attorney's Office of Special Narcotics (1992); Bankers Association of the Bahamas (1992); and law enforcement officials from Brunei, Czechoslovakia, Ghana, Greece, Israel, Kuwait, Nigeria, Pakistan, Uganda, Croatia, Italy, Bulgaria, Morocco, Saudi Arabia, Syria, and the United Arab Emirates.

## PRESIDENT, CGM GROUP, INC.
## (1985 - PRESENT)

Video Training Production Company

Producers of the *DIRTY MONEY* series (Written by Charles Morley, Produced by the CGM Group)

*A Banker's Guide to Self-Defense* (1985)
*Recognizing Laundering Schemes* (1986 In cooperation with INTERPOL)
*Teller Compliance and the Bank Secrecy Act* (1987; Revised, 1989)
*Exempting Transactions Under the Bank Secrecy Act* (1987)
*What the Feds Look For (And How to Find It First)* (1989)

The *DIRTY MONEY* series is endorsed and licensed by the major U.S. banking associations. The series is standard training for the U.S. bank regulatory agencies, the banking industry, all the major U.S. law enforcement agencies, INTERPOL and several major foreign enforcement agencies.

## CHIEF INVESTIGATOR
## U.S. SENATE PERMANENT SUBCOMMITTEE
## ON INVESTIGATIONS (1980 - 1985)

Investigations

Investigations and Senate hearings included: Home Health Care Fraud; International Narcotics Trafficking; Commodities Fraud; Criminal Dumping of Toxic Waste; Crime & Secrecy: The Use of Offshore Banks & Companies; Prevention of Drug Abuse Among Youth; The Role of the Entertainment Industry in De-glamorizing Drugs; Domestic Money Laundering: The Bank of Boston; Domestic Money Laundering: Puerto Rico

Books Published

*Crime & Secrecy: The Use of Offshore Banks & Companies*
Senate Staff Study (Co-editor. 1983)
Senate Report (Co-editor. 1985)

Papers Presented or Published

*Laundering Money Through Offshore Secrecy Havens*
FBI/DEA Field Supervisors' Seminar (1983 Training class)
IRS Criminal Investigation Mid-Atlantic Region (1983 Training class)
Battelle Memorial Institute (1984 & 1986 Seminars)
University of Maryland Law School (1985 Seminar)

## SPECIAL AGENT
## IRS CRIMINAL INVESTIGATION DIVISION (1969 - 1980)

National Office representative to Operation Greenback formation task force. Group Manager (1 1/2 yrs). Training Division (4 yrs). Led Special Agent Basic School redesign task force. Led Special Agent Intermediate School design task force. Newark NJ Strike Force (1 yr).

## REVENUE AGENT
## IRS EXAMINATION DIVISION (1967 - 1969)

Completed basic and advanced training. Examined individual, partnership, fiduciary, and corporate returns. Examined issues involving mergers, liquidations, excess retained earnings, controlled groups, sham transactions, and other complex issues.

## TOUCHE ROSS CPA FIRM (1965 - 1967)

## EDUCATION AND MEMBERSHIPS

University of Maryland honors graduate in accounting and finance (1965)
Completed 61 quarter-hours of law at University of Denver (evenings, 1971 - 1972)
Associate member, National Association of Criminal Defense Lawyers
Associate member, American Bar Association
Member Litigation, Tax, & Criminal Justice Sections
Member White Collar Crime Committee & Money Laundering Sub-Committee
Member Money Laundering Sentencing Guidelines Working Group
Member Complex Crimes Committee & Securities Fraud Sub-Committee

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Date: November 4, 1992

**MEMORANDUM**

To: The Money Laundering Subcommittee
From: Chuck Morley
Subject: Sentencing Guidelines for Money Laundering

In my second memorandum on sentencing guidelines, I refined my initial notes on money laundering and grouped the various offense characteristics under three headings: placement, layering, and integration. I have now further reduced these elements of money laundering and have put them into a hierarchy. The result is the following broad offense characteristics.

Note that these are not separated by placement, layering, and integration, but take these laundering steps into account. Note also that using an alias, presenting false information, or making false statements, only increase the levels for transactions involved in the layering or integration phase of money laundering. I think to make this work, we will need a short paragraph giving the agreed upon definition of placement, layering, and integration. That paragraph will save us the trouble of trying to use more words in the explanation of the characteristics themselves.

In my first memorandum of September 30, I recommend the base offense level for 2S1.1 and 2S1.2 be the *same* base offense level as the predicate offenses proven to sustain the section 1956 or 1957 offense. Section 2S1.1(b)(1), 2S1.2(b)(1)(A)&(B) remain the same as they now are. Sections 2S1.1(b)(2) and 2S1.2(b)(2) remain the same, but I recommend the value of the funds increase be capped *for increases resulting from government sting or reverse sting operations*. A new section is added under the Specific Offense Characteristics for both 2S1.1 and 2S1.2. The wording of the new section reflects the specific offense characteristics detailed below.

I have ranked the various characteristics below, but query whether or not these characteristics should be given specific levels (ie., 20, 23, etc), independent of the level assigned to the underlying offense. What we are saying is without the characteristics below, money laundering carries the same penalties as the underlying offense. This presumably would give rise to concurrent sentences (?). But once the defendant undertakes overt

laundering, a separate crime with separate guidelines has taken place, and separate sentencing is indicated.

As of the hour of this fax, I have not completed my work on 2S1.3 and 2S1.4. I hope to have that completed by later today.

## SPECIFIC OFFENSE CHARACTERISTICS

1. If the defendant conducted, attempted to conduct, or assisted in conducting a transaction through a straw party, a front company, or by concealing transactions in one or more legitimate businesses, increase by 2 levels.

    a. If the transaction is an attempt to layer or integrate the funds, or if as part of layering or integrating, an alias is used, increase by 3 levels.

2. If the defendant prepared or presented, attempted to present, or assisted in preparing or presenting altered, false or fraudulent documents with the intent of disguising the true source or ownership of funds, increase by 2 levels.

    a. If the transaction is an attempt to layer or integrate the funds, or if as part of layering or integrating, false information is supplied or false statements are made, increase by 3 levels.

3. If the defendant placed funds into, or moved funds through a company or financial institution outside the United States, increase by 3 levels.

**- C H M -**

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Date: October 14, 1992

**MEMORANDUM**

To: The Money Laundering Subcommittee
From: Chuck Morley
Subject: Sentencing Guidelines for Money Laundering

I am further refining my initial thoughts on the money laundering sentencing guidelines in accordance with our committee members' telephone conference call today.

The universally agreed upon definition of money laundering involves three steps: placement, layering, and integration. I have therefore attempted to group the offense characteristics detailed in my 9/30/92 memorandum under each of these three laundering steps.

I. PLACEMENT

A. Conducting currency transactions involving the proceeds of SUA in such a way as to evade the currency reporting/record keeping thresholds.

*Examples*

1. Structuring currency transactions involving the proceeds of SUA with the intent to evade the currency reporting/record keeping requirements;

*Examples*

a. Depositing the currency proceeds of SUA in amounts of $10,000 or less into a financial institution.

b. Using cadres of third parties to structure currency transactions involving the proceeds of SUA, or allowing oneself to be so used.

c. Purchasing multiple monetary instruments for oneself or another with less than $3,000 of currency proceeds of SUA for the purpose of evading the currency record keeping requirements.

d. Transporting currency proceeds of SUA across U.S. borders in amounts of $10,000 or less for oneself or another for the purpose of evading the CMIR filing requirements.

e. Breaking up large blocks of currency proceeds of SUA into smaller amounts for oneself or another for the purpose of keeping any other type of currency transaction under the currency reporting/record keeping thresholds.

2. Presenting false information or making false statements in order to cause a false currency report to be filed or a false currency record to be made with respect to proceeds of SUA.

*Examples*

a. Using a false drivers license.

b. Using a false passport or alien identification card.

c. Using a false credit card.

d. Giving a false name.

e. Using a false address.

f. Using a false telephone number.

g. Giving false identification numbers.

h. A person giving false information to a third party who is to make a currency transaction on behalf of the person.

i. A person intentionally keeping a transaction secret from third parties who, in the normal course of events, would have knowledge of the transaction.

j. A third party providing false documents to be used to cause a false currency report/record to be made.

3. Presenting false information in order to obtain an exemption from a bank with respect to the proceeds of SUA.

*Examples*

a. Making false statements or presenting false documentation to a bank in order to obtain an exemption.

b. Bribing or offering other illegal inducement to a banker in order to obtain an exemption.

c. A third party making false statements as part of a "cover story."

4. Bank, non-bank financial institution, or non-financial institution business employees, business employees, or others knowingly assisting in the placement of the proceeds of SUA.

*Examples*

a. Holding the currency proceeds of SUA back and feeding it into accounts/purchases in amounts under the currency reporting/record keeping thresholds.

b. A Casa de Cambio recording a single large transaction with one party as multiple small transactions conducted in the names of fictitious parties.

c. Preparing CTRs/8300s on a customer's transactions involving the proceeds of SUA, but willfully failing to file them.

d. Filing false CTRs/8300s with respect to a customer's transactions involving the proceeds of SUA.

e. Not filing CTRs/8300s on a customer's transactions involving the proceeds of SUA.

f. Preparing fraudulent bank exempt list information or documentation on behalf of a customer.

g. Willfully failing to aggregate currency transactions involving the proceeds of SUA, and known to be by or on behalf of the same person.

h. Willfully preparing false bank, financial institution, or business records in order to conceal the placement of proceeds of SUA.

*Example*

(1) In Puerto Rico, in 1985, certain financial institution officers knowingly entered false names on ledgers used to identify the purchasers of bearer certificates of deposit. The officers kept a code book which identified the true owners of the certificates.

5. Conducting a currency transaction involving the proceeds of SUA in the name of an alias, a straw party, a front business, or through a legitimate business for the purpose of having a false currency report filed or a false currency record made.

*Examples*

a. A Casa de Cambio deposits a customer's currency proceeds of SUA into the Casa's bank account to make it appear that the currency belongs to the Casa rather than the Casa's customer.

b. A trafficker has an associate buy a luxury automobile with the proceeds of SUA in the name of the associate in order that the trafficker's name will not appear on the form 8300.

c. A customer presents false identification in order that a currency report/record filed with respect to the proceeds of SUA will contain false information.

d. A person allows his/her name to be used in a currency transaction involving the proceeds of SUA, knowing the result will be a false currency report/record being made.

e. An attorney allows a client to place the proceeds of SUA into his/her escrow or other accounts to make it appear that the currency belongs to the attorney, rather than to the client.

f. A person formes a front cash business in order to disguise the true source of currency deposits from SUA.

g. A person co-mingles proceeds of SUA with legitimate revenues of a legitimate business in order to hide the true source of the dirty money.

h. In U.S. vs Sharir, a jeweler shipped over $100 million in currency to a third party jewelry company in order to "buy" gold bullion to be used in the manufacture of gold rope. Sharir knew the currency was proceeds from the sale of narcotics and the purported gold purchases were in fact sham transactions designed to disguise the true nature of the currency. The bank filed CTRs on the jewelry company, not Sharir.

B. Placing the proceeds of SUA into a financial institution, business or asset in such a way as to conceal the true nature or ownership of the proceeds.

C. Using offshore bank accounts to receive the proceeds of SUA.

*Examples*

1. Currency proceeds of SUA illegally smuggled out of the source country is deposited into a haven bank account.

2. Funds representing the proceeds of SUA are wire transferred to an offshore bank account of an offshore shell company; the company and account having been established to receive the proceeds of SUA.

II. LAYERING

A. Conducting a transaction involving the proceeds of SUA in the name of an alias, a straw party, or a business.

*Examples*

1. Opening a bank, stock or investment account in the name of an alias and moving funds through the account to additional accounts or assets.

2. Forming a corporation, partnership, or other business entity in the name of an alias, in order to move funds through it to additional entities.

3. Obtaining identification documents or other types of documents in the name of an alias in order to facilitate creating layers between the source of funds and the disposition of the funds.

B. Knowingly using a business (whether a legitimate business or a shell company) to facilitate the laundering of the proceeds of SUA.

*Examples*

1. Establishing and using one or more businesses that have no legitimate business purpose other than to act as conduits for the proceeds of illegal activities.

2. Incorporating offshore shell corporations that have no legitimate business purpose other than to create layers of transactions to facilitate laundering of the proceeds of SUA.

3. Using offshore corporations to commit fraud.

C. Creating or using two or more controlled (directly or indirectly) business entities for the transfer of funds in such a way as to facilitate laundering of the proceeds of SUA.

*Examples*

1. Repeatedly moving funds representing the proceeds of SUA among various controlled businesses, where the evidence shows that the movement of such funds has no apparent legitimate business purpose.

2. Moving funds representing the proceeds of SUA among various controlled businesses solely in order to create multiple layers of transactions between the origin of the funds and the ultimate transactor.

D. Knowingly assisting in subverting a business (whether a legitimate business or a shell company) to facilitate laundering of the proceeds of SUA.

*Examples*

1. An attorney incorporates one or more businesses for the primary purpose of creating layers to facilitate laundering of the proceeds of SUA.

2. A bank official, stock broker, etc., sets up a series of accounts and/or transactions for a person or business for the primary purpose of creating layers of transactions to facilitate laundering of the proceeds of SUA.

3. Knowingly making false or fraudulent entries in the business records to hide the true nature of transactions involving the proceeds of SUA.

4. Knowingly preparing, presenting, or accepting false or fraudulent documents to hide the true nature of transactions involving the proceeds of SUA.

5. Knowingly altering records to hide the true nature of transactions involving the proceeds of SUA.

6. Purposefully not keeping the types of records normal for the business in order to conceal the true nature of transactions involving the proceeds of SUA.

7. Purposefully destroying records that would normally be retained under normal business circumstances in order to conceal the true nature of transactions involving the proceeds of SUA.

8. Knowingly using false, altered, counterfeit, stolen, or otherwise non-legitimate documents to conceal the true nature of transactions involving the proceeds of SUA.

*Examples*

a. Submitting a false credit application.

b. Submitting a false bank or stock brokerage account opening form.

c. Using a false stock, bond, certificate of deposit, or other security.

d. Submitting false tax returns.

9. Knowingly making false statements in order to conceal the true nature of transactions involving the proceeds of SUA.

## III. INTEGRATION

A. Knowingly using a business (whether a legitimate business or a shell company) to facilitate laundering of the proceeds of SUA.

*Examples*

1. Opening a bank account, stock account, or other type of investment account in the name of a minor child, a spouse, a

spouse's maiden name, a mother's maiden name, a third party's name, etc., and conducting transactions through the account in order to avoid having any records of the transactions in the defendant's accounts.

2. Establishing and using one or more businesses that have no legitimate business purpose other than to act as resting places for the proceeds of SUA.

3. Intentionally conducting transactions involving the proceeds of SUA through an otherwise legitimate business or business account in such a manner as to disguise the proceeds or otherwise make them appear "normal".

B. Conducting a transaction in the name of an alias, a straw party, or a shell company for the purpose of concealing the illegal nature of the proceeds of SUA and making the proceeds appear legitimate.

*Examples*

1. Purchasing assets in the name of a third party (who may or may not be aware of the purchase) in order to hide the fact that the defendant is the true owner.

2. Allowing one's name to be used to buy an asset, knowing the purpose to be an attempt to hide the true identity of the owner of the asset.

3. An attorney allowing his/her escrow or other accounts to be used to hide the true identity of the owner of an asset.

4. Using secretly owned or controlled offshore corporations to "loan" money or otherwise "finance" the purchase or operations of U.S. based assets or businesses.

5. Using offshore corporations to provide fraudulent documentation for transactions.

C. Falsifying records to make illegal transactions appear legitimate.

*Examples*

1. Inflating invoices to fraudulently "document" the receipt of the proceeds of SUA.

2. Inflating purchase documents, shipping documents, etc., to fraudulently "document" the transfer of the proceeds of SUA.

3. Inflating currency receipts to fraudulently "document" the receipt of currency proceeds of SUA.

4. Submitting false or fraudulent documents to fraudulently "document" transactions involving the proceeds of SUA.

*Examples*

a. In Operation Polar Cap I, the defendants attempted to document the legitimacy of over $1 billion in proceeds from SUA by claiming the transactions involved the purchase and sale of gold bullion.

b. In U.S. vs Sharir, a jeweler shipped over $100 million in currency to a third party jewelry company in order to "buy" gold bullion to be used in the manufacture of gold rope. Sharir knew the currency was proceeds from the sale of narcotics and the purported gold purchases were in fact sham transactions designed to convert the proceeds of SUA into "legitimate" holdings of gold bullion.

**- C H M -**

**INTERNATIONAL ASSOCIATION OF RESIDENTIAL AND COMMUNITY ALTERNATIVES**

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Testimony concerning proposed U.S. Sentencing Commission Guideline Amendments for Public Comment

March 15, 1993

Submitted by: Mary K. Shilton on behalf of
The International Association of
Residential and Community Alternatives

Chairman Wilkins and Commissioners:

I am pleased to testify today on behalf of the International Association of Residential and Community Alternatives (IARCA). Founded in 1964, IARCA is dedicated to promoting and enhancing community-based correctional services as well as providing professional development for its members.

IARCA represents more than 250 private agencies operating over 1500 programs. It also serves over 600 individual members employed in community alternative and residential programs. They operate in conjunction with courts, departments of corrections, probation, the Federal Bureau of Prisons, counties and cities throughout the United States.

IARCA members are involved in a wide variety of programs including:

* Community Based Corrections Centers
* Educational/ Vocational Services
* Drug Testing/Treatment
* Tutoring Services
* Day Treatment
* Crisis Intervention
* Family/Individual Counseling
* Victim Services
* Community Service Supervision
* Bail Supervision
* Home Detention/Electronic Monitoring
* Neighborhood Outreach
* After Care

Approximately 80% of the adult community-based corrections facilities in the United States are represented by IARCA and its members.

IARCA is pleased that the Commission has published the wide range of proposals and issues for consideration at this hearing. I will focus on proposals related to the use and development of alternative punishments because community based sanctions have not been fully developed under the Federal Guidelines. It is IARCA's position that they offer more cost-effective punishments than incarceration.

There are several steps necessary to improve correctional treatment of offenders under the Guidelines, particularly in the area of community-based alternatives. With respect to issues for comment published by the Commission, proposals 32, 33, and 52 provide a context for several of the following recommendations:

* In view of Federal budget cuts for planned prison expansion, the Guidelines should save existing prison space for serious and violent offenders, and emphasize lower cost community based alternatives for nonviolent offenders.
* Continue to document the impact of mandatory minimums and the Anti-Drug Abuse Act of 1986.
* Develop guidelines which expand both categories of eligibility and range of community based options permissible as a condition of probation or as substitution for prison.
* Permit alternative sentences to be served in lieu of imprisonment by most drug offenders, and other non-violent first time offenders.
* Work with judges to develop sentencing practices which more fully utilize presently available alternatives.
* Include a sentencing policy of presumed transitional release programs for up to twelve months prior to release from prison.
* Gather available data related to information about basic questions concerning fairness, costs, recidivism and impact on the justice system and its components.

<u>The Commission and its staff are to be applauded for documenting the impact of Federal mandatory minimum sentences and the Anti-Drug Abuse Act of 1986.</u>

The Commission deserves credit for its leadership in studying the impact of mandatory minimums and their erosion of the Guidelines.[1] This is especially important due to the provisions of the Anti-Drug Abuse Act of 1986 which have created increased penalties and limited the ability of the guidelines to

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[1] United States Sentencing Commission, <u>Special Report to Congress: Mandatory Minimum Penalties In the Federal Criminal Justice System (August 1991).</u>

provide fair and proportionate sentences under these statutes. The Commission should continue to highlight the high rate of incarceration for this group as it affects potential rehabilitation, fair punishment, and burden on the justice system.

During the decade of the 1980s, a confluence of factors brought about considerable changes in Federal sentencing practices. The greatest number of offenders were affected by changes in drug related sentences. The U.S. Department of Justice, Bureau of Justice Statistics profiled the impact of our Federal drug sentencing policies during the past decade. There was a 213% increase in drug related cases between 1980 and 1990. The percent change of those sentenced to prison increased 274% during the decade, but the average prison term for drug offenders increased 515% over that period.[2]

Although the numbers outlined above give overall patterns,little effort has been made to document the individual human costs until recently. Examples of individual cases compiled by Families Against Mandatory Minimums bring home the human impact of our drug sentencing policies.

* O. Maffett Pound is serving a 20 year sentence for conspiracy to distribute 300 pounds of marijuana as a first offense. Maffett is a 52 year old owner of a Mississippi resort who purchased marijuana for his own consumption and his friends.
* Maffett's wife was sentenced to 5 years in prison for not turning him in although she did not use drugs. At her sentencing, the judge indicated he was forced to give her the 5 year term under the guidelines.
* Bobby Joe Ward is serving a 6 1/2 year sentence for manufacturing marijuana plants. Bobby Joe is a 60 year old retired coal miner with black lung disease who was arrested at his son's marijuana patch.
* Charles Dunlap is a 46 year old father, who worked for the army, as a fireman and as an emergency medical technician. He rented a truck for an informant to off-load marijuana. He is serving 8 years for conspiracy to import 10 tons of marijuana.

While IARCA supports incarceration of high volume, career drug dealers, it does not support the preferred use of incarceration of most non-assaultive criminals. We must take immediate steps to treat these non-assaultive offenders differently that violent, predatory offenders.

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[2] See Attachment A prepared by the National Association of Criminal Justice Planners, Washington DC (1993).

With half of all defendants sentenced to prison in 1990 guilty of drug-related offenses, and many to mandatory terms, it is time to re-evaluate whether our sentencing laws should permit assignment of many of these offenders to community alternatives, home confinement with electronic monitoring, and halfway houses. The nation cannot afford to continue imprisoning offenders who can be punished more effectively in community programs.

The Sentencing Guidelines should adopt a capacity-based approach to sentencing to give priority for holding the most serious and violent offenders.

The United States is on the verge of a massive prison building boom through the 1990s. According to the U.S. Department of Justice, Bureau of Justice Statistics, the population in federal prisons was 65,526. The Wall Street Journal(3/12/93) reports that the Federal prison population is projected to be 133,000 by the year 2000. The number of Federal prisoners increased at a higher rate than state or local prisoners during 1990.

It costs about one twentieth of our 1992 national debt to care for prisoners in the United States. Cells cost about $110,000 to build and it costs nearly $20,000 per prisoner per year on the average.

Federal prisons are operating at 151% of their capacity although a 1991 study by the General Accounting Office found that halfway houses were 27% under-utilized by the Federal government. Unless the Guidelines are also based on an assessment of limited space and resources, we will continue to fill prisons while ignoring the availability of more effective community-based programs.

The Sentencing Guidelines have increased the length of many sentences while failing to create rehabilitative options for many offenders.

A majority of Federal offenders have not committed a violent offense,[3] yet most receive a prison sentence. Most Federal offenders are ranked at the lowest and second lowest security levels and are not classified as dangerous.[4] Despite these facts, many will serve prison sentences because the Guidelines increased length of terms.

In developing Guidelines and avoiding unwarranted disparity

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[3] Bureau of Justice Statistics, U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 1990, p.646 (1991).

[4] Id.

in sentencing, the Commission has narrowed its focus to an offense and criminal history classification system. This was accomplished by creating a sentencing decision process which does not reflect other variables such as age, infirmity, culpability and capacity for change which may have been considered by the pre-guidelines sentencing judge. The tendency, in many instances, has been to apply more stringent confinement practices than are justified by the goals of rehabilitation, need for deterrence, incapacitation or demand for punishment proportionate to the offense.[5]

Although longer sentences have not resulted in all cases under the guidelines, the pattern has been to lengthen sentences. A recent study by Gerald W. Heaney, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit concluded that some Federal prisoners are serving twice as long as they did prior to sentencing guidelines and the number of offenders receiving probation has declined dramatically. Some writers have noted the importance of prosecutorial discretion in determining the ultimate sentencing result. Because the guidelines were based on sentences which were generally shortened by parole, and parole is now no longer available, this has had a tendency to lengthen terms when coupled with mandatory minimums.

<u>The Guidelines should set forth specific provisions to develop opportunities for intermediate sanctions and community based punishments.</u>

The statutory purposes of the Guidelines give equal weight to the primary goals of sentencing: punishment, deterrence, incapacitation, restitution and rehabilitation, as well as elimination of unwarranted disparity.[6] However, the legislation also indicates that when a court is considering whether to imprison and if so the length of term then it should note that "..imprisonment is not an appropriate means of promoting correction and rehabilitation."[7]

Because the legislation does not recognize rehabilitation as a basis for imprisonment, the Guidelines should provide a range of non-incarcerative rehabilitative options for all but the most serious offenders who are imprisoned for life. To provide no rehabilitative options for large categories of offenders is to disregard effective correctional treatment as one of the four

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5 For a lengthy discussion of thispoint of view see "Calculating Injustice: TheFixation on Punishment as CrimeControl," 27 <u>Harvard Civil Rights-Civil Liberties Law Review</u> (1992) at p. 597.

6 18 U.S.C. Sec 3553(a) (1988).

7 See 18 U.S.C. Sec. 3582"(a)(1988)

purposes of the legislation.

The Guidelines should include a non-incarcerative rehabilitative option for all non-violent first time offenders. As recommended in the Corrothers' Alternatives to Imprisonment Project Report, this can be accomplished by expanding the array of sentencing options to include: residential incarceration, intensive supervision, public service work, bootcamps, and day reporting centers as a substitute for imprisonment.[8] Another possibility is to extend split sentence options to Zone D. In addition, transitional release programs to halfway houses should be the norm for offenders for up to 12 months prior to their release from prison.

Rehabilitation is more likely to occur in an alternative sentencing program.

There is growing evidence that rehabilitation is more likely to occur with use of halfway houses or other alternatives in lieu of confinement.[9] According to Ralph Ardito, Jr. President, Federal Probation Officers Association. "Unlike prison, intermediate punishment programs deal with some root causes why people commit crime..They help offenders get a job and they receive treatment for their addiction and counseling for them and their families."

If appropriate offenders receive drug treatment, literacy training, and job placement in the community, they can become productive members of that community. This will enable them to support their families, build their neighborhoods and help reduce crime. Stable families with adequate economic support and opportunity for the future are the best anti-crime measures.

The National Institute of Justice reported that electronic monitoring was successful in three out of four cases. Only 11% of drug offenders granted home confinement in Florida re-offended compared to 27%. In Genessee County , Michigan 79% of offenders who completed community residential programs did not commit a new crime. Day reporting centers have reported successful completion rates as high as 80%. These are but a few of the program evaluations indicating lower rates of recidivism for community

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[8] See United States Sentencing Commission Alternatives to Imprisonment Project, The Federal Offender: A Program of Intermediate Punishment, (1990).

[9] The Challenge of Crime in a Free Society indicated community based programs are less expensive and at least as effective as incarceration according to Norval Morris and Michael Tonry, Between Prison and Probation, New York: Oxford University Press, 1990.

corrections programs.

Many judges believe that intermediate punishment programs are an effective option in lieu of prisons. In a survey of 225 federal judges a majority supported a wide array of sentencing alternatives and many indicated there were too few intermediate punishment programs available. Among the programs they identified for expansion were:community service, intensive supervision, electronic monitoring, boot camps and community treatment centers. Focused telephone interviews indicated that the most frequently mentioned program that was lacking was community treatment centers and home confinement with electronic monitoring.

Intermediate sanctions should be approached as a public private partnership. Both Federal and private agencies operate programs successfully but citizens, businesses and nonprofit groups should be engaged in the planning, implementation and delivery of services.

<u>The Commission should further expand the guidelines to permit courts to sentence non-violent first offenders to alternatives as suggested in Issue 32.</u>

Issue 32 suggest courts should impose sentences other than imprisonment for first offenders convicted of non-violent offenses. IARCA urges the Commission to develop and adopt an amendment as indicated by extending the option of a community sentence to all first time offenders including Zone D. There is a preference for this to be handled as an extension of Zone A rather than as a downward departure. If it were treated instead as a downward departure, it would increase the complexity of the sentencing process.

There is growing public support for the greater use of intermediate sanctions. A 1991 survey by the Wirthlin Group of 1,000 Americans indicated that four out of five support community-based corrections provided selected offenders are closely supervised, pay restitution, get a job and participate in substance abuse treatment. This is consistent with public opinion polls by the Public Agenda Foundation, Figgie International, Gallup and Harris polls which found that the public wants tough but rehabilitative programs for non-violent offenders.

<u>Under proposed issue 52, the Guidelines would be revised to presume probation without confinement for Zone A unless there is a finding to the contrary.</u>

IARCA supports proposed amendment 52 which would require a Zone A sentence to be probation without confinement unless the court gives reasons stated on the record that imprisonment is

necessary to serve the purposes of sentencing. There is presently a failure of judges to use probation or alternative split sentences for some offenders who would otherwise be eligible. Although there are a number of compelling reasons for declining to use non-incarcerative sentences permissible under the existing guidelines, these could be noted by the judge at sentencing.

Prison beds should be saved for violent offenders and those with a record of aggressive or dangerous behavior. With respect to non-violent first time offenders, the Guidelines should presume that punishment will be limited to probation or alternative community punishments in the absence of a finding by the sentencing judge that there is an adequate basis for a departure from this guideline. Such a presumption would be consistent with the tradition of parsimony in use of incarceration when more effective options are available.

IARCA supports an increase in the availability of the type of sentences in Zones A and B to more offense levels within all criminal history categories as proposed in 33.

Approximately 62% of all Federal offenders could be assigned to community based alternative punishments. In 1990 the Federal Bureau of Prisons reported that only 18.2% of the more than 65,500 prisoners were placed in halfway houses. Richard M. Bilby, United States District Judge, District of Arizona noted summed up the response of many judges when he noted: "We need more halfway houses because these programs keep offenders off the streets and away from those who contributed to their criminal behavior, they help offenders get a job and they mandate drug testing and treatment."

Halfway houses are most often private agencies under contract with the Bureau of Prisons. In order to adhere to the strict standards set by the Bureau of Prisons all Federal offenders are required to undergo drug testing and urinalysis, participate in substance abuse treatment, a GED or remedial education, and gain employment. Offenders are required to pay 25 percent of their gross wages for room and board and pay all court-ordered fines, costs and restitution.

There is a need for more information about individual impacts of the guidelines on offenders as well as on the entire justice system.

This Guideline decision model fails to adequately report on individual offender outcomes as well as justice system results. The Commission's publications have neglected to analyze results related to such factors as: cost for sentencing options, and whether current practices in any way limit the impact of crime on society. As a recent GAO report concluded: " At this time, neither we nor the Commission can definitively answer the central

question posed by Congress regarding how effective the sentencing guidelines have been in reducing sentencing disparity"[10].

In order to gain an understanding of whether the guidelines have any discernable impact on reducing crime or rehabilitating offenders, the Commission must continue to work with other Federal agencies to develop a better profile of sentencing outcomes, including probation, alternative sanctions and split sentences.

The Commission should continue to work with other agencies in gathering data about costs of imprisonment and sentencing alternatives, recidivism of various sentences populations, and impact of incarceration practices on the other justice agencies. Although statistical analyses and descriptions of offender characteristics and types of sentences are widely available, this information does not adequately describe the impact of the Sentencing Guidelines on crime reduction. For example, there is very little information about the effect of widespread use of imprisonment for the nearly half of all felons who are convicted of drug crimes. By sentencing them to prison are we doing as much as we can to preclude the possibility that they will re-offend upon release?

There is little information about the average cost of incarceration as compared to probation, split sentence and community based alternatives. According to national figures, it costs about $110,000 to build a prison cell and about $19,244 to house a person in prison for a year. In contrast, some intermediate sanctions are one third the cost of incarceration. More information is needed about the cost of prison compared to alternatives where prisoners can earn a wage, pay room and board and family support.

With respect to an analysis of results, the Commission has not gained sufficient access or used data from public defenders, prosecutors, the courts and other Federal agencies to indicate the real outcomes of the Guidelines. This has failed to shed light on the real decision points in the sentencing process. It has also failed to highlight the overall results of our increased incarceration rates.

I thank the Commission for this opportunity to discuss the expansion and use of alternatives under the Guidelines. I commend the Commission for its willingness to consider these issues which are very important to system of justice. It is my belief that the Commission will not have adequately addressed the area of fairness in sentencing until all sentences short of life include

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[10] United States General Accounting Office, Sentencing Guidelines: Central Questions Remain Unanswered, August 1992.

a community corrections sanction component.

ATTACHMENT A

TOTAL DEFENDANTS CONVICTED IN FEDERAL COURTS, 1980 TO 1990

| | 1980 | 1987 | 1988 | 1989 | 1990 | PERCENT CHANGE 1980-1990 |
|---|---|---|---|---|---|---|
| TOTAL | 29,943 | 44,518 | 43,587 | 46,779 | 46,283 | 55% |
| VIOLENT | 2,134 | 2,241 | 2,140 | 2,180 | 2,282 | 7% |
| PROPERTY | 10,780 | 14,349 | 13,434 | 13,546 | 13,399 | 24% |
| DRUGS | 5,135 | 13,423 | 13,383 | 15,803 | 16,068 | 213% |
| PUBLIC ORDER | 11,893 | 14,500 | 14,581 | 15,256 | 14,877 | 25% |
| PERCENT THAT ARE DRUG CHARGES | 17.1% | 30.2% | 30.7% | 33.8% | 34.7% | |

NUMBER OF FEDERAL DEFENDANTS SENTENCED TO PRISON

| | 1980 | 1987 | 1988 | 1989 | 1990 | PERCENT CHANGE 1980-1990 |
|---|---|---|---|---|---|---|
| TOTAL | 13,766 | 23,579 | 23,450 | 27,366 | 27,955 | 103% |
| VIOLENT | 1,770 | 1,837 | 1,733 | 1,892 | 1,999 | 13% |
| PROPERTY | 4,630 | 6,234 | 5,723 | 5,974 | 5,775 | 25% |
| DRUGS | 3,675 | 10,196 | 10,599 | 13,306 | 13,754 | 274% |
| PUBLIC ORDER | 3,690 | 5,312 | 5,395 | 6,194 | 6,427 | 74% |
| PERCENT THAT ARE DRUG CHARGES | 26.7% | 43.2% | 45.2% | 48.6% | 49.2% | |

AVERAGE PRISON TIME (NUMBER SENT TO PRISON TIMES AVERAGE TERM) IN YEARS

| | 1980 | 1987 | 1990 | PERCENT CHANGE 1980-1990 |
|---|---|---|---|---|
| TOTAL | 50,824 | 108,463 | 125,027 | 146% |
| DRUGS | 14,424 | 57,607 | 88,713 | 515% |
| NON-DRUGS | 36,398 | 50,855 | 36,314 | 0% |
| PERCENT THAT ARE DRUG CHARGES | 28.4% | 53.1% | 71.0% | |

PREPARED BY NATIONAL ASSOCIATION OF CRIMINAL JUSTICE PLANNERS-WASHINGTON DC

NORML
National Organization
for the Reform of
Marijuana Laws.

*estalished 1970*

March 15, 1993

To the UNITED STATES SENTENCING COMMISSION GUIDE LINE HEARINGS:

We understand that it is not within the power of this Commission to change even the most unjust laws, but it is within your power to lessen the evil consequences of such laws. When a very substantial minority of the population (meaning many millions of Americans, including millions of non-users of cannabis) believe that a body of laws is unjust, then the harsh enforcement of such laws further erodes the respect for the Law in general, and alienates a large segment of the population. We believe that this is a valid point of consideration for this Commission.

The National Organization for the Reform of Marijuana Laws (NORML) is opposed to any imprisonment of persons for the possession, growing, or sale (to adults) of cannabis. We believe that the imprisonment of such persons is not only unjust, but also an absurd waste of finite resources at a time when the nation is being overwhelmed with violence. NORML wishes to point out that virtually all of the violence associated with the use of cannabis is that perpetrated by the government itself.

At the very least, we pray that the Sentencing Commission will take these points into consideration:

1. The reduction of marijuana related offenses from Level 38 to Level 25 would leave such offenses in Zone D, but would save the government huge sums and free up overcrowded prison space for violent offenders.
2. Special consideration should be given to those possessing or growing cannabis for medicinal use. The United States government should not be in the business of persecuting the sick and dying, which at present it does. Currently, there is no consideration given to the medicinal use of cannabis even though it has been recognized by the Drug Enforcement Administration's own administrative law judge as having a wide range of medical uses. This fact should be reflected in the guidelines, and judges should be encouraged to make downward departures when there is a valid medical need.
3. The basis for the sentencing levels for cultivation of cannabis is arbitrary, capricious, and at variance with well estasblished fact. First, seedlings are given a weight of one kilo each when it highly unlikely that a full grown plant would have even one third of that weight of usuable product. Second, no recognition is given to the fact that over half of all plants will be male and therefore would be destroyed by the grower.

We hope that you will do all that you can to lessen the suffering caused by these cruel and unjust laws.

Respectfully,

Richard Cowan
National Director

(Supporting materials enclosed.)

1001 Connecticut Ave. N.W. • Suite 1119 • Washington, D.C. 20036 • 202-483-5500 • Fax 202-483-0057

# Senate Joint Resolution #8

**Introduced by Senators Mello and Marks**
**March 3, 1993**

## Legislative Counsel's Digest

**SJR No. 8 Relative to cannabis/marijuana.**

SJR 8, as introduced, Mello. Controlled substances: cannabis/marijuana.

This measure would memorialize the President and the Congress of the United States to enact appropriate legislation to permit cannabis/marijuana to be prescribed by licensed physicians and to ensure a safe and affordable supply of cannabis/marijuana for medical use.

Fiscal Committee: no.

## SJR #8

(Full Text)

**WHEREAS,** Scientific and medical studies by the National Academy of Sciences have shown Cannabis/Marijuana to be a safe and effective medicine with very low toxicity compared to most prescription drugs. It has been shown to be effective in the treatment of glaucoma; epilepsy; muscle spasticity; arthritis; the nausea, vomiting and appetite loss associated with chemotherapies anxiety and depression; and the symptoms of withdrawal from alcohol and narcotics.

**WHEREAS,** Studies show that one third of all cancer patients discontinue potentially life-saving chemotherapy due to the severe and debilitating side effects and the same is true for many AIDS patients receiving AZT or other similar therapies; and

**WHEREAS,** Most physicians surveyed said that they would prescribe Cannabis/Marijuana if legally available and one-half of all cancer of all cancer specialists surveyed said that they have already encouraged at least one of their patients to break the law and use Cannabis/Marijuana to ease the violent nausea and vomiting associated with their current treatments; and

**WHEREAS,** In May of 1991, the United Nations Narcotic Control Board voted overwhelmingly to reclassify Cannabis/Marijuana's active ingredient, placing it back on Schedule II and made available by prescription, and making it available by prescription, and the United States representative to this board voted in favor of rescheduling; and

**WHEREAS,** Despite a federal court order recognizing the "clearly established medical value" of Cannabis/Marijuana and mandating that it be reclassified to Schedule II and made available by prescription, the federal government continues to deny access to this safe and effective medicine; and

**WHEREAS,** By its own admission, the federal government continues to deny access to Cannabis/Marijuana for political rather than medical reasons, and are using patients as pawns in the ever-escalating war on drugs by following current policies which place message before medicine, convenience before compassion, and politics before patients; now, therefore, be it

**Resolved** by the Senate and Assembly of the State of California, jointly, that the Legislature of the State of California respectfully memorializes the President and the Congress of the United States to enact appropriate legislation to permit cannabis/marijuana to be prescribed by a licensed physicians and to ensure a safe and affordable supply of cannabis/marijuana for medical use; and be it further

**Resolved,** that the Secretary of the Senate transmit copies of this resolution to the President and the Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States.

# HOUSE JOINT RESOLUTION 11

J1 3lr1759

By: **Delegate Rynd**
Introduced and read first time: February 3, 1993
Assigned to: Environmental Matters

HOUSE JOINT RESOLUTION

A House Joint Resolution concerning

**Marijuana – Use for Medical Purposes**

FOR the purpose of urging the President and the Congress of the United States to remedy federal policies that inhibit or prevent legal access to marijuana for legitimate medical purposes.

WHEREAS, Scientific and medical studies show marijuana to be of medical value in the treatment of glaucoma, in easing the debilitating side effects of anticancer treatments, reducing muscle spasticity, and increasing appetite that is useful to those combatting the deadly AIDS virus; and

WHEREAS, The courts in several states have recognized the benefits of marijuana in the treatment of these diseases; and

WHEREAS, Numerous states have enacted laws and sought to establish compassionate programs of medical access to marijuana; and

WHEREAS, Individual physicians have applied to federal agencies in good faith for permission to use marijuana in a legal and controlled therapeutic regimen; and

WHEREAS, Federal agencies have failed to meet the good faith efforts of the states and individual physicians and have instead through regulatory ploys and obscure bureaucratic devices resisted and obstructed the intent of state legislatures and otherwise law-abiding citizens; and

WHEREAS, Individuals with cancer, AIDS, glaucoma, paralysis, multiple sclerosis, and other ailments have been promised legal access to marijuana through the federal investigative new drug (IND) process and are now denied supplies of the drug by the Public Health Service; and

WHEREAS, These problems are not particular to Maryland but generally affect adversely several other states and the citizens of those states; now, therefore, be it

RESOLVED BY THE GENERAL ASSEMBLY OF MARYLAND, That the General Assembly urges the President and Congress of the United States to:

(1) become informed of these difficulties;

(2) investigate and hold public hearings into federal policies that prohibit the legitimate use of marijuana;

(3) remedy federal policies that prevent the several states from acquiring, inhibit physicians from prescribing, and prevent patients from obtaining marijuana for legitimate medical applications; and

(4) end federal prohibitions against the legitimate and appropriate use of marijuana in medical treatments; and be it further

RESOLVED, That a copy of this Resolution be forwarded by the Department of Legislative Reference to the President of the United States, the President of the United States Senate, the Speaker of the House of Representatives, and to the Maryland Congressional Delegation: Senators Paul S. Sarbanes and Barbara A. Mikulski, Senate Office Building, Washington, D.C. 20510; and Representatives Wayne T. Gilchrest, Helen Delich Bentley, Benjamin L. Cardin, Albert R. Wynn, Steny Hamilton Hoyer, Roscoe G. Bartlett, Kweisi Mfume, and Constance A. Morella, House Office Building, Washington, D.C. 20515.

# TWENTIETH ANNUAL REPORT

of the

# RESEARCH ADVISORY PANEL

1989

## COMMENTARY SECTION

Prepared for the

## GOVERNOR AND LEGISLATURE

# EXECUTIVE SUMMARY

In previous annual reports the Research Advisory Panel has used the experience acquired during its operation to be critical of the research community and to summarize other problems of drug abuse important to the State of California. In this annual report, the Panel presumes to suggest that the Legislature act to redirect this State away from the present destructive pathways of drug control.

Our "War on Drugs" for the past fifty years has been based on the principle of prohibition and has been manifestly unsuccessful in that we are now using more and a greater variety of drugs, legal and illegal. As with the "noble experiment" of the 18th Amendment, prohibition as opposed to regulation has not controlled drug use and a societal over-reaction has burdened us with ineffectual, inhumane and expensive treatment, education and enforcement efforts. These efforts at reducing the social cost of drug use fail to distinguish between drug effects and associated criminal activity and fail to recognize that different drugs pose different problems and that we do not have one massive drug problem.

The Research Advisory Panel suggests to the Legislature that whatever we have been doing in the area of drug abuse should be immediately modified. Legislation aiming at regulation and decriminalization (not "legalization") should be formulated as novel efforts that could be quickly modified if unsuccessful. The Panel suggests that this legislation be formulated following four principles. First, separately consider the different drugs involved and not consider that there is one massive drug problem; second, distinguish between the effects of drugs and the associated criminal activity; third, design the legislation being aware that these are initial efforts subject to change with experience; and fourth think of "drugs" as including alcohol and nicotine, not as being separate substances.

The first suggestions for demonstration legislation, rationalized and detailed herein are:

1. Permit the possession of syringes and needles
2. Permit the cultivation of marijuana for personal use
3. As a first step in projecting an attitude of disapproval by all citizens toward all drug use, take a token action in forbidding the sale or consumption of alcohol in state supported institutions devoted in part or whole to patient care or educational activity.

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**The balance of this annual report may be obtained from:**
**Research Advisory Panel**
**455 Golden Gate Avenue, Room 6000**
**San Francisco, California 94102**

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# COMMENTARY

In previous annual reports the Research Advisory Panel has used the experience acquired during its operation to be critical of the research community and to summarize other problems of drug abuse important to the State of California. In this annual report, the Panel presumes to suggest that the Legislature act to redirect this State away from the present destructive pathways of drug control. The Panel suggests that this legislation be formulated following four principles. First, separately consider the different drugs involved and not consider that there is one massive drug problem; second, distinguish between the effects of drugs and the associated criminal activity; third, design the legislation being aware that these are initial efforts subject to change with experience; and fourth think of "drugs" as including alcohol and nicotine, not as being separate substances.

## PANEL QUALIFICATION

The Panel presumes to make these suggestions because of the long experience of Panel members in activities relating to drug abuse, both in their role as members of the Panel and also from their comprehensive experience outside of their Panel function in areas related to the effects of drugs, the treatment of drug abuse and societal response to drug abuse.

The Panel approaches the Legislature differently from most advocates that appear before you. Such advocates have some conflict of interest, but that conflict is not always disclosed nor easily apparent to the Legislature or to the persons themselves. It is not easy or pleasant, but it is essential, to acknowledge that even peace officers and workers in the drug abuse treatment industry (not to mention simple "legalization" advocates) have an interest in maintaining and initiating

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This report represents a consensus among Panel members acting as individual experts. It does not represent policies or positions of the appointing agencies nor have those agencies been consulted during its preparation.

The diversity of opinion and choice of tactics is so great that no Panel member adheres completely to every item herein. One Panel member disagrees with the commentary portion of the Annual Report on the grounds that the legislative recommendations are not within the authority of the Panel as granted by the Legislature. Two members disagree with certain legislative recommendations within the commentary. Their comments are contained in minority reports at the end of this commentary.

carefully reasoned discussions establishing that our present policies are worse than useless. "Legalization" (not our term) has even been supported by conservative leaders such as William F. Buckley and Milton Freedman.

## BASIS OF DERIVATION OF SUGGESTED LEGISLATION

The Panel believes that a rational approach to change should be based on three concepts that neither the public nor many legislators appear to be aware of or appreciate, however clear the distinctions are to researchers and practitioners in the area of drug abuse:

1) Differentiate different drugs and different routes of administration. There is no basis for progress in talking about the drug problem and looking for one magic solution to the massive problem as it is perceived by the public. The approach must be based upon a separate consideration of each of the several drugs involved. The various drugs involve different toxicities and different individual and social problems. The terrible lethal effects of cigarette smoking, that is, of inhaling tobacco smoke, are familiar. Some drugs, notably alcohol, cause, as a direct pharmacological effect, criminal or anti-social activity. Other drugs, notably heroin, are much less inherently dangerous either to the individual or to society, in spite of their high addiction liability, but they generate massive problems for the criminal justice system. The statement about heroin is not controversial or arguable. The California and Federal Legislatures have acknowledged that narcotics are not inherently prohibitively dangerous and have authorized programs to provide huge doses of methadone, a strong narcotic, to heroin users in lieu of their street drug.

We must then, not be naively permissive in our attitude toward alcohol and other depressants that disinhibit and cause inappropriate reactions. And we should not react emotionally against less harmful drugs in such a way that their regulation generates more problems than would their ungoverned use.

Eventualiy, although certainly not at this time, regulations, that is, societal reaction, will have to take into account different routes of administration as well as different drugs and recognize, for example, that cocaine in one form may be a minor hazard, whereas smoked cocaine may be highly addictive and require a more restrictive approach.

In our judgment, a first step in rationalizing our approach would be to further isolate marijuana from the other illegal drugs. This drug is widely used as a social drug, comparable to alcohol. More than half of the population has or will have had experience with this drug. Marijuana presents the same problems of responsible and irresponsible use as alcohol. However, no change in regulation would be acceptable if it leads to another industry comparable to the alcohol and tobacco industry.

this time. Instead, we suggest a phased approach based upon the above principles of differentiating drugs and their problems that would initially achieve minor change but would demonstrate to the public that the minor change involved would not be accompanied by any significant increase in use or other damage. Since the Panel does not pretend to have the ultimate solution it suggests that the outcome of such legislation be monitored closely.

Not only the traditional legislative responses, but most current proposals in the area of drug abuse legislation, are almost entirely in the direction of being increasingly more restrictive and vengeful. One can surmise this is a result of an apparent fear of being labeled "soft on drugs." Existing legislation, like prohibition itself, should be considered essentially a failure but one from which we can learn. Prohibition was characterized at the time as a "noble experiment," a judgment with which most of us would now agree. The experiment, however, was unsuccessful and after less than a decade was terminated. The intent of the 18th Amendment was beyond criticism and the effort was indeed noble, did accomplish a decrease in alcohol consumption, and could be used to justify additional experimental approaches. However, the experiment was unsuccessful in that the American public did not support enforcement and the illegal market generated an amount of associated criminal activity in the 1920's that was unacceptable to the public.

We are currently at a similar point in our history where much of the leadership and a considerable fraction of the public are coming to question whether prohibition is not equally unproductive in coping with the drug problems. Clearly the marijuana laws are unenforceable in the face of the attitudes and practices of a significant fraction of the population.

The Panel then suggests areas in which initial steps can be taken to prevent individual tragedies and unclog our judicial system. Should any of the ideas prove less than optimal, the legislation can be modified as easily as the Volstead Act was terminated. If the changes are successful, they will serve to demonstrate to the citizenry of California that different drugs can be viewed differently, that some decriminalization may be beneficial to the general public, and that they can be developed without great or irreversible harm.

## SUGGESTED LEGISLATION

<u>Remove penalties for possession of needles and syringes</u>.
The statement that heroin is inherently not a dangerous drug has been somewhat weakened by the appearance in the community of the AIDS virus. This virus is transmitted, among other ways, by the use by one person of paraphernalia contaminated with the blood of an infected person. The AIDS virus has already

against the possession of drug using equipment, which equipment is after all no different than that used by a diabetic or that available in the trash cans of some dozens of offices and hospitals in every city. The suggestion then, is that those sections of the codes (California Health and Safety Code sections 11364, 11364.5, and 11364.7 and Business and Professions Code section 4140) be revised to decriminalize possession of needles and syringes. Whether syringes and needles remain prescription items or not is a minor consideration in the spread of drug abuse, since this equipment or substitutes improvised out of plastic tubes and pacifiers are already easily available.

The result of this action would be to control to some extent the spread of the AIDS virus. Fortunately, in California the action could have significant impact since the incidence in drug users with HIV infection is still below 5% in cities other than San Francisco. Also, there would be important progress in controlling the spread of hepatitis, other infections, and local abscesses. Most important, it would provide experience and presumably evidence that liberalization of regulations would be followed by some gain in individual and public health rather than by a massive increase in drug use. There is no reason to believe that the availability or lack of availability of needles and syringes has anything to do with the recruitment of new heroin users. Except during the early years of the epidemics (1949-50 and 1970-71) the spread of heroin use to new users can be best understood by considering what older students in this area refer to as the "infectious disease model." New heroin users do not appear because of the availability of syringes, but because of their contact with established heroin users.

Allow cultivation of marijuana for personal use. Insofar as damage to the individual and society is concerned, the quantitatively most important drugs are alcohol and nicotine in the form of cigarettes. There remains, then, as the other quantitatively important drug, marijuana, which has become, for a large fraction of the population, a social drug comparable in pattern and approaching that of alcohol in extent of usage.

Marijuana is a disinhibiting drug used socially to relieve anxiety and as such has many liabilities in common with alcohol. We acknowledge that marijuana is not without its effect on the individual user and would not suggest any change that carried a significant risk of increasing the use of marijuana. We resist the use of the word "legalization" in relation to any drug, including marijuana. On the other hand, an objective consideration of marijuana shows that it is responsible for less damage to the individual and to society than are alcohol and cigarettes, the other social drugs mentioned above. A further consideration in forming a reaction to the wide use of marijuana is that it is a source of conflict between generations and of disrespect for the law.

From the point of view of the younger members of the population, the problem becomes a matter of consistency which we should answer by saying marijuana is "just as bad as alcohol", rather than as the defenders of marijuana would probably say, "it's no worse than alcohol".

The resulting conflict between the proposed change in California Law and existing Federal law is apparent, but the liberalization of State regulations would result in decreased enforcement activity at the State level, and Federal enforcement activity is directed primarily at a level above the activity we are presently discussing. The success of a trial of this sort would provide leadership to other states and nationally. It would have no immediate effect on problems related to other more emotionally-laden drugs, except as it demonstrates the need to consider these problems separately and one-by-one with an awareness of risk/benefit ratios.

## REDUCING THE USE OF DRUGS

The present status or effectiveness of education aiming at drug abuse prevention is obviously disappointing. The amount and variety of drugs with which younger people are experimenting and subsequently using have increased to its present level during the very period when this State had a required kindergarten through 12th-grade anti-drug use curriculum in place. National efforts, in or out of the formal school situation, have been equally disappointing.

Not even the success in controlling cigarette smoking extends to the youthful population. However, it is from the successful imposition and acceptance of restrictions on smoking by the adult population that we must learn important lessons about which target population to focus on and about which arguments work and which do not. The successful campaign against smoking did not focus entirely on the user but engaged most of the population in making an aesthetic and personal responsibility issue out of smoking.

The abstract advertisements about cancer and other deadly issues were ineffective compared to the demonstration provided by intelligent community leaders and, laudably, doctors who publicly gave up tobacco and made an issue of passive smoking. In drug education we have focused on physical damage, which is not important to a young risk-taker. And we have focused on the population that we consider to be at-risk, that is, young people and some minority groups. The target population should be the total population and should examine the use of all drugs, including or even especially, the nominally legal alcohol, tobacco and prescription drugs.

In efforts to limit the use of quantitatively important drugs, we should act to influence the entire population so that an unambiguous attitude of disapproval is

## SUGGESTED ACTIONS

Prohibit (legal) drug use in special State establishments.
We have recently seen amazing progress in dissuading people from the use of tobacco. We will below suggest additional action in relation to alcohol, already a regulated drug, with at least some discipline applied. Overall, prohibition is not feasible but restricted use of alcohol in inappropriate places is justifiable and would be an essential step in projecting the attitudinal change desired.

The Panel applauds the establishment of tobacco free areas in State institutions. As a condition of their funding the Legislature should now insist that certain agencies within the State system not sell or provide alcoholic beverages within the confines of their campus or building. This should be immediately applied to any medical center campus or hospital. Doctors and other care-givers have a generally favored status and acquire with that a special responsibility to project an attitude of disapproval about the use of any disabling drug while they are accepting responsibility for a dependent patient. Certainly the State acquires a liability in providing alcohol to individuals who are then going to drive or see patients. More importantly, such use then projects an attitude totally at odds with that which we claim throughout our discussions as desireable.

Similarly, it is impossible to rationalize the use of a depressant drug, clearly shown to impair performance after small doses, on a University or State University campus dedicated to intellectual activity. The individual instructors, that is, teachers at all levels, should probably feel an obligation to neither drink nor smoke in public, but this is not a matter for legislation.

Counter ads. In addition to the emphasis on role modeling implied by the suggestion immediately above, there is an obvious need for counter promotion to offset the various advertising techniques that subtly, or explicitly, imply sexual or other social rewards for the use of products. The experience with cigarette advertising would suggest that counter ads placed immediately after the offending ad and providing an alternate view of the problem were more effective than current isolated, however cute, anti-drug ads. To what extent this policy could be initiated intra-state is a matter beyond our competence, but it would appear more than desirable.

Minority Report of Member Edward P. O'Brien for the
1989 Research Advisory Panel Annual Report.

The Commentary portion of the Annual Report sets forth suggested legislation to amend or repeal certain laws relating to drug enforcement and control. The Commentary states that the Panel "presumes" to recommend such changes in law because of the experience of the Panel members in activities relating to drug abuse both in their role as Panel members and their experiences outside of their Panel functions. The Commentary states that the Panel is "mandated as an advisory group to the Legislature to suggest some legislation ... to reduce the damage to society ... imposed by drugs."

This claim of authority to recommend legislation on drug control and enforcement is not supported by and, indeed, is contrary to the statement in the Annual Report concerning the Panel's Legislative Mandate. This Report on page 19 states: "**LEGISLATIVE MANDATE** The Research Advisory Panel was created in 1969 by the California Legislature to encourage and oversee research related to controlled drugs and narcotic addiction. The Panel was given responsibility to review, approve and oversee research projects involving marijuana, hallucinogenic drugs and other controlled substances, and innovative treatment programs for narcotic addiction and abuse of controlled substances. Since 1969, such research within the State of California has operated under the aegis of the Panel. The Legislature also mandated that the Panel encourage research with marijuana and other controlled substances as well as research into the treatment of drug addiction."

Further, an examination of the statutes pertaining to the Panel reveals that the Legislature has only given the Panel authority with respect to research projects involving the use of controlled substances and research projects concerning the treatment of abuse of controlled substances. The statutes also require the Panel to report annually to the Legislature and Governor the research projects approved by the Panel including the nature and conclusions of the research projects. (Appendix A)

In my opinion, the Commentary's recommendations to amend or repeal the laws on drug enforcement and control are not within the legislative authority of the Panel. There is no statutory authority for the Commentary's statement that the Panel is mandated to suggest drug enforcement legislation. The Panel's "presuming" of such authority is unwarranted and ill advised. Since the Panel lacks legislative authority in the above area, it is my position that the Commentary portion of the Annual Report should be omitted.

In addition to the lack of authority for the Commentary, I would emphasize that the Commentary's legislative recommendation allowing cultivation of marijuana for personal use is particularly injudicious. The argument, that since marijuana use continues to escalate and therefore criminal sanctions should be abandoned, fails to acknowledge or discuss the extent of marijuana use if sanctions were removed. Certain premises for the recommendation, e.g., that marijuana is currently increasing in use and is comparable to alcohol in extent of usage, are not established. The recommendation is not accompanied by a strong, well-planned comprehensive program to reduce the use and abuse of marijuana. Allowing marijuana cultivation for personal use as an experimental approach is not appropriate since the research subjects would extend to all citizens of California. If the experiment were not successful, the social cost of the experiment could be significant.

The Marihuana Problem in the City of New York (Mayor's Committee on Marihuana), 1944, Cattell Press, Lancaster, PA.

Engelsman, E.L.: Dutch policy on the management of drug related problems, British Journal of Addition, 1989; 84: 211-218, and, especially, commentaries thereon 1989; 84: 989-997. [Discussion of pragmatic Dutch efforts to minimize drug problems and prevent deterioration of individuals and of society. Cannabis seen as "lower-risk drug".]

Documenting that the emotional over-reaction continues to the present day

Koren, G., et al: Bias against the null hypothesis: the reproductive hazards of cocaine. Lancet, 1989 (Dec. 16): 1440. [In Canada and the U.S. papers of poor quality claiming great hazard to the foetus were much more likely (5.5 times) to be accepted for publication than better quality negative studies.]

Pollitt, K.: "Fetal Rights": A new assault on feminism. The Nation, 1990 (Mar.26): 409.

Strand, J. and Edwardo, G.: Cocaine and crack: The drug and the hype are both dangerous. British Medical Journal, 299: 337, 1989.

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marijuana DIGEST

Vol.3. No.2 Fall. 1991

# Marijuana and the Criminal Justice System

**The Relationship of Illegal Drug Use to Crime**

The legislation and enforcement of anti-drug laws has created an unprecedented strain on the criminal justice system. Advocates of drug legalization argue that there are other more effective ways to regulate drug-related behavior and commerce than criminalization, which creates economic incentives to increase crime.

The National Institute of Justice (NIJ) holds that the use of drugs such as heroin, cocaine and marijuana would create crime even if the drugs were legalized. This position is meant to counter arguments that drug legalization would eliminate large numbers of crimes.

The argument that drug use contributes to criminal behavior is laid out in a July 1990 report of the National Institute of Justice *Searching for Answers - Research and Evaluation on Drugs and Crime.* Drug use creates dangers, the report states, including heightened criminal activity, degraded work performance, and personal and property damage. While there is no drug which itself causes someone to commit a crime, drug use is held to be one of several major causes of criminal behavior.

The report claims convincing empirical linkage between drug use and crime. Drug use is believed to amplify criminal tendencies, and criminal behavior is seen to diminish when drugs are removed or absent. Three linking mechanisms are described. First, drug use has an effect on crime due to the psychopharmological effects, the "disinhibiting or disorienting effects of the drug on the mind or body". Second, drug use creates an economic compulsive contribution to crime - when crime becomes a way to pay for drugs. Finally, they point to the systemic contribution to crime when criminal acts become a routine way of doing business related to drugs. The data summarizing these linking mechanisms are reviewed below and in Table 1.

Drug legalization would remove the economic compulsive and systemic influences of illegal drugs. The argument against legalization, in many respects, rests on the premise that drug use causes criminal behavior, and that if the now illegal drugs were legalized, crime rates would increase far beyond what they are now, even with the elimination of drug possession and trafficking offenses.

Attention will also be devoted below to distinguishing the effects of widespread marijuana use from that of other drugs associated by NIJ with criminal activity.

**The Evidence (1):**
**Drug Use Among Criminals**

The most prominent evidence cited by the report is that drug use is much more popular with prisoners and arrestees than with the general population. For example, according to surveys by the Bureau of Justice Statistics (BJS) in the mid 1980's, 62% of state prisoners used illegal drugs weekly compared to 18% of the general population; 63% of incarcerated juveniles were weekly users compared to 25% of high school seniors.

There is no evidence that marijuana use contributes to criminal behavior. BJS also reports that more than half of state prisoners who ever used a major drug such as heroin or cocaine had

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## Table 1. Links Between Drugs and Crime
## National Institute of Justice

| Linking Mechanism | Supporting Data: Cocaine & Heroin | Supporting Data: Marijuana | Other Factors |
|---|---|---|---|
| **Psychopharmological:** relating to the disinhibiting or disorienting effects of the drugs on the mind or body. When drugs are present, tendencies within the individual or group toward crime are amplified, and when drugs are removed or absent, criminal behavior diminishes. | -serious offenders have a history of pill, cocaine or heroin use<br>-25% to 40% of inmates in custody said they were "high" during the offense for which they were incarcerated<br>-criminals have higher drug usage rates than the non-criminals according to both surveys and urinalysis testing<br>-while not all drug users are involved in other illegal activity, serious offenders are also the heaviest users | -9% of local jail inmates were high on marijuana when they committed the crime that jailed them<br>-during the 1980's roughly three out of four jail inmates reported using marijuana some time in their lives | -43.3% of local jail inmates were under the influence of alcohol when their crime was committed<br>-most serious offenders with a history of drug abuse began use of a major drug (heroin, cocaine, PCP) after their first arrest<br>-while many criminals use and or abuse drugs, including alcohol, most drug and alcohol users do not commit crimes<br>-the incarceration rates per capita for alcohol, and marijuana are similar to the incarceration rates for non-drug users |
| **Economic compulsive:** relating to the motivation to commit crime as a means of supporting a drug habit | -daily heroin users who commit crimes are criminally active on more days per year than other groups<br>-in one study daily heroin use was calculated at costing $17,000/yr<br>-In 1986, 28% of jail inmates reported past drug dependencies<br>-One fourth of property crime can be attributed to needing money for drugs | -the large profits of marijuana farming has attracted rural groups formerly engaged in illegal alcohol production<br>-domestic marijuana cultivation accounts for at least 25% of the marijuana consumed in the United States | -there is no mention in the BJS crime data or research summaries of research or data that indicates that the need for money to buy marijuana is a cause or contributing factor in the commission of crime<br>-two or more grams of crack cost the same as an ounce of marijuana |
| **Systemic:** relating to violence or crime as parts of the business or cultural lifestyle associated with drugs, as in gang wars or turf battles | -drug dealers are at a high risk for violence<br>-a high percentage of urban homicides have been linked to cocaine and heroin related violence | -some marijuana farmers use booby-traps to discourage poaching their crop<br>-marijuana has been sold by violent groups incl. Jamaican posses and motorcycle gangs | -the DEA has reported decreasing incidents of violence associated with marijuana farming<br>-such violence is not statistically significant related to general crime rates |

not done so until after their first arrest. Major drug use may be as much a symptom of criminal behavior as it is a cause.

Of the survey population of local jail inmates, 70.7% admit to have using marijuana at least once in there life, and 28.1% reveal they are monthly users. General population surveys indicate that 66.5% of the general population have tried marijuana at least once, but only 10.2% are monthly users.

Usage rates may be much higher, as according to *Searching for Answers* the "stigma associated with drug use has increased over the past 20 years" and this may have caused "an increasing reluctance to admit drug use" to surveys of the general population.

There is evidence linking opiate addiction to criminal activity, For example, a study of of New York City street-level opiate abusers held that extensive criminality is proportionate to levels and patterns of drug usage. Daily use of heroin was estimated as costing $17,000 annually. This is evidence of the economic compulsive linking mechanism.

Gang warfare over crack markets is persuasive evidence of the systemic linking mechanism. As evidence of criminal activity due to marijuana use, the report cites as an example how "the large profits of drug marketing, particularly of marijuana, have also attracted rural groups formerly engaged in other criminal activities such as illegal alcohol production."

However, these causes of crime would be eliminated by legalization of drugs. There are no studies on record that indicate that significant numbers of people steal to support a marijuana dependency. While occassional stories surface of booby-trapped marijuana fields, the marijuana trade does not have a violent reputation. The 1990 Drug Enforcement Administration report on domestic cannabis eradication states that "violence and the use of booby traps have decreased."

**The Evidence (2):**
**Drug Use at the Commission of a Crime**

The other evidence presented that there is a psychopharmological contribution of illegal drug use to criminal behavior concerns the number of inmates who were on drugs at the time they committed the offense that placed them in prison. According to surveys by the BJS, in the mid 1980's 25% of convicted inmates were on drugs at the time of the offense, and 40% of incarcerated juveniles.

A BJS special report, *Profile of Jail Inmates, 1989* provides recent data to examine the prevalence of drug and alcohol use at the time criminal offenses occur. The survey is of prisoners in local jails rather than state prisons or federal institutions. In 1989 nearly 1 in every 4 inmates were in jail for a drug offense, compared to 1 in every 10 in 1983.

The data concerns drug use at the time the offense was commited, regardless of whether the offense was drug-related or not. The focus here is to what extent people on drugs commit crimes (in addition to illegal drug use.) Of the 205,524 convicted offenses of the survey population, 27% of them were caused by someone under the influence of an illegal drug.

Alcohol, though, was a factor in 41.3% of all offenses, and 44% of the offenses commited under the influence of drugs were also under the influence of alcohol.

The data suggests a strong link between alcohol and crime. Alcohol use at the time of offense was more prevalent among violent offenders (46.8%) than property offenders (30.7%). An estimated 63.2% of those serving time for homicide and 54.1% of those for assault reproted being under the influence of alcohol.

Drug use of any kind was common among burglars (37.9%) and robbers (35.0%) and least common among persons serving time for assault, minor traffic offenses, Driving While Intoxicated, and other public-order offenses.

Of greater interest is how the population of local jail inmates compares to the general population of drug users. For example, the number of offenses committed under the influence of alcohol is going to be a lot larger than others because a lot more people drink alcohol than take any illegal drug. Table 2 rates the number of offenses committed under the influence of various drugs according to their annual using population as estimated by the 1990 National Institute on Drug Abuse Household Survey of drug use.

Rating allows the comparison of equal populations, as if to answer the question 'of every 100,000 people who drink alcohol, how many will commit an offense serious enough to land them in a local jail while under the influence?'

If illegal drug use does contribute to crime, than the incarceration rates for illegal drug users will be significantly higher than those for both alcohol and the non-drug using population.

The local jail incarceration rate for the general population is 209 per 100, 000. Another reference point is provided by calculating the incarceration rate for adults who are not monthly drug users. The incarceration rate for this control group is 137.

The rate for heroin, at 6,120 per 100,000, is

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## Table 2. Incarceration Rates for Crimes Committed Under the Influence of Drugs & Alcohol

This table compares two sets of data. The first is an estimate of how many local jail inmates were under the influence of an illegal drug or alcohol at the time their crime was committed. A local jail is defined as a facility which holds persons pending adjudication or persons committed after adjudication, usually for sentences of a year of less. The second data set consists of estimates of the annual national drug using populations. These two sets of estimates are used to compare incarceration rates in local jails for different drug using populations. As standards of comparison, the incarceration rate in local jails is also calculated for the entire adult population, as well as for those committing crimes under the influence of any drug or alcohol and those committing crimes not under the influence of drugs or alcohol.

| Drug | Est. Local Jail pop.[1] | % | Annual Using pop.[2] | % | Incarcerations/ 100,000 users |
|---|---|---|---|---|---|
| Heroin | 18,195 | 4.6 | 297,293 | .19 | 6,120 |
| Cocaine | 54,191 | 13.7 | 5,829,090 | 3.08 | 924 |
| Stimulants | 8,702 | 2.2 | 2,508,090 | 1.32 | 347 |
| Marijuana | 35,995 | 9.1 | 18,553,274 | 9.80 | 194 |
| Alcohol | 163,363 | 41.3 | 124,632,698 | 65.87 | 131 |

| Standards | Jail pop. | | Population | | Incarcerations/ 100,000 adults |
|---|---|---|---|---|---|
| Total | 395,553 | 100.0 | 189,210,065 | 100.0 | 209 |
| Control[3] | 221,905 | 56.1 | 177,391,932 | 93.8 | 137 |
| Summary[4] | 223,883 | 56.6 | 124,632,698 | 65.9 | 179 |

### Notes:

1) U.S. Department of Justice, Bureau of Justice Statistics, 1991. Special Report: Profile of Jail Inmates, 1989. Washington, D.C. Bureau of Justice Statistics NCJ-129097. Does not include juveniles.

2) U.S. Department of Health and Human Services, National Institute of Drug Abuse, 1991. Summary of Findings from the 1990 National Household Survey on Drug Abuse. Washington, D.C. National Institute on Drug Abuse. Figures are for adults, and do not includes ages 12 - 17.

3) While all other population estimates are annual, these estimates, while based on the same surveys, are monthly. The control group is offenders who have not used illegal drugs thirty days prior to arrest compared to adults who did not report using illegal drugs within the last thirty days.

4) The summary group is composed of offenders who were under the influcence of drugs or alcohol at the time of their offense compared to the annual drug and alcohol using population, which assumes that most drug users also drank alcohol during the year. Illegal drug users who do not drink alcohol are not thought to be statistically significant, but if added to the drinking population would lower the summary incarceration rate.

# Recent Drugs & Crime Data

from the
United States Department of Justice,
Bureau of Justice Statistics,
Washington, D.C.

## Growth Trends:

Drug arrests have grown from 583,000 in 1983 to 1,247,000 in 1989. In the same period the percentage of inmates in local jails on drug offense charges rose from 9.3% to 23%. While total inmate growth rose 77% during this time, the numbers of inmates charged with drug offenses rose 328%. *(Drugs and Jail Inmates, 1989. August 1991)*

In 1988 drug offenders comprised 1/3 of all state court felony cases. From 1986 to 1988 state court convictions for drug trafficking rose 46%. *(Drugs and Crime Facts, 1990. August, 1991)*

In a comparison of prior drug use by jail inmates, in 1983 only 12% of the sample used cocaine while in 1989 that had doubled to 24%. Cocaine was the only drug proportionally more inmates used in 1989 than in 1983. Cocaine users were three times as likely as other drug users to have committed offenses to get money for drugs. *(Drugs and Jail Inmates, 1989. August 1991)*

## Prohibition Related Crime:

According to a survey of local jail inmates, 1/4 of all property crime (including robbery, burglary, larceny, theft, motor vehicle theft, fraud, stolen property and other property crimes) is committed to gain money to buy drugs. Over 30% of robberies and burglaries are committed for money to buy drugs. *(Drugs and Jail Inmates, 1989. August 1991)*

## Persons under Correctional Supervision:

In 1988 there were 3,713,000 persons under correctional supervision in the U.S., 2% of the adult population. The figures are: 344,000 in jail (9%), 2,356,000 on probation (64%), 607,000 in prison (16%) and 408,000 on parole (11%). Probation is a sentencing alternative to jail or prison, while parole is in conjunction with time served. *(Correctional Populations in the United States, 1988. March, 1991.)*

## Arrest and Incarceration:

In 1988 there were 13.8 million arrests *(FBI Uniform Crime Reports)* and yet only 3.7 million people under correctional supervision (26.9%). Of those arrested in 1988, approximately 2.5% went to jail; 4.4% went to prison; 17.0% went on probation, and 2.9% ended up on parole. *(Based on Correctional Populations in the United States, 1988. March, 1991.)*

In 1990 state prisons, on average, were operating at 115% of their lowest capacity and 127% of their highest capacity. *(Prisoners in 1990. May 1991)*

In 1990 local jails operated on average at 111% of their occupation capacity. Jurisdictions with at least one jail operating under a court order to reduce population operated on average at 113% over capacity. *( Jail Inmates, 1990. June 1991 )*

## Who is in Jail for Drug Offenses?

Race: Drug offenders in local jails in 1989 were 25.5% white, 48.3% black, and 24.7% hispanic.

Age: 18 - 24: 33.6% 25-29: 25.4% 30-34: 15.9% 35-44: 15.2%

Education: 8th grade or less: 15.2% some high school: 39% high school graduates: 32.7% some college: 13% *(Drugs and Jail Inmates, 1989. August 1991)*

## What sentences do drug offenders get?

The survey population of local jail inmates represents offenses which were serious enough to land the offenders in jail, rather than receive a sentence of probation or dismissal of charges. In surveys conducted in both 1983 and 1989 half of drug offenders sentenced to a local jail received a sentence of 9 months or less. *(Drugs and Jail Inmates, 1989. August 1991)*

Of drug traffickers brought before state courts in 1988, 71% were sentenced to some kind of incarceration: jail (30%), prison (41%), or probation (28%.)

The average sentence for a drug trafficker in 1988 was 66 months, with 20 months actually served and the remainder on parole. (Generally, a prisoner is elgible for parole after one third of the sentence has been served.) Other average sentences are larceny - 50 mo.; burglary 74 mo.; robbery - 114 mo. ; rape - 183 mo. and murder - 230 mo. *(Drugs and Jail Inmates, 1989. August 1991)*

## Table 3. Correctional Populations - 1988

| | Total | Probation | Parole | Jail | Prison | Ave. $ Cost /conviction | Ave. $ Cost /incarceration | Ave. $ Cost /Prob. & Parl. |
|---|---|---|---|---|---|---|---|---|
| Alabama | 47,056 | 25,178 | 4,701 | 4,819 | 12,365 | 3,671 | 8,235 | 585 |
| Alaska | 5,817 | 2,994 | 489 | 27 | 2,307 | 14,292 | 30,419 | 2,111 |
| Arizona | 45,938 | 25,468 | 2,410 | 6,006 | 12,095 | 7,026 | 14,939 | 1,602 |
| Arkansas | 27,127 | 15,931 | 3,840 | 1,994 | 5,455 | 2,618 | 8,584 | 195 |
| California | 452,512 | 262,796 | 49,364 | 64,216 | 76,171 | 7,502 | 20,483 | 1,311 |
| Colorado | 36,195 | 23,939 | 1,743 | 4,882 | 5,646 | 5,873 | 17,283 | 813 |
| Connecticut | 53,770 | 45,883 | 371 | 0 | 7,516 | 3,089 | 17,965 | 568 |
| Delaware | 13,714 | 9,576 | 1,093 | 0 | 3,045 | 3,656 | 13,302 | 376 |
| Dist. of Columbia | 26,385 | 12,393 | 3,949 | 1,693 | 8,381 | 9,100 | 22,437 | 738 |
| Florida | 226,535 | 161,989 | 2,562 | 28,236 | 34,327 | 3,848 | 12,245 | 533 |
| Georgia | 162,840 | 115,268 | 11,308 | 17,482 | 18,787 | 2,830 | 10,680 | 416 |
| Hawaii | 12,981 | 9,718 | 1,108 | 0 | 2,155 | 5,546 | 27,228 | 988 |
| Idaho | 7,447 | 7,357 | 793 | 810 | 1,493 | 4,556 | 12,235 | 542 |
| Illinios | 136,057 | 90,376 | 14,369 | 9,891 | 21,081 | 4,378 | 16,508 | 520 |
| Indiana | 75,886 | 55,931 | 3,411 | 5,235 | 11,444 | 2,903 | 11,820 | 271 |
| Iowa | 19,111 | 13,099 | 1,945 | 1,036 | 3,034 | 4,824 | 19,837 | 620 |
| Kansas | 30,779 | 19,462 | 3,497 | 1,906 | 5,932 | 4,207 | 14,718 | 490 |
| Kentucky | 21,687 | 7,398 | 3,443 | 4,695 | 6,187 | 8,413 | 14,148 | 2,109 |
| Louisiana | 62,598 | 31,218 | 8,097 | 11,222 | 12,110 | 4,032 | 9,674 | 485 |
| Maine | 8,007 | 6,059 | 0 | 669 | 1,285 | 6,625 | 22,944 | 703 |
| Maryland | 109,362 | 78,619 | 9,225 | 7,486 | 14,084 | 3,821 | 16,198 | 558 |
| Massachusetts | 108,995 | 92,347 | 4,333 | 5,454 | 6,862 | 3,701 | 27,557 | 500 |
| Michigan | 159,957 | 115,274 | 7,677 | 9,404 | 27,612 | 4,819 | 17,650 | 736 |
| Minnesota | 57,986 | 50,184 | 1,639 | 3,227 | 2,942 | 3,656 | 27,336 | 811 |
| Mississippi | 19,814 | 6,854 | 3,177 | 3,501 | 6,348 | 3,729 | 6,281 | 898 |
| Missouri | 66,050 | 42,498 | 7,226 | 5,154 | 12,176 | 3,718 | 12,258 | 564 |
| Montana | 5,803 | 3,275 | 671 | 616 | 1,249 | 4,996 | 12,220 | 1,378 |
| Nebraska | 15,152 | 11,411 | 447 | 1,156 | 2,161 | 3,845 | 13,246 | 601 |
| Nevada | 14,886 | 5,925 | 1,716 | 2,343 | 4,902 | 9,638 | 17,294 | 1,992 |
| New Hampshire | 5,179 | 2,948 | 461 | 789 | 983 | 7,549 | 20,063 | 721 |
| New Jersey | 103,953 | 59,724 | 18,463 | 11,124 | 14,652 | 6,143 | 19,563 | 1,080 |
| New Mexico | 11,640 | 5,691 | 1,080 | 2,188 | 2,745 | 8,957 | 18,319 | 1,457 |
| New York | 225,199 | 120,809 | 33,962 | 25,928 | 44,560 | 11,081 | 31,700 | 1,296 |
| North Carolina | 96,116 | 67,164 | 6,191 | 5,469 | 17,292 | 4,011 | 14,499 | 479 |
| North Dakota | 2,696 | 741 | 163 | 288 | 525 | 5,007 | 15,691 | 390 |
| Ohio | 111,455 | 70,206 | 5,991 | 9,160 | 26,113 | 5,683 | 15,412 | 814 |
| Oklahoma | 36,355 | 23,404 | 1,455 | 2,595 | 8,921 | 4,084 | 9,252 | 709 |
| Oregon | 34,303 | 24,178 | 2,610 | 2,819 | 4,703 | 5,096 | 17,935 | 1,114 |
| Pennsylvania | 170,340 | 92,296 | 46,466 | 13,649 | 17,929 | 3,345 | 15,552 | 522 |
| Rhode Island | 12,184 | 9,824 | 442 | 0 | 1,918 | 3,752 | 19,009 | 369 |
| South Carolina | 49,371 | 29,223 | 3,672 | 3,497 | 13,002 | 4,995 | 12,538 | 502 |
| South Dakota | 4,656 | 2,504 | 617 | 522 | 1,030 | 4,593 | 11,747 | 1,011 |
| Tennessee | 56,501 | 28,761 | 9,529 | 10,858 | 7,354 | 4,977 | 13,335 | 666 |
| Texas | 436,578 | 288,906 | 77,827 | 29,439 | 40,437 | 2,286 | 11,151 | 476 |
| Utah | 10,130 | 5,595 | 1,218 | 1,261 | 2,057 | 8,448 | 20,824 | 1,629 |
| Vermont | 6,918 | 5,966 | 182 | 0 | 770 | 3,537 | 20,262 | 1,094 |
| Virginia | 46,357 | 17,633 | 6,610 | 9,372 | 12,787 | 9,678 | 17,026 | 1,500 |
| Washington | 84,012 | 60,244 | 10,745 | 5,934 | 7,089 | 3,534 | 18,802 | 599 |
| West Virginia | 8,473 | 4,791 | 807 | 1,393 | 1,482 | 4,912 | 12,148 | 689 |
| Wisconsin | 41,622 | 26,747 | 4,106 | 4,667 | 6,159 | 5,392 | 16,335 | 896 |
| Wyoming | 3,452 | 1,814 | 289 | 457 | 945 | 7,482 | 16,137 | 812 |



Source: Bureau of Justice Statistics, 1991, U. S. Department of Justice

## Table 4. Justice Expenditures - 1988

| | Total State Exp. | $ /adult | Total Justice Exp. | % | $ /adult | Corrections Exp. | $/adult |
|---|---|---|---|---|---|---|---|
| [redacted] | 10,834,476 | 3,626 | 561,644 | 5.18 | 188 | 172,744 | 58 |
| [redacted] | 5,574,408 | 15,615 | 283,240 | 5.08 | 793 | 83,135 | 233 |
| [redacted] | 12,556,880 | 4,949 | 961,724 | 7.66 | 379 | 322,749 | 127 |
| [redacted] | 5,235,777 | 3,000 | 233,078 | 4.45 | 134 | 71,018 | 41 |
| [redacted] | 111,685,527 | 5,364 | 8,939,614 | 8.00 | 429 | 3,394,647 | 163 |
| [redacted] | 11,386,172 | 4,682 | 701,062 | 6.16 | 288 | 212,580 | 87 |
| [redacted] | 11,509,153 | 4,652 | 692,068 | 6.01 | 280 | 166,094 | 67 |
| [redacted] | 2,663,290 | 5,391 | 158,031 | 5.93 | 320 | 50,140 | 101 |
| [redacted] Columbia | 4,827,746 | 10,079 | 529,894 | 10.98 | 1,106 | 240,097 | 501 |
| [redacted] | 36,378,379 | 3,813 | 2,810,272 | 7.73 | 295 | 871,671 | 91 |
| [redacted] | 19,363,054 | 4,241 | 1,187,219 | 6.13 | 260 | 460,851 | 101 |
| [redacted] | 3,673,768 | 4,524 | 271,040 | 7.38 | 334 | 71,989 | 89 |
| [redacted] | 2,499,344 | 3,576 | 132,715 | 5.31 | 190 | 33,929 | 49 |
| [redacted] | 35,274,944 | 4,097 | 2,339,975 | 6.63 | 272 | 595,705 | 69 |
| [redacted] | 14,168,799 | 3,460 | 688,290 | 4.86 | 168 | 220,324 | 54 |
| [redacted] | 8,298,399 | 3,914 | 353,651 | 4.26 | 167 | 92,183 | 43 |
| [redacted] | 7,211,409 | 3,915 | 404,077 | 5.60 | 219 | 129,492 | 70 |
| [redacted]cky | 9,560,244 | 3,482 | 496,330 | 5.19 | 181 | 182,456 | 66 |
| [redacted]siana | 12,281,937 | 3,948 | 747,619 | 6.09 | 240 | 252,422 | 81 |
| [redacted] | 3,583,464 | 3,973 | 169,464 | 4.73 | 188 | 53,044 | 59 |
| Maryland | 15,190,895 | 4,370 | 1,091,219 | 7.18 | 314 | 417,898 | 120 |
| Massachusetts | 23,238,249 | 5,099 | 1,448,933 | 6.24 | 318 | 403,372 | 89 |
| Michigan | 32,973,918 | 4,858 | 2,131,971 | 6.47 | 314 | 770,865 | 114 |
| Minnesota | 16,935,877 | 5,314 | 735,496 | 4.34 | 231 | 212,018 | 67 |
| Mississippi | 6,623,589 | 3,602 | 263,213 | 3.97 | 143 | 73,894 | 40 |
| Missouri | 12,514,893 | 3,268 | 829,103 | 6.62 | 217 | 245,584 | 64 |
| Montana | 2,564,868 | 4,392 | 104,457 | 4.07 | 179 | 28,991 | 50 |
| Nebraska | 5,615,472 | 4,763 | 216,231 | 3.85 | 183 | 58,255 | 49 |
| Nevada | 3,636,557 | 4,615 | 331,632 | 9.12 | 421 | 143,475 | 182 |
| New Hampshire | 2,894,412 | 3,573 | 170,275 | 5.88 | 210 | 39,097 | 48 |
| New Jersey | 28,620,201 | 4,860 | 2,117,568 | 7.40 | 360 | 638,597 | 108 |
| New Mexico | 4,757,902 | 4,501 | 290,358 | 6.10 | 275 | 104,263 | 99 |
| New York | 90,008,951 | 6,641 | 7,144,927 | 7.94 | 527 | 2,495,522 | 184 |
| North Carolina | 18,259,485 | 3,763 | 1,040,998 | 5.70 | 215 | 385,519 | 79 |
| North Dakota | 2,121,026 | 4,382 | 70,971 | 3.35 | 147 | 13,499 | 28 |
| Ohio | 33,460,312 | 4,166 | 1,809,484 | 5.41 | 225 | 633,424 | 79 |
| Oklahoma | 8,769,932 | 3,718 | 441,909 | 5.04 | 187 | 148,459 | 63 |
| Oregon | 9,463,057 | 4,547 | 592,773 | 6.26 | 285 | 174,810 | 84 |
| Pennsylvania | 35,537,565 | 3,883 | 1,918,775 | 5.40 | 210 | 569,787 | 62 |
| Rhode Island | 3,402,704 | 4,460 | 193,868 | 5.70 | 254 | 45,709 | 60 |
| South Carolina— | 9,524,474 | 3,777 | 553,477 | 5.81 | 219 | 246,584 | 98 |
| South Dakota | 1,905,749 | 3,693 | 82,659 | 4.34 | 160 | 21,387 | 41 |
| Tennessee | 15,019,516 | 4,124 | 756,257 | 5.04 | 208 | 281,211 | 77 |
| Texas | 49,064,094 | 4,139 | 2,938,736 | 5.99 | 248 | 997,829 | 84 |
| Utah | 5,601,669 | 5,285 | 282,177 | 5.04 | 266 | 85,578 | 81 |
| Vermont | 1,816,066 | 4,366 | 83,907 | 4.62 | 202 | 24,472 | 59 |
| Virginia | 17,361,496 | 3,819 | 1,195,297 | 6.88 | 263 | 448,627 | 99 |
| Washington | 18,335,594 | 5,302 | 887,377 | 4.84 | 257 | 296,912 | 86 |
| West Virginia | 5,009,363 | 3,583 | 167,924 | 3.35 | 120 | 41,619 | 30 |
| Wisconsin | 15,744,367 | 4,397 | 864,211 | 5.49 | 241 | 224,434 | 63 |
| Wyoming | 2,303,431 | 6,815 | 98,430 | 4.27 | 291 | 25,828 | 76 |

Source: Bureau of Justice Statistics, 1991, U. S. Department of Justice

incredibly high. The high cost of illegal heroin and its addictive properties create the classic case study in the relationship between drug use and crime. Since criminal activity diminishes as heroin use is reduced, this extremely high incarceration rate is an argument for getting addicts into treatment. It seems that a small number of heroin addicts are committing a great deal of crime.

While heroin may offer the classic model, this does not mean that the same relationship holds for other drugs.

The rates for cocaine and stimulants are extremely high by comparison with either standard, 924 and 347 per 100,000 respectively. These rates may support the argument that cocaine and stimulant use makes someone significantly more likely to commit a crime than someone in the general population. The question remains whether this criminal activity is due to the effects of drug abuse or the need to get money to buy drugs.

The incarceration rates do not support the theory that the psychopharmological effects of alcohol or marijuana contribute to a higher rate of criminal activity than is present in the general population.

The incarceration rate for marijuana users (194) is not significantly different from that of the general population (209). Furthermore, the percentage of inmates who committed their offense under the influence of marijuana is nearly equal to the percentage of marijuana users in the general population. Taken along with the general lack of data linking marijuana use to economic compulsions to commit crime and systemic market violence, the low incarceration rate for marijuana users is an indication that it does not cause criminal activity.

The even lower rate for alcohol (131) is an indication that far far more people use alcohol responsibly than those who commit criminal acts. The incarceration rate for alcohol users is not significantly different for that of the non-drug using population. Otherwise, the evidence suggests that while most alcohol users do not commit crimes, the criminal behavior of those who do can be reduced by treating their alcohol abuse.

**Allocating Resources:**

According to "Searching for Answers": "crafting a coherent drug enforcement strategy requires not only an assessment of the jurisdiction's drug problem - the types of markets, the range of drugs available, and the characteristics of their users populations - to inform selection of the appropriate tactics; but also assessment of the costs of committing additional resources (in terms of alternative activities that cannot be undertaken); and then a realistic estimate of the capabilities of other parts of the system - prosecutors, judges, and corrections officials - to respond to increased arrests and mounting numbers of drug cases."

State and local police are being encouraged to pursue retail, street level enforcement focusing on particular neighborhoods, while letting the federal agents go after the Mr. Big's of the drug trade.

Despite the political rhetoric of the day, the resources do not exist for ambitious prosecution of possession offenses. The costs to the taxpayers of each state justice system are reviewed in Tables 3 and 4, as well as the size of the each states correctional population. NIJ's response is to find more creative ways to place people under correctional supervision.

**Sanctions:**

"The Institute will continue to search for new low-cost sanctions that can be used on a large scale against recreational drug users. The criminal justice system cannot afford to supervise millions of casual users . . . nor can it ignore them. NIJ wants to find solutions that do not congest the courts or swell probation caseloads. One appealing solution is income proportioned fines for first offenders. On the model of traffic courts, a computerized system can impose and collect fines in high volume to halt the drain drug cases make on correctional resources. The Institute will encourage research on all sanctions that effectively (but not unrealisitically) inflict damage on offender households and require minimal additional resources to administer."

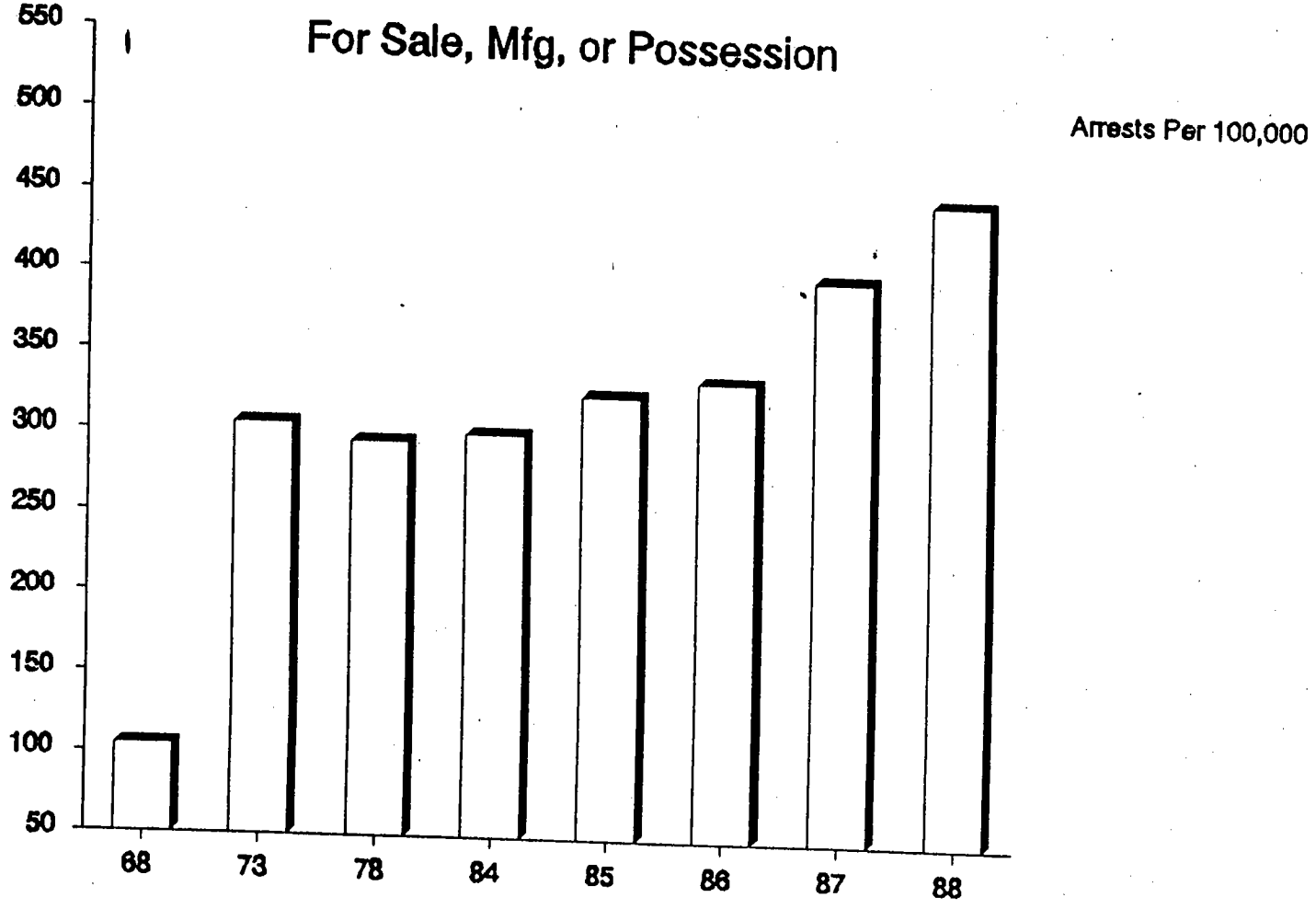
"NIJ's research is exploring intermediate sanctions like house arrest, electronic monitoring, shock incarceration, asset seizure and forfeiture, and intensive probation superivision. The goal is to give the American criminal justice system a more problem-specific, more rational structure of options for dealing with diverse offenders."

**Marijuana Digest:**
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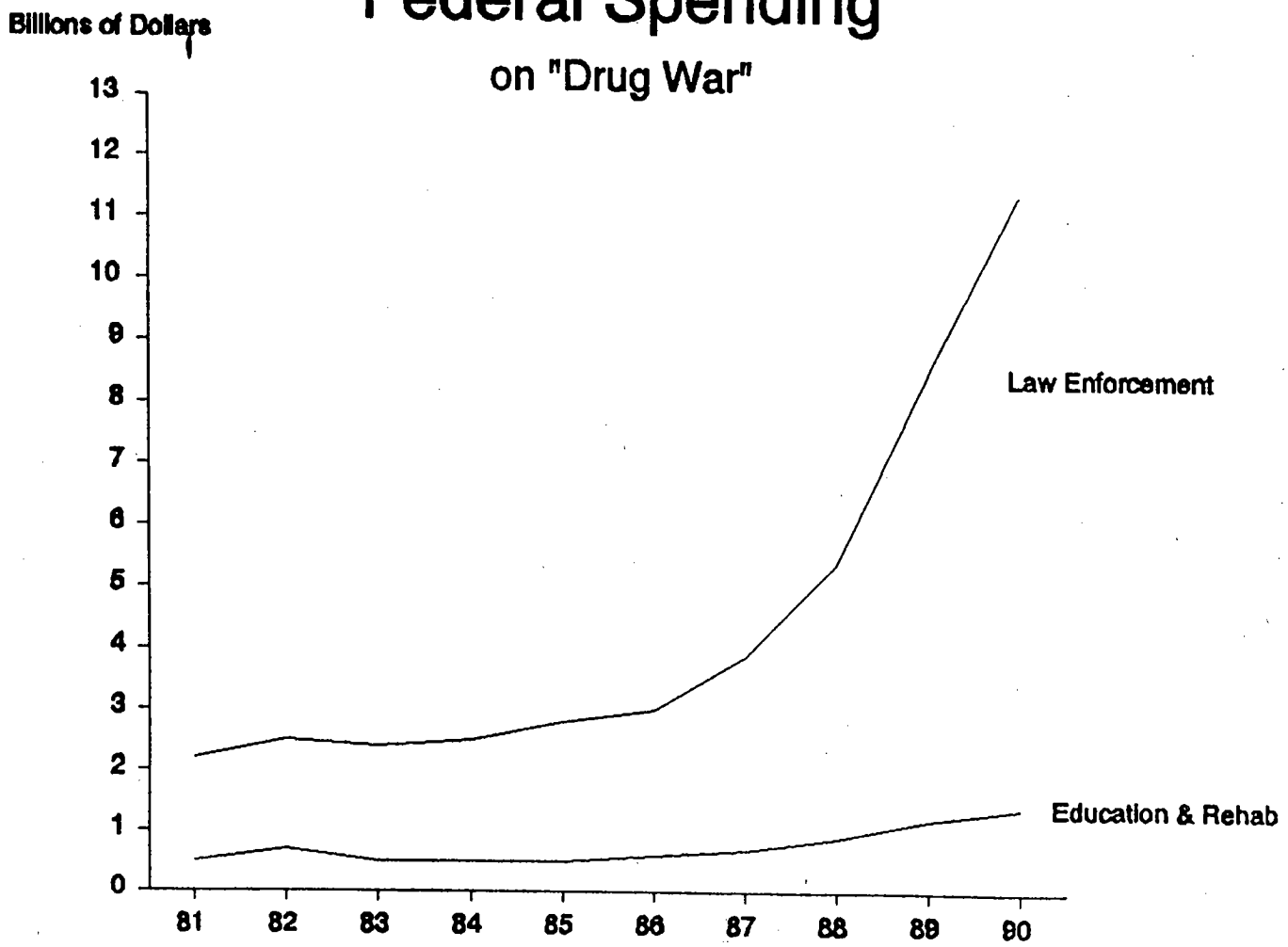
# Drug Arrests in the U.S.

Source: FBI



# Federal Spending

## on "Drug War"



# Drug & Marijuana Arrests 1968-1990

| Year | All Drug Arrests | % MJ | Marijuana Arrests | Percentage of MJ Arrests: MJ Poss | Marijuana Possession | MJ Sales | Marijuana Sales/MFG | Percentage of All Drug Arrests: MJ Possession | MJ Sales |
|---|---|---|---|---|---|---|---|---|---|
| 1965 | 60,500 | 0.31 | 18,815 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1966 | 75,900 | 0.41 | 31,119 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1967 | 121,500 | 0.51 | 61,843 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1968 | 198,900 | 0.48 | 95,870 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1969 | 288,600 | 0.41 | 118,903 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1970 | 415,600 | 0.45 | 188,682 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1971 | 492,000 | 0.46 | 225,828 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1972 | 527,400 | 0.55 | 292,179 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1973 | 628,900 | 0.67 | 420,700 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1974 | 642,080 | 0.69 | 445,000 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1975 | 601,300 | 0.69 | 416,100 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1976 | 609,700 | 0.72 | 441,100 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1977 | 642,700 | 0.71 | 457,600 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1978 | 628,700 | 0.71 | 445,800 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1979 | 558,600 | 0.70 | 391,600 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1980 | 580,900 | 0.70 | 405,600 | 0.00 | | 0.00 | | 0.00 | 0.00 |
| 1981 | 559,900 | 0.71 | 400,300 | 0.86 | 344,339 | 0.14 | 55,990 | 0.62 | 0.10 |
| 1982 | 676,000 | 0.67 | 455,600 | 0.84 | 383,968 | 0.15 | 68,276 | 0.57 | 0.10 |
| 1983 | 661,400 | 0.62 | 406,900 | 0.82 | 334,007 | 0.17 | 69,447 | 0.51 | 0.11 |
| 1984 | 708,400 | 0.59 | 419,400 | 0.82 | 342,157 | 0.18 | 73,674 | 0.48 | 0.10 |
| 1985 | 811,400 | 0.56 | 451,138 | 0.81 | 365,941 | 0.19 | 85,197 | 0.45 | 0.11 |
| 1986 | 824,100 | 0.44 | 361,780 | 0.82 | 296,676 | 0.18 | 65,104 | 0.36 | 0.08 |
| 1987 | 937,400 | 0.40 | 378,709 | 0.83 | 313,709 | 0.17 | 65,618 | 0.33 | 0.07 |
| 1988 | 1,155,200 | 0.34 | 391,600 | 0.83 | 326,921 | 0.17 | 64,961 | 0.28 | 0.06 |
| 1989 | 1,361,700 | 0.29 | 398,977 | 0.79 | 314,552 | 0.21 | 84,425 | 0.23 | 0.06 |
| 1990 | 1,089,500 | 0.30 | 326,850 | 0.80 | 260,391 | 0.20 | 66,460 | 0.24 | 0.06 |
| ***Totals:*** | **15,858,280** | | **8,447,993** | | **3,282,661** | | **699,152** | | |

# COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 1993 AMENDMENTS TO THE SENTENCING GUIDELINES

**Respectfully submitted,**

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**Co-Chair, Sentencing Guidelines Committee**

**March 12, 1993**

# NEW YORK COUNCIL OF DEFENSE LAWYERS

## COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 1993 AMENDMENTS TO THE SENTENCING GUIDELINES

We would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense attorneys. In the pages that follow, we address a number of proposed amendments of interest to our organization. With respect to those proposed amendments and issues for comment, we have organized our submission essentially in numerical sequence. However, with respect to those matters which deal in the white collar business crime area and the narcotics area, we have departed from the sequential presentation in order to present those areas together.

**PROPOSED AMENDMENT 1**

Relevant Conduct (§1B1.3) -- prohibits use of acquitted conduct in determining guideline offense level; possible basis for departure in exceptional cases

We support this proposed amendment, which provides that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant's offense level under the relevant conduct section. We oppose the proposed amended commentary insofar as it states that in an exceptional case acquitted conduct may provide a basis for an upward departure.

We believe this proposed amendment comports with the philosophical underpinnings of the Guidelines, as well as fundamental notions of due process. There is an inherent imbalance in including, for the purpose of adding up the relevant conduct of a defendant applicable to Guidelines calculations, conduct for which a defendant has been found not guilty. It is also unfair. For these reasons, we support the proposed amendment as reasonable.

The proposed amendment is also necessary. Practice under the Guidelines thus far indicates that most courts which have confronted the issue have held that an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence. E.g., United States v. Averi, 922 F.2d 765 (11th Cir. 1991); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990); United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989);

United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (per curiam); United States v. Ryan, 866 F.2d 604 (3d Cir. 1989). One court has held that a trial court may consider a prior acquittal as long as that acquittal is not relied upon to enhance the sentence, United States v. Perez, 858 F.2d 1272, 1277 (7th Cir. 1988).

We believe the proposed amendment reflects a far better approach.

NYCDL opposes acquitted conduct providing the basis for an upward departure in any case. The Guidelines reflect a balance that in many ways limits the avenues by which defendants can seek downward departures; we cannot see why the prosecution should be able to seek an upward departure as a result of conduct for which the defendant has been found not guilty.

**PROPOSED AMENDMENT 2**

Use of Guidelines Manual in Effect on Date of Sentencing (§1B1.11) -- application of amended guidelines to multiple count cases

We oppose this amendment, which extends the Commission's "one book" rule to multiple count cases on the basis of judicial convenience, while ignoring the basic principles of the ex post facto clause of the United States Constitution. The proposed amendment provides that in cases where a defendant is convicted of two offenses which "straddle" an amendment to the Guidelines, the

latest revised edition of the Guidelines is to be applied "even if" the revised edition of the Guidelines results in an increased penalty for the first offense. This position is in direct conflict with the "Background" to this Guidelines section which specifically states that courts have consistently held that the ex post facto clause does, in fact, apply to sentencing Guideline amendments that subject the defendant to increased punishment.

The general rule of § 1B1.11 is to apply the sentencing Guideline in effect on the date that the defendant is sentenced. Subsection (b) provides an exception to this general rule where the court decides that to apply the Guidelines in effect on the date of sentencing would violate the ex post facto clause. The Guidelines, therefore, permit the courts to apply the Guidelines in effect on the date of the offense of conviction. By enacting such a provision, the Commission codified the rationale displayed throughout the federal courts, which recognizes that to sentence a defendant based on legislation not in effect at the time of the offense raises serious constitutional problems. We believe that proposed amendment 2, which provides that "straddled" offenses be sentenced uniformly based on the most recent amendments, contradicts the policy and the rationale epitomized in enacting § 1B1.11(b) in the first place. This amendment enables a court to sentence a defendant based on legislation not in effect at the time of the offense and therefore violates the ex post facto clause.

It is the position of the NYCDL that the proposed amendment be revised to say one of two things. Primarily, we would endorse a version of the amendment which replaced the words "even if" with "unless," thereby allowing use of the most recent amendment for sentencing on multiple counts in cases where such "grouping" would not result in a harsher sentence for the defendant based on legislation not in effect at the time he committed his crime. This proposal balances institutional interests in judicial convenience and efficiency with the well-established constitutional concerns of Article I, section 9.

Our second recommendation concerning this amendment calls for reworking the section to read that "the revised edition of the Guidelines shall be applied to both offenses, when the court, in its discretion, so decides that such application balances the government's practical interests with the defendant's constitutional concerns." Leaving this determination up to the court's discretion is consistent with the rest of § 1B1.11. Section 1B1.11(b) already gives the court authority to make the initial determination of whether there is an ex post facto consideration. Enabling the court to further this inquiry in cases consisting of multiple "straddled" offense counts is consistent with the rest of the section and the policy considerations behind enabling the court to make that determination in the first place. In addition, the Guidelines have gradually usurped the all too important discretion of the sentencing court in most other

sentencing areas. In an area as fact specific as ex post facto determinations, where the Commission has already recognized the need for court discretion, the Guidelines should not abandon its rational approach towards this difficult issue on the basis of symbolic uniformity and efficiency.

Accordingly, the NYCDL opposes the proposed amendment to §1B1.11 as presently worded. We do, however, support an amendment which either prevents the application of the most recent version of the Guidelines where it prejudices the defendant's constitutional rights under the ex post facto clause or which leaves the determination in the discretion of the sentencing court, balancing the interests of the government with those of the defendant.

**PROPOSED AMENDMENT 5**

Fraud, Theft, Tax (Chapter Two, Parts F, B & T) -- deletes "more than minimal planning" adjustment from fraud and theft guidelines and "use of sophisticated means" from tax guidelines; restructures monetary loss tables in fraud, theft, and tax

The NYCDL believes that the proposed changes to the theft and fraud tables are unwise, and that they exacerbate one of the worst aspects of the current sentencing regime: virtual mandatory imprisonment for first offenders who commit relatively minor property offenses.

Under the present Guidelines, the offense levels for theft and fraud offenses are determined largely by the amount of loss involved as set forth in the dollar tables that are central to the sentencing scheme. See Guidelines § 2B1.1(b)(1), § 2F1.1(b)(1). There is a two-point "bump" for crimes that involve "more than minimal planning." The proposed amendment would eliminate the "more than minimal planning" offense characteristic, and substitute dollar tables with increased offense levels for almost all amounts of dollar loss.

In our view, to enact these proposed changes would be a serious mistake, affecting thousands of cases each year. We believe that one of the worst features of the present Guidelines is the compelled imprisonment of first-offenders in larceny and fraud cases. Under the current provisions, any defendant who steals more than $10,000 is not eligible for a straight sentence of probation. Absent other mitigating factors in such cases, present law sets a minimum offense level at "9", taking the offender out of "Zone A" of the sentencing table and requiring at least one month of imprisonment, intermittent confinement, community confinement, or home detention. Offenders who cause losses in excess of $40,000 face offense levels of "11" or higher, taking them out of "Zone B" of the sentencing table and requiring that at least half of the minimum term of the Guideline sentence be satisfied by imprisonment. As a practical matter, therefore,

under current law any first-offender who steals in excess of $40,000 must spend at least 4 months in a federal prison.[1]

If the proposed changes in the theft and fraud tables are enacted, even more first-offenders will wind up in federal prisons. According to the new tables, any offender who steals more than $5,000 faces a minimum offense level of "9"; such an offender is out of Zone A and is ineligible for a sentence of straight probation. Similarly, any offense involving a loss of more than $13,500 generates a minimum offense level of "11", requiring a prison sentence unless some other deduction is applicable.

These changes are unwarranted for a slew of reasons. First, they fly further in the face of the Congressional mandate, contained in 28 U.S.C. § 994(j), that the Commission "insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." (emphasis added). If this statute means anything, then persons with no criminal records who steal $5,000 or $10,000 or $15,000 ought not be sent to prison as a routine matter. The typical defendant in such cases

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[1] The base offense level for theft cases, pursuant to Guidelines § 2B1.1(a) is "4." A case involving a loss of $40,000 results in a "7" level increase, for an offense level of "11". First-offenders, i.e., those in Criminal History Category I, face a "Zone C" guideline sentence of 8-14 months. Pursuant to Guidelines § 5C1.1(d)(2), at least one-half of the minimum sentence -- 8 months in this example -- must be satisfied by imprisonment, resulting in at least a 4-month prison term.

-- an embezzling bank teller, for instance -- commonly faces such collateral consequences as the loss of employment and the difficulty of finding a new job as a convicted felon. The sentencing tables ought not require prison in such relatively non-serious cases, particularly when Congress has indicated that prison generally should not be required in those circumstances. The proposed amendment, which reduces further the loss threshold at the door of the federal prison cell, is unwise and contrary to Congressional intent.

It bears emphasis here that the proposed increase of punishment levels at the low end of the spectrum in theft and fraud cases evidently was not a deliberate policy decision by the Commission or its staff. Rather, the increased punishment levels appear to be an artifact of the proposal to abolish the specific offense characteristic for crimes marked by "more than minimal planning." If the two-point increase for offenses with more than minimal planning is killed, its ashes apparently are to be scattered over the entire theft and fraud tables, resulting in higher sentences for all levels of loss. Ironically, however, when the White Collar Working Group began examining these issues, its "Preliminary Purpose Statement" indicated that it would examine, inter alia, "whether the punishment level is low enough at the low end of the loss spectrum and high enough at the high end." The amended tables drastically increase sentences at the high end -- cases involving multimillion dollar losses -- but they inexplicably

raise punishment levels even at the low end. Yet, the offenses at the low end of the spectrum -- those involving several thousand dollars of loss -- typically were not the kinds of cases in which sentences were enhanced for "more than minimal planning." The net result, therefore, is that the Commission has proposed doing away with an aggravating factor that typically did not impact low-end cases, and raising sentence levels across the board. The low-end offender winds up facing more prison time, when the question at the outset was whether punishment levels at the low end of the spectrum already were too high.

We emphasize in this regard that the purpose of the Guidelines was to eliminate sentencing disparity, and not to increase prison sentences generally. With the Guidelines, however, have come sharply higher average sentences. According to statistics published by the Department of Justice in September 1992, defendants sentenced for fraud offenses who were released from prison in 1991 had spent, on average, 37% more time in prison than fraud defendants who were released from prison in 1985. Federal Criminal Case Processing, 1980-90, United States Department of Justice, Bureau of Justice Statistics, at 18.[2] To the extent

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[2] Defendants who were released in 1985 had served an average time until first release of 11.4 months. Defendants released in 1991 for the same offenses had served an average time of 15.6 months until first release. This increase undoubtedly understates the impact of the loss tables in generating increased sentences, because fraud prosecutions tend to involve lengthy investigations, and the statistics for 1991 therefore must include a substantial number of pre-Guidelines cases.

this phenomenon reflects the imprisonment of first-time offenders who steal relatively minor amounts of money, it is deplorable, and the proposed amendments only make matters worse.[3]

An additional problem with the proposed loss tables for theft and fraud cases is that they increase the number of gradations calibrated to dollar loss, further complicating a sentencing scheme that already draws unwarranted distinctions between offenders. A case involving a loss of less than $40,000 would be slotted into one of eleven pigeon holes, rather than one of the nine categories that currently exist. The dollar gradations at the lower end of the spectrum seem almost trivial. In the experience of our membership, the defendant who steals $3,000 is not a materially different person from the defendant who steals $5,000 or $8,000 or $13,500. Yet, these defendants receive markedly different sentences under the loss tables, particularly as amended. By contrast, an offender who already has stolen $70,000,000 may steal an additional $49,999,999 before his offense level jumps by so much as one point. To be sure, a one-point increase in offense level translates into substantially more prison time at the high end of the spectrum, but we question whether the

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[3] We note that the only low-end offender whose lot would be improved under the amendments is the defendant whose conduct generates a loss of less than $600. Such defendants would face no increase in the base offense level of their crimes, whereas previously there was some increase for any loss of more than $100. The impact of this change, at least in the districts in which our members practice, will be less than de minimus.

Guidelines ought to draw distinctions that turn on whether the defendant steals $600 as opposed to $1,000 or $1,700, as the proposed loss tables would mandate. The NYCDL believes that punishment for property crimes already is myopically focused on the amount of loss involved. The kinds of picayune distinctions that the proposed loss tables draw in low-end cases aggravate this problem and serve no valid purpose. Our members, undoubtedly joined by federal judges all over the country, would prefer tables that draw fewer and broader distinctions, perhaps based on orders of magnitude. Put simply, a $10,000 thief may perhaps be distinguished from a $100,000 thief, and a person who steals $100,000 may commonly be distinguished from a defendant who steals $1,000,000. But a person who steals $1,000 ought not be treated differently from one who steals $1,700. That is just silly.

With respect to the wisdom of doing away with the specific offense characteristic for crimes that involve "more than minimal planning," we agree that this characteristic has resulted in some sentencing disparities because it is both overbroad and ambiguous. However, we also believe that there is a valid distinction to be drawn between sophisticated, carefully calculated criminal conduct and unplanned, opportunistic behavior. Accordingly, we favor redrafting and retaining this characteristic so that it can be applied in appropriate cases, as opposed to abolishing it in favor of across-the-board increases in the offense levels for theft and fraud offenses. An appropriate formulation,

in our view, would allow for enhancing the sentence where the defendant has engaged in substantial planning beyond that typical of the offense of conviction.

**PROPOSED AMENDMENT 6 AND ISSUES FOR COMMENT 7 AND 38**

Fraud (§2F1.1) -- invites departure in fraud cases in which loss fails to fully capture the seriousness of the offense or the fraud causes substantial non-monetary harm

Fraud & Theft (Chapter Two, Parts B & F) -- issue for comment about adding offense levels when loss fails to fully capture the harmfulness and seriousness of the conduct

Theft (§2B1.1) -- issue for comment regarding whether downward adjustment should be added for defendants who do not personally profit from the offense

In proposed amendments 6 and 7, the Commission has proposed permitting an upward departure in fraud cases where the defendant's conduct causes substantial nonmonetary harm. The Commission also has asked for comment whether significant nonmonetary harm should be a specific offense characteristic for theft and fraud cases, resulting in a one- or two-level increase in offense level severity.

We agree that there are cases in which the dollar amount of the loss does not appropriately reflect the seriousness of the defendant's crime. The theft of $50,000 from an elderly couple with no other savings is properly viewed as a more serious crime than a bank officer's theft of a like amount from a commercial

bank. It is our view, however, that such differences are best handled by considering them on a case-by-case basis, rather than creating another specific offense characteristic. No further amendment is necessary; Application Note 10 to §2F1.1 already addresses these situations, and permits upward departure where the loss table "does not fully capture the harmfulness and seriousness of the conduct."

We are far more concerned with the plethora of cases in which the single-minded focus on financial loss overstates the seriousness of the defendant's crime. A major weakness of the current system, in our view, is that the Guidelines in theft and fraud cases do not distinguish sufficiently between defendants who are and who are not motivated by personal profit. The corrupt president of a savings and loan institution who steals $10,000,000 to line his pocket deserves a heavy sentence. But the assistant who aids and abets that president, perhaps only in order to keep their job, should not have the severity of his or her offense slavishly determined by the same "dollar loss" yardstick. We realize that in some cases (though by no means all), the assistant may merit a deduction for minor role in the offense. However, where the offense level already has risen out of sight because of the amount of loss involved -- loss that the assistant may not have desired, and from which they may not have profited -- the impact of the mitigating role adjustment is insubstantial.

The Commission already has taken note of a similar anomaly in narcotics cases. Proposed amendment No. 8 provides for a ceiling for lower-level defendants in drug cases, and the basis for the proposed amendment is, in part, as follows:

> Commentators have argued that the guidelines over-punish certain lower-level defendants when the sentence is driven by the quantity of drugs involved in the offense. For such lower-level defendants, the quantity of drugs involved is often opportunistic and may be a less appropriate measure of the seriousness of the offense than when the defendant has assumed a mid-level or higher role.

We believe that precisely the same point applies to lower-level defendants in theft and fraud cases when the sentence "is driven by" the amount of financial loss that the case involves. Accordingly, we strongly endorse the suggestion of the Practitioners' Advisory Group, set forth at proposed amendment 38, that the Guidelines permit a downward adjustment where the defendant did not personally profit from the theft, and we believe that courts should be encouraged to depart downwardly in such cases. Likewise, we agree that there should be a cap on the offense level for minor or minimal participants whose sentences are determined with respect to the theft or fraud loss tables.

**PROPOSED AMENDMENT 23**

Abuse of Position of Trust
(§3B1.3) -- guideline reformulated
to better distinguish intended scope
of adjustment for abuse of "special" trust

We strongly support the proposed amendment. The addition of the word "special" and the proposed additional Commentary make it plain that the "position of trust" necessary as a predicate for the enhancement may not be, for example, the ordinary employee-employer relationship (such as the relationship abused in ordinary embezzlement or postal employee theft cases)[4] but rather must involve the abuse of a trust that has been specially placed in the defendant, a trust that does not involve a merely ministerial function.

In applying the current § 3B1.3, the courts have considered a number of factors, including (1) the extent to which the position of trust provided the freedom to commit a difficult-to-detect crime, United States v. Hill, 915 U.S. 502, 506-7 (9th Cir. 1990); (2) defendant's duties as compared to those of other

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[4] In this connection we strongly oppose proposed amendment 46, propounded by the United States Postal Service, precisely because it provides for an automatic enhancement for certain offenses, based exclusively on the status of the defendant (employee of the USPS) without regard to the particular circumstances of the offense or defendant. There is no reasoned basis to enhance the penalties for USPS employees, and for the same reason that the "ordinary bank teller" is not subject to enhancement, the "ordinary postal employee" should not be subject to enhancement.

employees, United States v. Lange, 918 F.2d 709-10 (8th Cir. 1990); (3) defendant's level of specialized knowledge, United States v. Mulligan, 958 F.2d 345, 346 (11th Cir. 1992); (4) defendant's level of authority in the position, United States v. Gergiadis, 933 F.2d 13219, 1227 (3d Cir. 1991); and (5) the level of public trust involved in the offense, United States v. Rehal, 940 F.2d 1, 5 (1st Cir. 1991). However, a large number of courts have struggled to apply the provision's general language, (which appears to focus on the abuse of any trust) with the exception carved out in the current Commentary for "embezzlement by an ordinary bank teller." See e.g. United States v. Odoms, 801 F. Supp. 59 (N.D. Ill. 1992). To resolve that conflict many courts have turned to the analysis offered in United States v. Hill, supra, which applies only the first of the above-listed factors and seems to ignore the others, particularly those which focus on the nature of the position of trust in question.

We believe that the proposed amendment would encourage courts to apply all of the above-listed factors and, thus, would promote careful distinctions between those cases where the abuse of trust is critical to the commission of the crime and the extent of the harm to the victim from those cases where the abuse of trust is not central to the crime. It would induce the courts to examine all facts which speak to the question of whether the defendant's abuse goes beyond the ordinary elements of the crime in question.

However, it would do so without rejecting the useful (though not exclusive) analysis offered in United States v. Hill, supra.

An amendment just to §§ 2B1.1 and 2B1.2 to deal with simple embezzlement cases (as suggested by the additional issue for comment) would not address the concern posed by the Hill case in an across-the-board manner. For example, such a limited amendment would leave simple mail fraud cases in which employees defraud their employers (where no "special" trust is abused) in the same posture as the simple embezzlement cases have been in under the current section. We do not believe the issues posed in the embezzlement cases are limited simply to embezzlement cases and would recommend a broader approach.

We urge the Commission to adopt the proposed amendment.

**PROPOSED AMENDMENT 20**

Money Laundering (Chapter Two, Part S) --
consolidates §§2S1.1 and 2S1.2 and §§2S1.4 and 2S1.4;
ties offense level closer to seriousness of offense

The NYCDL generally supports the proposed modifications to the money-laundering Guidelines. Money-laundering charges have become the latest "darling in the prosecutor's nursery"; given the breadth of the money-laundering statutes, and the government's prevalent threatened and actual use of those statutes in imaginative (and frequently inappropriate) ways, the existing base

offense levels clearly need to be changed in order to prevent manifest injustice.

We must question, though, why the base levels remain as high as they are even under the amendments. Under proposed Guideline § 2S1.1(a)(3), for instance, the base offense level for a defendant who launders money that has been stolen is "8" plus the number of offense levels from the fraud table. However, it is not evident that the defendant who launders stolen funds should be punished more severely than the defendant who stole the money in the first place. The thief starts with a base level of "6", after which the fraud table comes into play. Additionally, for many defendants, including personnel at financial institutions, the amount of funds laundered (or the amount of funds not reported as required) may not be an appropriate measure of the seriousness of the crime. Courts generally should have the ability to depart downward where the dollars involved seriously overstate the magnitude of the defendant's offense.

Subject to these criticisms, however, we support the changes to the money-laundering Guidelines, and urge that the amendments be presented to Congress.

**PROPOSED AMENDMENT 21**

Tax (Chapter Two, Part T) --
consolidates §§2T1.1, 2T1.2, 2T1.3, and
2T1.5; adopts uniform definition of tax loss

We endorse proposed amendment 21's efforts to simplify the tax Guidelines, and eliminate inherent confusion in their application. We also endorse the efforts made in this amendment to allow deviations from the pure percentage calculation of tax loss in appropriate circumstances by stating that the percentages are subject to a rebuttable presumption.

We oppose the additional issue for comment which asks whether the tax table levels should be increased one level to account for a change in the sentencing table which increased the available levels for probation. If a defendant is within levels 7 or 8 already, and the court believes some type of confinement (community or otherwise) is appropriate, the court has the authority to impose such a sentence. If the tax tables are increased in response to the changes in the sentencing tables, the salutary purpose of the change in the sentencing table -- to increase the number of defendants for whom straight probation is available -- will be lost since those defendants will no longer fall within the new ranges. In sum, we think the change is ill-advised and defeats the purpose of the 1992 amendment.

**PROPOSED AMENDMENT 8**

Drug Trafficking & Role in the Offense
(§§2D1.1, 3B1.2) -- provides offense level
ceiling in drug trafficking guideline for
defendants who receive a mitigating role adjustment

While we believe it entirely appropriate to limit the offense level for "lower-level defendants," as proposed § 2D1.1 would achieve, we question whether the proposed "cap" for defendants who receive a mitigating role adjustment, that is, level 32, is low enough to reflect the truly mitigated role that some lower-level poor and financially desperate defendants play in concerted activity.

For defendants who receive a "minimal role" adjustment, the "cap" should be even lower than for those who receive a minor role adjustment. Further, as suggested in other proposed amendments (specifically, 39 and 48), the "cap" should be lower depending on the type of controlled substance involved -- with a lower cap for less dangerous controlled substances. Such differentiation would further achieve the purposes of the proposed amendment in the first place, which is differentiating between defendants whose culpability is not appropriately measured by reference to whatever quantity of drugs may be involved, but rather by the economic and social circumstances in which they find themselves.

While we reach no determination on the precise "cap" that ought to be applied in each circumstance (as to which experience under some "cap" may be the best guide), we do wish to comment on another aspect of the proposed change in the Guideline, which is unjustified regardless of whether there is a "cap" or not. Thus, the NYCDL strongly objects to the proposed Application Note 7 to the proposed revision of the Mitigating Role Guideline, § 3B1.2. Both proposed Options of the proposed Application Note specifically exclude from the class of defendants who are eligible to receive a mitigating role adjustment, any "defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule, not an offloader or deckhand)."

It is our view that this exclusion of all "mules," without regard to characteristics of the individual defendant and transactions is an unjustified exclusion. The culpability levels of any individual "mule" is not necessarily higher than other minimal participants in a narcotic distribution scheme. More significantly, the exclusion is entirely inconsistent with Proposed Application Note 5, which lists characteristics "ordinarily . . . associated with a mitigating role" that can be said to apply to many courier-defendants, and with Note 3, which directs that, whenever certain characteristics exist, a minimal role adjustment is appropriate. When such characteristics exist with a "mule"-

defendant, there is no valid reason to deny a minimal role adjustment as to that defendant too.

Proposed Application Note 3 thus provides that the 4-level reduction "applies" to a defendant who is "one of the least culpable of the participants in the criminal activity," and that, to be considered one of the least culpable, such defendants "ordinarily must have all of the characteristics consistent with a mitigating role listed in Application Note 6 below." Application Note 6 provides that no defendant is entitled to a mitigating role adjustment if he or she

> (a) sold, or played a substantial part in negotiating the terms of the sale . . .;
>
> (b) had an ownership interest in any portion of the contraband; or
>
> (c) financed any aspect of the criminal activity.

Application Note 3 also suggests consideration -- "though not determinative" -- of the fact of a defendant's "lack of knowledge or understanding of the scope and structure of the criminal activity and of the activities of others" in determining whether a defendant played only a "minimal role."

In our experience, many mule-defendants -- generally including the "intestinal tract smugglers, a class of defendant often seen in the Districts in which we practice -- meet the qualifications of Application Notes 3 and 6. Indeed, the vast majority of these defendants are not sellers or negotiators of the

terms of any sale, have no ownership interest, and have not financed the transaction. Indeed, the vast majority of the defendants we encounter in the Districts in which we practice are from foreign countries, often from rural environments, who are driven by some of the worst economic hardship to undertake activity of the most offensive and dangerous nature (swallowing drugs), and who have no idea of American culture or of the significance and effect of their conduct on our American culture. Not only do they have no "knowledge or understanding of the scope and structure of the criminal activity and of the activities of others," as Application Note 3 discusses, but they are exploited by traffickers who lie to them about quantity so that they can underpay them for their piecemeal work.

Not only do these individuals meet the qualifications of Application Note 6 for "minimal role" attribution, but they also meet the qualifications of Application Note 5. That Note provides "a non-exhaustive list of characteristics that are ordinarily associated with a mitigating role," as follows:

> (a) the defendant performed only unskilled and unsophisticated tasks;
>
> (b) the defendant had no decision-making authority or responsibility;
>
> (c) total compensation to the defendant was small in amount, generally in the form of a flat fee; and
>
> (d) the defendant did not exercise any supervision over other participant(s).

While there may be mule-defendants who possess none of these qualifications (or not all of them), the vast majority meet the characteristics which the Note recognizes as defining "the least culpability." The task they perform is not only unskilled and unsophisticated, but it is disgusting and dangerous. There is no decision-making responsibility on the part of these individuals at all, and indeed, most are escorted to the airport in the foreign country of origin and met in this country at the airport. They are totally supervised, and not supervisory in any sense of the word. And though the compensation paid to these defendants is often dependent on weight, it is small compensation, and, because the principals wish to limit their financial outlay, they often lie to the mules about the weight they are carrying. In a weight-driven scheme of sentencing, culpability is often overstated for this reason alone.

There is no reason to deny an adjustment to a courier as a matter of justice because the characteristics set forth elsewhere to qualify criminal conduct applies no less to a courier who fits the characteristics, than to any other participant in a drug operation who possesses these characteristics. There is no reason to deny the adjustment as a matter of policy because, as a very real matter, there is no real deterrent effect of increasing the sentence for the many foreign offenders who have no knowledge or understanding of the laws, or of the risk that they take in performing the task of carrying drugs. (Indeed, though there are

repeat couriers, we have rarely, if ever, seen a defendant who is a "second-offender" courier.)

In sum, because most couriers, including almost all intestinal tract smugglers, meet all of the inclusive definitions of minimal role, and none of the exclusions, it makes no sense to have a categorical bar to treating them as any other defendant.

**PROPOSED AMENDMENT 9**

Drug Trafficking (§2D1.1) -- reduces upper limit of Drug Quantity Table; adds adjustments to further reflect defendant culpability and risk of harm

We endorse the concept of reducing the upper limit of the Drug Quantity Table. We believe that adjustments by virtue of specific offense characteristics more appropriately deal with gradations of seriousness in offenses than increases due solely to quantity of drugs involved.

As to the suggested adjustments for firearm possession and use, we oppose any expansion of the adjustment from the current 2-point adjustment to 4 or 6 points. This adjustment could potentially alter a defendant's sentence by some 150%. Such a huge adjustment is inappropriate where the adjustment is based on conduct that constitutes a separate substantive offense, as these firearms adjustments do. Use of a firearm during a drug transaction could be charged as a violation of 18 U.S.C. 924(c). Discharge could be charged as attempted murder or assault, if

warranted. Causing injury could be charged as assault or attempted murder, and killing someone as murder.

The impact of transferring separate substantive offenses into offense characteristics is to dilute the government's burden of proof. We believe that substantive crimes, such as those represented by the firearms adjustments, should be tried to factfinders with the standard trial burden of proof and with the evidentiary protections that Due Process require in a criminal trial.

Accordingly, we oppose the portion of proposed amendment 9 (and the similar portion in proposal 39, which we separately address, infra, at pp. 29-31) that would allow firearms enhancements ranging from 2 to 6 points. We all agree that those who brandish or fire guns should be punished severely, but we believe that they should be tried and convicted for the offense first.

We further believe that there should be no adjustment when a defendant has been convicted of § 924(c) or any substantive offense that is premised on the use of a weapon in a drug transaction. Additionally, we believe that, wherever there is an adjustment because of the use or discharge of a weapon, the adjustment should be applied, as proposed amendment 39 suggests, only when the defendant himself "actually possessed" or discharged the gun, or where he "induced or directed another participant" actually to do so. Given the statements of various courts that

"guns are tools of the narcotics trade", any adjustment that is not so limited is potentially abusive in its overinclusiveness.

We also approve of the decrease for defendants who "did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills." We would not approve any limitation on the type of defendant for whom that decrease could be made -- specifically, the limitations in other proposed amendments for couriers. Where such couriers -- or indeed any participant -- in drug activity meets the criteria for a decrease, the court should have discretion to award the decrease regardless of whether the defendant "carried" the drugs or not, for the same reasons as are stated in our comments to proposed amendment 8.

We also oppose the sliding scale of upward adjustments for a defendant who was "the principal organizer or leader of the criminal activity or was one of several such principal organizers or leaders," based on the number of participants "involved." Aside from the difficulty in counting "participants," we believe that the number of participants "involved" does not necessarily increase true culpability, unless the defendant was responsible for procuring the participation of those others. The quality of the leadership function, rather than the absolute number of followers, is, we think, the better measure of culpability.

**PROPOSED AMENDMENT 39**

Drug Trafficking and Role in the Offense (§§2D1.1, 3B1.2) -- revises drug and role guidelines by reducing maximum offense level in drug quantity table, adding enhancements for weapon usage and high-level organizers, and capping offense levels for defendants receiving mitigating role adjustments; increases reduction for minimal participants

As with proposed amendment 8, we agree that there should be a "cap" for those who qualify for a mitigating role adjustment. We approve of a lower "cap" where less dangerous controlled substances are involved, as this proposal provides.

As we stated in our comment to proposal 9, we oppose expansion of the firearm enhancement from the current 2 points to a 6-point range. We believe that for such substantial adjustment to be applied for conduct that in essence constitutes a separate crime, the defendant should first be tried and convicted for the offenses.

We further believe, however, as stated in our comment to proposal 9, that any adjustment for weapon use should focus on what the defendant himself did -- not on whether weapons "were used". In this regard, this proposed amendment, number 39, is far better than 9, because it indicates that an adjustment should apply only where the defendant himself possessed a weapon, or where he is equally culpable because he "induced or directed another participant" to actually do so. Given the by now-familiar

maxim that guns are tools of the trade, "looser" language, that does not focus on individual conduct, has the potential to add points to defendants who are not truly culpable for the offending weapons conduct.

As with proposal 9, we disagree with an increase for a principal organizer or leader of criminal activity "that involved 15 or more participants." Where the organizer or leader does not himself bring in participants, the exact number of participants may not be a fair measure of actual culpability.

Finally, we oppose a 2-level increase for a defendant who qualifies for an aggravating role adjustment where he or she "obtained substantial income or resources" from the criminal activity. First, the use of this definition in essence constitutes "double counting." Larger quantities entail large profits, and also higher offense levels. So, an increase keyed to profits counts the same increase in culpability that is already accounted for in increased offense levels.

Moreover, when applied to convictions premised on § 848 -- which includes such an element of the obtaining of "substantial income or resources" -- there is also a factor of double counting. For these reasons, we oppose the adjustment.

Further, the term is too ambiguous for proper application. A proposed Application Note 16 would direct a court that must interpret "substantial income or resources" to refer to the law that has developed under 21 U.S.C. § 848(c)(2)(B). Cases

interpreting those words, however, have shown that the term is ambiguous. For instance, the Second Circuit held in one case that the sum of $2000 constituted "substantial income or resources" sufficient to render § 848 applicable. United States v. Losada, 674 F.2d 167 (2d Cir. 1982). If $2000 constitutes "substantial income or resources," then anything can be, and the term is too ambiguous for legitimate use.

This proposed amendment also contains three different mitigating role adjustments instead of two -- or actually, five adjustments, since the proposal contemplates cases "falling between" the adjustment levels provided. While we applaud larger decreases for truly minimally-involved defendants, we wonder how a "significantly minimal participant" is different from a "minimal participant." We would welcome the amendment, however, so that a district judge can exercise this added discretion in an appropriate case.

To the extent that the proposed application note 7 provides that a defendant who transports contraband "shall not receive" any of the mitigating role adjustments as to the amount of contraband transported, we object for the reasons expressed in our comment to proposed amendment 8, supra, pp. 21-26; couriers are, in fact, often "minimally" involved, even if they carry contraband.

**PROPOSED AMENDMENT 48**

Drug Trafficking (§2D1.1) --
established ceiling on offense levels
for minor and minimal participants

We again approve of the concept of a "cap" for minor and minimal participants. This proposal specifically sets forth lower caps for those minimally involved than for those who are minor participants, and specifically sets forth lower caps for certain kinds of controlled substances. We approve of these further distinctions, and favor the formulation in this proposal over the others. These proposals promote the policy of the Guidelines in recognizing further distinctions based on the level of participation of the defendant and the nature of the controlled substance involved.

**PROPOSED AMENDMENT 60**

Mitigating Role (§3B1.2) --
prohibits mitigating role adjustments
for defendants held responsible under
relevant conduct only for the quantity
of drugs in which they actually trafficked

For the same reasons as are expressed in our comment to proposal 8, we object to this DOJ proposal, which prohibits any mitigating role adjustment as to drugs "in the defendant's actual possession."

**PROPOSED AMENDMENT 51**

Drug Trafficking (§2D1.1) -- clarifies that term "cocaine base" means "crack"

We specifically endorse this proposal, because it remedies a defect in both the Guidelines and the statutes. It is clear that Congress and the Commission meant to punish "crack" offenses more heavily than other offenses. At present, "crack" is subsumed into the term "cocaine base." There is, however, another substance that falls within the definition of "cocaine base" which, unlike crack, is a precursor to cocaine, and is unlike crack in nature or dangerous effect.

We strongly believe that, regardless of any other amendments, the Commission should adopt this amendment, to make it clear that it is "crack" to which heavier penalties are meant to apply, not the type of cocaine base that is also covered by present definitions.

**ISSUES FOR COMMENTS 24, 31 AND 47:**

Modification or deletion of Government motion requirement for 5K1.1 downward departure

We strongly endorse issues for comment 31 and 47, which would eliminate the need for a government motion as a predicate for a § 5K1.1 "substantial assistance" departure. Access to this most important of departures should not be controlled by the

prosecution. While we applaud the Commission's solicitation of comment in this area (see issue for comment 24), we do not agree with its suggestion that elimination of government control might be limited to cases involving non-violent first offenses. We believe that courts are fully able to assess the extent and value of a defendant's cooperation, and that the nature of the crime and the offender's history should not preclude the court, in appropriate cases, from adjusting the sentence downward.

**PROPOSED AMENDMENTS 25 AND 36**

Standards of Acceptance of Plea Agreements (§6B1.2) -- adds commentary recommending that the government disclose to the defendant information relevant to application of the guidelines prior to entry of a guilty plea

We endorse proposed amendments 25 (Commission) and 36 (Practitioner's Advisory Group) regarding disclosure by the government of information known to it in the context of plea discussions so the parties can have a realistic perception of probable sentencing out-comes. This practice is already encouraged in the Second Circuit by virtue of that Court's suggestions in United States v. Pimental, 932 F.2d 1019, 1034, (2d Cir. 1991), and as practitioners in the Second Circuit we have found it extremely helpful in plea discussions. By engaging in those discussion many factual disputes between the parties have been resolved, eliminating the necessity of pre-sentencing factual

hearings, and defendants have been able to enter the plea process with some level of knowledge of the likely sentence.

Dated: New York, New York
March 12, 1993

Respectfully submitted,

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March 14, 1993

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500 South Lobby
Washington, D.C. 20001

Dear Sirs/Mesdames,

For the past five years I have served as an expert on the subject of marijuana cultivation, intent and yield in both federal and state courts. Before that, I studied the plant, cannabis, for over fifteen years. As a result of my study and research I have come to the conclusion that federal sentencing in marijuana cultivation cases is inappropriate and unjust. In addition it does not accomplish any of the purposes for which it has been promulgated.

The Guidelines were created to develop a more uniform method of sentencing for offenses of equal magnitude. The Guidelines, as they pertain to marijuana cultivation do not accomplish this goal. Instead, they create a system of arbitrary and capricious punishment, not justice.

In order to have a clear understanding of the effects of the sentencing regulations as they affect marijuana growers it is helpful to have an understanding of marijuana's botany as it relates to yield, cultivation techniques, patterns of personal use and sales and intent.

Botanically, marijuana is considered a short day or long light plant. That means that its flowering cycle is triggered when the plant receives between 8-12 hours of uninterrupted darkness each evening. Two plants of the same variety, one a seedling and one a large, older plant will both flower at the same time if given the same long night regimen. One implication of this is that plants grown outdoors will flower at a given time during the season no matter what size they are.

Once the plants begin to flower, they stop new growth of branches and stem. Instead, all of the new growth consists of flowers in the male, which then dies, or the flowers of the unpollinated female. If the female remains unpollinated it continues to grow new flowers which spread along the branches and develop into thick masses commonly called buds or colas. Should the female flowers be pollinated, which occurs through wind pollination in nature, the plant stops growing new flowers and instead devotes its energy to developing seeds.

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 14, 1993

Marijuana is a dioecious plant, there are separate male and female plants. Males make up half the population. The male is removed from the garden to prevent pollination of the females as soon as its sex is detected. The plant is discarded. If a garden is seized one day, the plant count might be much higher than the next day after males are removed.

Marijuana users prefer to smoke sinsemilla because it produces more weight of useable material and is easier to prepare for use than seeded flowers. The seeds cannot be used for intoxicating purposes and are commonly thrown away.

The size and yield of the plant is dependent on several factors.

1.) Variety.

Since there is no central source for seed, varieties have not been standardized as they have for commercial vegetable and flower crops. Growers either use seed that they have found in marijuana they bought for use, in the same way that a person might start a plant from an avocado pit, or find a source of seeds or cuttings. When they need new plants, they then use seeds which they have produced. Because of this each grower eventually has his/her own distinct variety. There are literally thousands of varieties and each has its own potential yield and prime conditions, climate and weather, gardening technique, water conditions, and date of planting.

2.) Cultivation Technique

No matter what the potential of a particular plant's genetics, cultivation processes determine the actual yield of a particular plant.

A.) Plants which are grown close together stunt side growth so that each has smaller buds with less branching than it would grow given more space. Unreleased DEA studies on spacing and yield confirm this. In these experiments, plants were placed on 6 foot centers (about 36 square feet) and yielded just one pound of bud per plant. A typical indoor garden may be the same size as the single plant grown by the DEA, six by six feet, a total of 36 square feet.

Rather than trying to grow large plants, growers often use a method dubbed, "sea of green". Plants are started four or more per square foot and are never intended to grow out of that space.This garden may have plants growing at the density of four plants per square foot, a total of 144 plants. Each plant would have a maximum yield under ideal conditions with a high yielding variety of only about one half ounce. The maximum yield of the garden would be four and a half pounds. If the grower were reproducing plants using cuttings, a small tray of them, with a size of less than two square feet, could contain 36 plants.

B.) Plant growth and yield is determined in part by the amount of water the plant receives. Less water results in smaller growth. This is especially important in gardens which receive no irrigation. In parts of the country, there is no water for long periods during the growing cycle. This results in very small plants. Indoors, plants are often over watered, resulting in poor growth.

C.) Plants receiving low light or too intense a light have lower yields than plants receiving optimum light. Because of the necessarily surreptitious nature of growing operations and the need for them to remain hidden, plants are often grown in less than ideal conditions. They are often hidden under the shade of trees or in other areas where they do not receive direct sunlight. Plants receiving these conditions will grow much smaller than plants receiving direct sunlight. In areas of the country where the sun is very intense, plants will be stunted from over-radiation. Indoors, growers often try to grow plants using inadequate lighting, resulting in very low yields.

D.) Outdoors, late planting results in smaller plants, because the plants of a single variety flower at the same time no matter the size. Surreptitious growers often plant late so that there is less time for the plants to be detected and so that stay small, making detection less likely. Indoors, growers using the "sea of green" force the plants to flower when they are only 18 inches high. At maturity, the plants are only two to three feet tall, with no branching and a yield of only one half ounce.

3.) Conditions

A.) Soil fertility and fertilizing regimen plays a part in growth of plants. Plants receiving inadequate nutrients have smaller yields than those obtaining adequate amounts. No two farmers use exactly the same techniques, so each will have different results.

B.) Temperatures which are too high or too low retard both growth and yield. This affects all outdoor crops. Indoors, gardeners often find it difficult to control temperatures because of the heat generated by high intensity of the lights needed for indoor cultivation.

C.) Very high or low humidity lowers the growth rate and yield of the plant by slowing photosynthesis. This leads to lower yields.

D.) Rain may destroy a crop if it occurs close to harvest time because the ripening buds are susceptible to mold under conditions of high humidity and moisture. Once attacked the bud can be destroyed by the spreading fungus overnight.

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 14, 1993

Lowering Level 42 through 24 as proposed (Sec 2D1.1) is a step in the right direction. The offense levels for what is now Levels 22-26 should also be reduced. Even a 2 point reduction would make the sentencing more appropriate.

The Guidelines should also be amended so that the court can consider downward departures based on mitigating circumstances for marijuana crimes of Level 12 and under. Penalties other than incarceration should be considered for first time offenders in these cases. This would free the courts of many small and relatively minor cases as well as limiting the possibility of these offenders mingling with hardened criminals.

(Commentary not yet available)

# ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION)
## Sentencing Alternatives and Procedures and Appellate Review of Sentences
Approved February, 1993

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## PART I. SCOPE OF CHAPTER; SENTENCE AUTHORITIES

### Standard 18-1.1. Scope of chapter

(a) This chapter deals with sentencing of adult individuals or organizations convicted of felonies and misdemeanors [for which an individual offender may be sentenced to total confinement for six months or more].

(b) This chapter does not deal with capital punishment.

(c) This chapter does not deal with sentencing of juvenile offenders unless those offenders are tried and convicted as adults.

(d) This chapter does not deal with commitments to institutions for treatment programs, whether characterized as criminal or civil, unless a commitment is a part of a sentence imposed following conviction for an offense.

(e) This chapter does not deal with sentencing by military justice tribunals.

### Standard 18-1.2. The legislative function

(a) The legislature and executive should determine the public policies of sentencing and enact the statutory framework for the sentencing system. The legislative function is performed best by statutes that articulate the societal purposes in sentencing, define the authorized types of sanctions, and set the maximum limits of those sanctions.

(b) The legislature and executive should establish the organs of government necessary to implement the legislatively determined policies within the legislative framework and delegate to them the powers appropriate to their roles.

### Standard 18-1.3. The intermediate function; guided judicial discretion

(a) The legislature should create or empower a governmental agency to transform legislative policy choices into more particularized sentencing provisions that guide sentencing courts. The agency should also be charged with responsibility to collect, evaluate and disseminate information regarding sentences imposed and carried out within the jurisdiction. Guidance of judicial discretion in sentencing and development of an information base about sentencing are the basic aspects of what these Standards describe as "the intermediate function."

(b) The intermediate function should be performed by an agency with state-wide authority. The intermediate function is performed most effectively through a sentencing commission.

(c) If a jurisdiction elects not to create a sentencing commission, the legislature should either undertake the intermediate function itself or designate another organ of government to do so. If the function is delegated to the judicial branch, it should be made the responsibility of the highest state court or a state-wide judicial conference.

Standard 18-1.4. The sentencing function; abolition of jury sentencing; sentencing councils; appellate review of sentences

(a) Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence.

(b) Sentencing courts may convene councils, composed of judges sitting on a sentencing court, as advisory panels to develop common criteria for sentencing decisions and to assist individual judges in determining the appropriate sentences in particular cases.

(c) The highest court of the state, if authorized to promulgate rules of criminal procedure, should establish rules for pre-sentence and sentencing proceedings.

(d) Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts.

## PART II. PUBLIC POLICY LEGISLATIVE CHOICES

### A. Societal Purposes

Standard 18-2.1. Multiple purposes; consequential and retributive approaches

(a) The legislature should consider at least five different societal purposes in designing a sentencing system:

(i) To foster respect for the law and to deter criminal conduct.

(ii) To incapacitate offenders.

(iii) To punish offenders.

(iv) To provide restitution or reparation to victims of crimes.

(v) To rehabilitate offenders.

(b) Determination of the societal purposes for sentencing is a primary element of the legislative function. The legislature may be aided by the agency performing the intermediate function.

## B. Types of Sanctions

Standard 18-2.2. Types of sanctions authorized

(a) The legislature should enact a criminal code that authorizes imposition of the following types of sanctions upon persons convicted of offenses:

(i) Compliance programs. Compliance programs are sanctions intended to promote offenders' future compliance with the law. For individuals, compliance programs involve control or supervision of offenders within their communities, such as probation. For organizations, compliance programs may involve supervision or change in the management or control of an offender.

(ii) Economic sanctions. Economic sanctions include fines, monetary awards payable to victims, and mandatory community service. The legislature should not authorize imposition of economic sanctions for the purpose of producing revenue.

(iii) Acknowledgment sanctions. Acknowledgment sanctions include court-ordered communications to the public at large, or to particular classes of persons, of information about offenders' convictions and other facts about the offenses.

(iv) Intermittent confinement. Intermittent confinement is confinement during specified hours in a local facility or in an offender's residence.

(v) Total Confinement. Total confinement is incarceration in a federal, state, county, or municipal institution.

(b) The legislature should be receptive to the development and use of new sanctions not set forth in these standards.

(c) The legislature should enact an adult community corrections act to facilitate the establishment of a comprehensive adult community corrections program. The Model Adult Community Corrections Act is a suggested example.

## C. Costs and Resources

Standard 18-2.3. Costs of criminal sanctions; resources needed

(a) In designing or changing the criminal justice system, the legislature should consider financial and other costs of carrying out sentences imposed. For this purpose, the legislature should ensure that it receives a "sentencing impact statement" before it enacts new provisions in the criminal code.

(b) The legislature should appropriate the operating and capital funds necessary for each part of the sentencing system to perform its prescribed role. In particular, the legislature should provide adequate funding for alcohol and drug treatment programs.

(c) Presumptive sentences ideally should not be determined on the basis of funds or resources available.

(d) The legislature should recognize the consequences of not appropriating necessary funds, including the possibility that offenders will not serve appropriate and just sentences.

(e) In the event that the legislature fails to provide necessary funds, the agency performing the intermediate function should see that the aggregate of sentences imposed in conformity with legislative policies does not exceed the facilities and services provided for proper execution of those sentences. In particular, the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and jail system of the state.

## D. Severity of Sanctions

Standard 18-2.4. Severity of sentences generally

The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should ~~be~~ no more severe than necessary to achieve the societal purposes for which they are authorized.

## E. Determinacy, Disparity and Individualized Sentences

Standard 18-2.5. Determinacy and disparity

(a) The legislature should create a sentencing structure that enables the agency performing the intermediate function to make reasonably accurate forecasts of the aggregate of sentencing decisions, including forecasts of the types of sanctions and severity of sentences imposed, so that the legislature can make informed changes in sentence patterns through amendment of the criminal code, or the agency can do so through revised guidance to sentencing courts.

(b) The legislature should create a sentencing structure that sufficiently guides the exercise of sentencing courts' discretion to the end that unwarranted and inequitable disparities in sentences are avoided.

Standard 18-2.6. Individualization of sentences

(a) The legislature should authorize sentencing courts to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders.

(i) Sentencing courts should be permitted to take into account facts and circumstances concerning the offense or the offender that constitute aggravating or mitigating factors.

(ii) Neither the legislature nor the agency performing the intermediate function should assign specific weights to aggravating or mitigating factors.

(b) The legislature should authorize sentencing courts, sentencing individual offenders, to take into account personal characteristics not

material to their culpability that may justify imposition of a different type of sanction or, in limited circumstances, a sentence of lesser severity than would otherwise be imposed.

### F. Systemic Review

Standard 18-2.7. Systemic review

(a) The legislature should ensure that valid, current data are compiled on the operation of the criminal justice system, including data on the use and efficacy of each type of sanction.

(b) At least once every ten years, the legislature should re-examine legislative policies regarding sentencing in light of the pattern of sentences imposed and executed.

## PART III. LEGISLATIVELY AUTHORIZED SENTENCES

### A. Legislative Framework Generally

#### 1. Current Offense Sentences

Standard 18-3.1. Ordinary offenses and offenders

(a) For each offense, the agency performing the intermediate function should guide sentencing courts to the presumptive sentence, i.e., the level of severity of the sentence and the permissible types of sanctions to be imposed in the ordinary case. For cases that are not ordinary, the legislature or the agency should establish criteria for imposing sanctions of more or less severity, or of different types of sanctions. Such criteria should include the factors aggravating or mitigating the gravity of offenses, the degree of offenders' culpability, and personal characteristics of individual offenders that may be taken into account.

(b) Presumptive sentences may be expressed in terms of ranges of severity of sanctions.

Standard 18-3.2. Mitigating factors

(a) The legislature or the agency performing the intermediate function should identify factors that may mitigate the gravity of an offense or an offender's culpability in commission of the offense.

(b) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the mitigating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(c) Mitigating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(d) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider mitigating factors in determining sentences within the range and, if the factors are substantial, in departing downward from the range.

Standard 18-3.3. Definition of offenses; aggravating factors

(a) The legislature should define offenses so that important factors determining the gravity of offenses are made elements of the offenses rather than aggravating factors to be considered only in sentencing.

(i) The legislature should categorize offenses in which an act of violence is an element separately from similar non-violent offenses so that the levels of severity of authorized and presumptive sentences are appropriate for each type of offense.

(ii) For offenses in which the gravity of the offense varies with the amount of money or quantity of goods, the legislature should differentiate offenses by including amounts or quantities as elements of the offenses.

(b) The legislature or the agency performing the intermediate function should identify factors that may aggravate the gravity of an offense or an offender's culpability in commission of the offense.

(c) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the aggravating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(d) Aggravating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(e) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider aggravating factors in determining sentences within the range and, if the factors are substantial, in departing upward from the range.

Standard 18-3.4. Personal characteristics of individual offenders

(a) The legislature and the agency performing the intermediate function should authorize sentencing courts, sentencing individual offenders, to consider their physical, mental, social and economic characteristics, even though not material to their culpability for the offenses, only as provided in this Standard.

(b) The legislature and the agency should permit sentencing courts to use information about offenders' financial circumstances for the purpose of determination of the amount or terms of fines or other economic sanctions.

(c) Except as provided in (b), the legislature and the agency should provide that sentencing courts may take into account personal characteristics of offenders not material to their culpability to determine the appropriate types of sanctions to impose or, if the characteristics are indicative of circumstances of hardship, deprivation, or handicap, to lessen the severity of sentences that would have been imposed.

(d) The legislature should specify that the following personal characteristics shall not, in and of themselves, be used for this or any other purpose with regard to sentencing:

(i) Race,

(ii) Gender or sexual orientation,

(iii) National origin,

(iv) Religion or creed,

(v) Marital status,

(vi) Political affiliation or belief.

## 2. Criminal History of Offenders

Standard 18-3.5. Criminal history; recidivism

(a) The legislature should authorize more severe sentences for convicted offenders with prior convictions. The extent of enhancement should be reasonably related to the sentence severity levels authorized for the offense of conviction.

(b) Standards for enhancement of sentence on the basis of criminal history should take into account the nature and number of prior convictions and the time elapsed since an offender's most recent prior conviction and completion of service of sentence. The legislature should fix time periods after which offenders' prior convictions may not be taken into account to enhance sentence; these periods may vary with the nature of the prior offenses.

(c) The agency performing the intermediate function should guide sentencing courts to the appropriate weight to be given to an offender's criminal history.

(d) If a jurisdiction has an "habitual offender" statute or comparable law regarding recidivists, the statute should provide that sentences imposed because of prior convictions should be reasonably related in severity to the level of sentence appropriate for the offense of current conviction.

## 3. Simultaneous Sentences for More than One Offense

Standard 18-3.6. Offense of conviction as basis for sentence

The legislature and the agency performing the intermediate function should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

Standard 18-3.7. Convictions of multiple offenses

(a) The agency performing the intermediate function should direct sentencing courts to impose on any offender convicted of multiple offenses a consolidated set of sentences that appropriately takes into account all of the offender's current offenses.

(b) For offenses that are part of a criminal episode,

(i) convictions of offenses whose elements substantially overlap should be merged for sentencing,

(ii) sentencing courts should not change the type of sanction or increase the severity of sentences for multiple offenses merely as a result of the number of counts or charges made from a single episode, and

(iii) where the separate offenses are not merged for sentencing, sentencing courts should impose sentences of a type of sanction and level of severity that take into account the fact that the separate offenses occurred as part of an episode.

(c) If multiple offenses are of a kind that is graded by the amount of money or property involved, sentencing courts should be authorized and guided to determine the appropriate sentence by treating the offenses as a single offense and measuring its gravity by cumulating the amounts of money or property in the separate offenses.

(d) Upon conviction of an offender for multiple offenses not within (b) or (c), the presumptive sentence should be derived by reference to the sentence appropriate for the most serious offense. If the court determines that an enhanced sentence is appropriate because of the other current offenses, the enhancement should ordinarily be determined as if the other current offenses were treated as part of the offender's criminal history or as factors aggravating the most serious offense.

(e) Sentencing courts, sentencing an offender who is subject to service of a prior sentence, should be authorized and guided to take into account the unexecuted part of the prior sentence in shaping a consolidated set of sentences.

Standard 18-3.8. Multiple offenses in different jurisdictions

(a) The agency performing the intermediate function should direct sentencing courts, sentencing an offender who is subject to a prior sentence of total confinement imposed by a court in another jurisdiction, to take into account the unexecuted part of the prior sentence in shaping the sentence to be imposed.

(b) The legislature should make it possible for multiple sentences of total confinement imposed by different states to be served under one prison authority. A sentencing court should be authorized to impose a sanction of total confinement to run concurrently with an out-of-state sentence, even though the time will be served in an out-of-state institution.

(c) Outstanding charges of offenses committed in different states should be disposed of promptly.

(d) The legislature should authorize implementation of the principles in this standard through interstate and federal-state agreements.

## 4. Offenders' Conduct in Response to Charges As Affecting Sentence

Standard 18-3.9. Acknowledgment of responsibility

(a) On guilty pleas, the agency performing the intermediate function should guide sentencing courts to impose sentences in accordance with Standard 14-1.8.

(b) In the absence of a guilty plea, sentencing courts should be guided to impose sentences of lesser severity or of a different type of sanction upon defendants who have acknowledged responsibility for their conduct.

Standard 18-3.10. Cooperation with prosecution

(a) The agency performing the intermediate function should guide sentencing courts to impose sanctions of lesser severity or of a different type upon defendants who have cooperated with the prosecution.

(b) The agency should ensure that the views of the relevant prosecutor are considered by the sentencing court.

## B. Legislation as to Types of Sanctions

### 1. Authorization and Use

Standard 18-3.11. Authorization of sanctions

(a) The legislature should authorize sentencing courts to impose sentences composed of any one or more of the available sanctions.

(i) All types of sanctions should be available for sentences of individual offenders.

(ii) The sanctions of intermittent or total confinement are not feasible for sentences of organizations, but all other sanctions should be available.

(b) For each offense, the legislature should specify a maximum authorized severity level for each type of sanction.

(c) The legislature should not mandate the use of the sanction of total confinement for an offense unless the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction.

Standard 18-3.12. Use of authorized sanctions; guidance to sentencing courts

(a) The agency performing the intermediate function should provide principles of preference among the types of sanctions to guide sentencing courts in the determination of sentences in light of the societal purposes to be served. The agency should recognize that

(i) Every criminal sanction is a deprivation of liberty or property and has the effects of punishing offenders, deterring criminal conduct and fostering respect for the law.

(ii) Sanctions other than total confinement may serve to punish and incapacitate offenders.

(iii) Rehabilitation of offenders is an insufficient basis, standing alone, for imposition of a criminal sanction not otherwise justified, or for imposition of a more severe sentence than otherwise justified. The possibility of rehabilitation or treatment of an individual offender is properly considered in choosing the type of sanction to impose.

(b) The agency should give priority to the use of sanctions that have the purpose and effect of promoting offenders' future compliance with the law. Compliance programs, alone or in conjunction with other types of sanctions, are an appropriate type of sanction for all offenders.

(c) Imposition of a sanction of total confinement may be proper -

(i) if the offender caused or threatened serious bodily harm in the commission of the offense,

(ii) if other types of sanctions imposed upon an offender for prior offenses have proven ineffective to induce the offender to avoid serious criminal conduct,

(iii) if necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law, or

(iv) for a very brief period, if necessary to impress upon an offender that the conduct underlying the offense of conviction is unlawful and could have resulted in a longer term of total confinement.

(d) Use of economic sanctions, alone or in conjunction with other types of sanctions, is appropriate for offenders with ability to pay the amounts ordered. Use of the sanction of restitution or reparation is not proper unless the amount of the claims can be ascertained without inordinate burden on the time and resources of sentencing courts.

(e) The legislature should ensure that levels of severity of composite sentences that combine sanctions of different types are not, in the aggregate, unreasonably severe.

(i) The agency performing the intermediate function should provide particular guidance on the maximum severity of composite sentences.

(ii) Appellate courts reviewing sentences should monitor the patterns of composite sentences being imposed and develop, through caselaw, standards of appropriate severity.

## 2. Compliance Programs

Standard 18-3.13. Compliance programs for individuals

(a) The legislature should authorize sentence of an individual to a compliance program or programs. Sentence to a compliance program should be authorized as an appropriate sentence whether an offender has plead guilty, was convicted on plea of not guilty, or intends to appeal from conviction.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual sentenced to a compliance program for a period specified in the sentence, subject to legislatively established maximum periods.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of compliance programs for individuals.

(i) Programs should promote offenders' future compliance with the law.

(ii) Programs should not be unduly restrictive of an offenders' liberty or autonomy. Where fundamental rights are concerned, special care should be taken to avoid overbroad restraints that are so vague or ambiguous as to fail to give real guidance.

(iii) Before an offender is sentenced to a program of education, rehabilitation or therapy, the court should consider whether the offender will participate in and benefit from the program, and

(iv) When an individual is required to pay a fine as a condition of a compliance program, the court should consider the offender's financial circumstances in determining the total amount of the fine and the schedule of payment. When an individual is required to make restitution to a victim as a condition of a compliance program, the court should consider the offender's financial circumstances in determining the schedule of payment.

(d) The agency should ensure that sentencing courts set conditions of a compliance program that fit the circumstances of an individual offender. The basic condition of every sentence to a compliance program is that the offender lead a law abiding life. Discretionary conditions may deal appropriately with other matters to the extent that restrictions have a

reasonable relationship to the individual's current offense and criminal history, such as:

(i) cooperating with the required terms of supervision;

(ii) meeting family responsibilities;

(iii) maintaining steady employment or engaging in a specific employment or occupation;

(iv) pursuing a prescribed educational or vocational training program;

(v) undergoing available medical, rehabilitative, psychological or psychiatric treatment, including periodic testing for illegal use of controlled substances;

(vi) maintaining residence in a prescribed area or in an available facility for individuals sentenced to a compliance program;

(vii) refraining from consorting with specified groups of people, frequenting specified types of places, or engaging in specified business, employment, or professional activities;

(viii) making restitution of the proceeds of the offense or making reparation for loss or injury caused by the offense;

(ix) payment of a fine;

(x) refraining from the use of alcohol or illegal substances or the possession of a dangerous weapon;

(xi) performing specified public or community service.

The agency performing the intermediate function should develop a model set of compliance program conditions and guidance concerning their use.

(e) The legislature should authorize sentencing courts to set terms of a compliance program following release from total or intermittent confinement. The post-release program may, but need not, require supervision of an offender.

Standard 18-3.14. Compliance programs for organizations

(a) The legislature should authorize sentences of an organization to a compliance program. Sentence to a compliance program should be authorized as an appropriate sentence whether the organization has plead guilty, was convicted on plea of not guilty, or intends to appeal from conviction.

(b) The legislation should authorize a sentencing court to retain jurisdiction over an organization for a period specified in the sentence, subject to legislatively established maximum periods for various offenses.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of compliance programs for convicted organizations.

(i) Programs should promote offenders' future compliance with the law;

(ii) Programs may require that an organization cease or modify specified practices or activities that gave rise to the organization's criminal behavior, including a requirement that the organization engage in an internal study to identify such practices or activities;

(iii) Programs should not interfere with or delay the making of legitimate "business judgment" decisions by the organization's management, governing board, shareholders, or members.

(d) The legislature should authorize continuing judicial oversight of the overall activities of a convicted organization if the sentencing court finds from the organization's current offense and criminal history that the organization's criminal behavior (i) was serious, repetitive, and facilitated by inadequate internal management, accounting or supervisory controls, or (ii) presented a clear and present danger to public health or safety. Judicial oversight may be effected through adoption of monitoring, reporting, record keeping, and auditing controls designed to increase the organization's mechanisms for internal accountability, such as an independent audit committee, special counsel, and a separate staff system for an organization's governing board.

## 3. Economic Sanctions

Standard 18-3.15. Restitution or reparation

(a) For an offense that resulted in a victim's personal injury or loss of money or property, the legislature should authorize sentencing an individual or an organization to make restitution to the victim or to compensate the victim for losses suffered. The legislature should authorize a sentencing court to order payment to a fund for future disbursement if the identities of the victims or the amounts of their claims are not ascertained at the time of sentencing.

(b) In the event of injury or loss that the offender has special capacity to restore or repair, the legislature should authorize sentencing an individual or organization to perform such reparations.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of restitution and reparation.

(i) The sanction should be limited to the greater of the benefit to an offender or actual loss to identified persons or entities. Claimants seeking general, exemplary, or punitive damages, or asserting losses that require estimation of consequential damages, such as pain and suffering or lost profits, should be limited to their civil remedies.

(ii) The agency should provide that sentencing courts may require offenders to pay the full amount of the sanction forthwith or, taking into account the financial circumstances of an offender, to pay the amount in scheduled installments.

(d) The legislature should enact appropriate provisions to integrate the criminal sanction of restitution or reparation with a victim's right of civil action against an offender. The legislature should authorize sentencing courts to allow a defense or plea in bar, which might have been raised in a civil proceeding by a victim against an offender, as appropriate and relevant to liability imposed in the criminal proceeding.

(e) The legislature should authorize a sentencing court to retain jurisdiction over an offender sentenced to a restitution or reparation sanction until the sanction is satisfied or the sentence is rescinded.

(f) The legislature should place responsibility for enforcement of orders of restitution or reparation on a designated public official. The

legislature should authorize that official to enforce the court order by use of any method available to enforce a civil judgment.

Standard 18-3.16. Fines

(a) The legislature should authorize sentence of an individual or an organization to a fine.

(b) The legislature should not prescribe a minimum fine for any offense.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of fines. Fine amounts may be set by use of one or more factors, including the following:

(i) the income and assets of the offender;

(ii) the amount of the victim's loss or the offender's gain; and

(iii) the difficulty of detection of the offense.

(d) The legislature should provide that sentencing courts, in imposing fines, are required to take into account the documented financial circumstances and responsibilities of an offender.

(i) An offender's ability to pay should be a factor in determining the amount of the sanction. Sentencing courts, in imposing a fine on an individual, should consider the offender's obligations, particularly family obligations.

(ii) Sentencing courts, in imposing a fine, should not undermine an offender's ability to satisfy a civil judgment, or sentence, requiring an offender to make restitution or reparation to the victim of the offense.

(iii) Sentencing courts, in imposing fines upon organizations, should not duplicate sanctions imposed under statutory provisions, such as antitrust laws or securities laws, for government or private civil actions for equitable relief, money damages, or civil penalties that have the same deterrent or remedial purpose as the sanctions of the criminal law.

(iv) Sentencing courts, taking into account the financial circumstances of an offender, should require the offender to pay the

full amount of a fine forthwith or to pay the amount in scheduled installments.

(e) The legislature should authorize a sentencing court to retain jurisdiction over an offender sentenced to a fine until the fine is paid or the sentence is rescinded.

(f) The legislature should place responsibility for enforcement of fines on a designated public official. The legislature should authorize that official to collect a fine by use of any method available to enforce a civil judgment for a sum of money and, in appropriate cases, to seek a court order holding a delinquent offender in civil or criminal contempt.

Standard 18-3.17. Community service

(a) The legislature should authorize sentence of an individual or organization to perform a specified community service without compensation.

(b) The legislation should authorize a sentencing court to retain jurisdiction over an individual or organization sentenced to perform a specified community service for the period specified in the sentence, subject to the same legislatively established maximum periods applicable to sentences to a compliance program.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the community service sanction.

(i) Offenders should be ordered to perform community service only in programs of public agencies or non-profit organizations.

(ii) Sentencing courts selecting the particular community service to be included in an individual offender's sentence may, but need not, specify work possibly beneficial in rehabilitating an offender.

(iii) Sentence of an organizational offender may provide that the organization, at its expense, supply managers or employees of the organization to work for a public agency or non-profit organization for the period of the sentence.

## 4. Acknowledgment Sanctions

Standard 18-3.18. Acknowledgment sanctions

(a) The legislature should authorize sentence of an individual or an organization to perform a specified acknowledgment sanction without compensation.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual or organization sentenced to perform an acknowledgment sanction for the period specified in the sentence, subject to the same legislatively established maximum periods applicable to sentences to a compliance program.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the acknowledgment sanction.

(i) Sentencing courts selecting the particular acknowledgment sanction to be included in an offender's sentence may, but need not specify a sanction possibly beneficial in rehabilitating the offender.

(ii) Sentence of an organizational offender may provide that the organization, at its expense, supply managers, employees of the organization, or agents hired from outside the organization to perform the acknowledgment sanction for the period of the sentence.

## 5. Intermittent Confinement Sanctions

Standard 18-3.19. Intermittent confinement in facility

(a) The legislature should authorize sentence of an individual offender to commitment in a facility on an intermittent basis that permits the offender to leave the facility for employment, education, vocational training, or other approved purpose, but requires the offender to return to the facility for specified hours or periods, such as nights or weekends.

(b) The legislation should authorize the sentencing court to retain jurisdiction over an individual sentenced to intermittent confinement for the term specified in the sentence.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of intermittent confinement.

Standard 18-3.20. Home detention

(a) The legislature should authorize sentence of an individual offender to remain at home except for specified periods when the offender may leave for employment, education or vocational training, or other approved purpose.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual sentenced to home detention for the term specified in the sentence.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of home detention.

(d) Use of electronic monitoring devices as part of a sentence to home detention is appropriate, but the availability of such devices should not be a prerequisite for such sentences. The ability of an offender to pay the costs of such a device should not be considered by sentencing courts in determining whether to use the sanction of electronically monitored home detention.

## 6. Total Confinement

Standard 18-3.21. Total confinement

(a) The legislature should authorize sentence of an individual offender to a term of total confinement.

(b) A legislature should not prescribe a minimum term of total confinement for any offense.

(c) The agency performing the intermediate function should guide courts in the appropriate use of the sanction of total confinement.

(d) The legislature should provide that individuals sentenced to total confinement be committed to the custody of the department or bureau charged with operation of the prison or jail system for the term of their confinement.

(e) The legislature should provide that individuals sentenced to total confinement receive substantial "good time" credit toward service of their sentences. The legislature should determine a specific formula for "good time" credit.

(f) The legislature should provide that the department or bureau with custody of an individual must determine the individual's release date by giving credit for:

(i) time spent in custody prior to trial or plea, during trial, pending sentence, pending appellate review, and prior to the arrival at the institution to which an offender has been committed.

(ii) time spent in custody under a prior sentence if the prior sentence has been set aside and the individual has been sentenced again for the same offense or for another offense based on the same conduct. In the event of a reprosecution, credit should include all time spent in custody, in accordance with paragraph (i) as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(iii) time spent in custody upon arrest on a different charge if the charge on which the individual has been sentenced grew out of conduct that occurred prior to the arrest and that time has not been credited toward another sentence.

When an individual has been sentenced to consecutive terms of total confinement, credit toward the remaining sentence should be given for time spent in custody under a sentence that has been set aside as a result of appeal or postconviction review without reprosecution or resentence for that offense or for another offense based on the same conduct.

(g) If the aggregate of total confinement sentences imposed does not satisfy the requirement of adequate determinacy in sentencing, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released. The legislature should direct the board to take into account, in setting guidelines for presumptive dates of release or in considering the release date of a specific individual, the provisions in this standard.

Standard 18-3.22. Costs, fees, and assessments

(a) The legislature may provide that an offender may be charged with reasonable court costs and, in an appropriate case, with reasonable costs associated with a correctional program or sanction included in that offender's sentence. The legislature should characterize such assessments as separate from offenders' sentences.

(b) The agency performing the intermediate function should provide that sentencing courts should take into account offenders' financial circumstances in determining whether to assess costs and the amount of costs assessed.

(c) The agency should ensure that sentencing courts, in assessing such costs, do not undermine an offender's ability to satisfy a civil judgment, or sentence, requiring the offender to make restitution or reparations to the victim of the offense. The agency should determine whether assessments of such costs should be subordinated to sentence provisions for economic sanctions other than restitution or reparation.

(d) The agency should ensure that sentencing courts, in determining the amount of economic sanctions other than restitution or reparation, take into account the amount of costs assessed or to be assessed.

(e) The legislature should place responsibility for enforcement of cost assessments on a designated official. The legislature should authorize that official to enforce an assessment of costs by any method available to enforce a civil judgment. Non-payment of assessed costs should not be considered a sentence violation.

## PART IV. THE INTERMEDIATE FUNCTION

### A. General

Standard 18-4.1. Basic responsibilities of the agency performing the intermediate function

(a) Implementation of legislative policy determinations within the statutory framework of the criminal code requires a state-wide agency to develop a more specific set of provisions that guide sentencing courts to presumptive sentences and in the appropriate use of aggravating and mitigating factors, offenders' criminal history, and offenders' personal characteristics. This intermediate function is crucial to effective administration of a criminal justice system in a way that meets the established societal objectives, makes optimal use of available resources, and results in sentences that are reasonably determinate.

(b) The agency performing the intermediate function should be the information center for all elements of the criminal justice system. The agency should collect, analyze and disseminate information on the nature and effects of sentences imposed and carried out. The agency should develop

means to monitor, evaluate, and predict patterns of sentencing, including levels of severity of sentences imposed and relative use of each type of sanction. Information gathered by the agency is necessary to the legislature's performance of the legislative function, to the agency's performance of the intermediate function, and to the courts' performance of the judicial function. The agency's responsibility to provide information concerning the sentencing system extends to members of the bar and to the general public.

## B. The Intermediate Function and a Sentencing Commission

Standard 18-4.2. Establishment of sentencing commission

(a) If a jurisdiction elects to establish a sentencing commission, the legislature should authorize the commission as a permanent body. The legislature should authorize appointment of commission members and chairman by the governor with the advice and consent of the senate or by the presiding judge of the highest state court. The legislature should provide that the commission be composed of lay persons and persons with varying perspectives and experience within the criminal justice system and with sentencing processes, including at least one representative of the judiciary, prosecuting authorities, defense bar, and correctional and probation agencies. In composing the commission, consideration should be given to the community's ethnic and gender diversity.

(i) Members of the commission should serve for a term of years long enough to ensure continuity and efficient functioning of the commission, but short enough to allow for the regular infusion of new perspectives and experience.

(ii) Members of the commission should be selected for their knowledge and experience and their ability to adopt a systemic, policy-making orientation. Members should not function as advocates of discrete segments of the criminal justice system.

(b) The legislature should designate the commission's responsibilities to include the following:

(i) promulgation and periodic revision of presumptive sentences and other provisions to guide sentencing discretion;

(ii) ongoing data gathering and research relating to sentencing policies and practices, including studies regarding compliance with the provisions promulgated by the commission, rates of disparities in

sentencing, and the past and projected impact of the provisions promulgated by the commission;

(iii) periodic reports to the legislature and the public regarding the commission's data gathering and research, and reports responsive to any particular queries posed by the legislature to the commission;

(iv) periodic recommendations to the legislature regarding changes in the criminal code or to the rule making authority regarding changes in the rules of criminal procedure;

(v) provision of information to the bar and the public regarding sentencing provisions promulgated by the commission and sentencing policies and practices;

(vi) development of manuals, forms, and other controls to attain greater consistency in the contents and preparation of presentence reports;

(vii) monitoring compliance with procedural rules, particularly as applicable to administrative and correctional personnel engaged in the collection and verification of sentencing data;

(viii) service as an educational agency for judges, probation officers, and for other personnel; and

(ix) administration of periodic sentencing institutes or seminars to discuss problems relating to sentencing and to develop improved criteria for the imposition of sentences.

(c) Adequate staff assistance for the commission is essential and should include persons familiar with recent developments in empirical criminology.

(d) The commission's empirical research capacity should be given highest priority and should be adequately funded by the legislature.

Standard 18-4.3. Creation of provisions to guide sentence discretion

(a) Presumptive sentences and other criteria to guide judicial sentencing discretion should be the product of cooperative effort by the legislature and the sentencing commission. The legislature should make a clear delineation of responsibility between itself and the commission with respect to the promulgation of sentencing policy.

(b) A new commission's first task, prior to the creation of sentencing provisions, should be a detailed empirical study of prior sentencing patterns in the jurisdiction. Projections regarding the impact of any proposed sentencing provisions should be developed. The legislature should require that the provisions promulgated by the commission reflect legislatively determined policy goals and judgments; presumptive sentences and related provisions should not be merely the product of reproducing or averaging prior sentencing practice.

(c) Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments.

(d) The commission should be required to observe the standards and procedures that apply generally to administrative agencies in rulemaking proceedings. Informal consultation with interested public groups and other criminal justice agencies should be encouraged.

Standard 18-4.4. Structure of provisions to guide sentence discretion

(a) The legislature should authorize the sentencing commission to transform the legislatively determined policy choices into more particularized sentencing provisions that guide sentencing courts to the levels of severity of presumptive sentences, within statutory limits, that are appropriate for ordinary offenders.

(b) The legislature should require the commission to indicate the types of sanctions that constitute the presumptive sentence for particular offenses. The legislature should further require the commission to specify the presumptively appropriate level of severity for each sanction.

(i) The sentencing provisions should direct sentencing courts to the types of sanction and severity of sanction determined with reference to the offense of conviction and the degree of culpability of the ordinary offender.

(ii) For the sanctions of fine, intermittent confinement or total confinement, the presumptive level of severity may be expressed in terms of a range. Sentencing courts, taking into account the material facts regarding the offense and the offender, should have broad discretion in determining sentences within the stated ranges. Ranges of presumptive sentences should be fixed so that sentences imposed are adequately determinate.

(iii) The sentencing provisions should indicate to sentencing courts the extent of adjustments in sentences appropriate to take into account an offender's criminal history.

(iv) The legislature should permit sentencing courts to impose a sentence of lesser or greater severity or types of sanctions different from the presumptive sentence if the court finds substantial reasons for so doing. Such circumstances are present:

(A) When a court finds a mitigating or aggravating factor that on balance justifies the court's determination, or

(B) When a court, sentencing an individual offender, finds a social, economic, physical or mental characteristic of the offender, indicative of circumstances of hardship, deprivation, or handicap, that justifies imposition of a less severe sentence.

(c) The legislature should require the commission to determine presumptive sentences for the sanction of total confinement with the expectation that, apart from credit for good time, the sentences imposed will determine the length of sentences served.

(i) The legislature should provide that the commission may not promulgate sentencing provisions that will result in prison populations beyond the capacity of existing facilities unless the legislature appropriates funds for timely construction of additional facilities sufficient to accommodate the projected populations.

(ii) The legislature should provide that the commission may amend its sentencing provisions to reduce the length of presumptive sentences for the sanction of total confinement to relieve prison overcrowding. The amended provisions, when promulgated, should be applied to offenders still serving sentences of total confinement as well as to newly sentenced offenders.

### C. The Intermediate Function in the Absence of a Sentencing Commission

Standard 18-4.5. Legislative agency to perform the intermediate function

(a) If a jurisdiction elects not to establish a sentencing commission, the legislature may elect to perform the intermediate function through an arm of the legislative branch.

(b) To assist the legislature in performing the intermediate function, the legislature should establish a permanent body, comparable in knowledge, experience, competence, and diversity to a sentencing commission, to advise on the substance of the guidance to sentencing courts. The legislature should also charge that body with performance of all aspects of the intermediate function.

(c) The legislature should distinguish clearly between statutory provisions that carry out the legislative function, which should be controlling authority in sentencing proceedings, and provisions that carry out the intermediate function, which should be subject to exercise of discretion by sentencing courts.

Standard 18-4.6. Judicial agency to perform the intermediate function

(a) If a jurisdiction elects not to establish a sentencing commission, the legislature may delegate the intermediate function to the highest state court or a state-wide judicial conference. The intermediate function may be performed, in part, by rules of court.

(b) To assist the highest state court or judicial conference in performing the intermediate function, the supreme court should establish a permanent body, comparable in knowledge, experience, competence, and diversity to a sentencing commission, to advise on the substance of the guidance to sentencing courts. The court or conference should also charge that body with performance of all aspects of the intermediate function.

(c) The supreme court or courts of appeal should have the authority to modify judicially created guidelines in the normal course of the courts' appellate review of sentences imposed.

## PART V. SENTENCING PROCEDURES

### A. Information Base

Standard 18-5.1. Information for sentence determination and system accountability

(a) The legislature and the agency performing the intermediate function should ensure that, in all cases, adequate information is developed,

through presentence investigations or other means, to enable sentencing courts and members of the bar to perform their sentencing responsibilities.

(b) The legislature and the agency should ensure that basic information is collected on all cases in which sentences are imposed to enable monitoring and evaluation of the operation of the sentencing system.

(c) The highest state court should ensure that regular educational programs are conducted to inform sentencing courts and members of the bar about community or state-wide programs and facilities that may be utilized in sentences of offenders.

## B. Presentence Reports

Standard 18-5.2. Requirement of report

(a) The rules of procedure should authorize sentencing courts, upon their own motion or upon request of either party, to call for a presentence investigation and a written report of its results.

(b) The rules of procedure should require such investigation and report in all cases except that -

(i) The investigation and report may be omitted in a case if the offender waives them, with the consent of the prosecutor, and the court finds that it has sufficient information to sentence the offender.

(ii) The rules of procedure may provide exceptions for sentencing in cases where the costs of investigations and reports exceed possible benefits in the sentencing process.

Any sentencing court that lacks sufficient information to perform its sentencing responsibilities should have the power to order a presentence investigation and report.

Standard 18-5.3. Substantiation of information

The rules of procedure should provide that:

(i) Information in the presentence report should be limited to material facts which the preparer of the report, upon diligent inquiry, believes to be accurate and which, if challenged, can be substantiated;

(ii) The preparer of the report should be available to answer questions concerning the content of the report and the sources of information at a presentence conference and at the sentencing hearing;

(iii) If any material information in the report is challenged by either the prosecution or the defense, the preparer of the report is responsible to assist in determining whether the information can be sufficiently substantiated.

Standard 18-5.4. Contents of report

(a) The rules of procedure should require that agencies preparing presentence reports adhere to standards, developed by the agency performing the intermediate function, relating to the contents, preparation, and substantiation of presentence reports. The rules should require that all reports be made in writing.

(b) The rules should permit a sentencing court to vary the scope of reports in accordance with the court's determination of the information it needs to perform its sentencing responsibilities. A full presentence report may contain:

(i) A description of the offense of conviction, together with any aggravating or mitigating factors;

(ii) A description of any prior criminal convictions or juvenile adjudications of the offender;

(iii) A description of personal characteristics of an individual offender, even though not material to the offender's culpability, that may be taken into account in determination of the sentence;

(iv) Information about programs or resources, such as treatment centers, residential facilities, vocational training services, educational and rehabilitative programs, and other programs that might be incorporated in an individual offender's sentence;

(v) Information assessing the physical, psychological, economic, or social effects of the offense on any person against whom the offense was committed;

(vi) A description of the authorized types of sanctions and the ranges of severity, and reference to the guidance applicable to sentencing in the case;

(vii) An assessment of the impact of possible sanctions and collateral consequences upon an organizational offender, including employees, creditors and other third parties who would be directly affected by the sanctions;

(viii) A summary of the most significant aspects of the report and, if the sentencing court has so requested, a recommendation as to the appropriate sentence.

(c) A statement prepared by a victim under Standard 5.10 should be included as an attachment to the presentence report.

Standard 18-5.5. Timing of investigation and report

(a) The rules of procedure should provide that a presentence investigation must not be initiated until there has been a determination of guilt, unless the defendant, with the advice of counsel, has consented to such action.

(b) When a presentence investigation has been initiated prior to determination of guilt, the rules should provide that --

(i) In a case being tried, adequate precautions must be taken to assure that nothing disclosed by the investigation comes to the attention of the prosecution, the defense, the court, or the jury prior to a determination of guilt;

(ii) In a case in which a defendant has offered a plea of guilty, on request of the defense or the prosecution, the court should be authorized to examine the report prior to determining whether to accept the plea.

Standard 18-5.6. Confidentiality of presentence report

(a) The rules of procedure should provide that a presentence report not be made part of a public record and should be available only to the following persons or agencies under the conditions stated:

(i) The report should be available to the parties.

(ii) The report should be available to the sentencing court for the purpose of assisting it in determining the sentence.

(iii) The report should be available to all judges who participate in a sentencing council consideration of the case.

(iv) The report should be available to reviewing courts where material to an issue on which an appeal has been taken.

(v) The report should be available to the department or bureau responsible for supervision of offenders or with custody of individual offenders.

(vi) Reports should be available to sentencing guideline commissions or other bodies charged with performance of the intermediate function.

(b) Upon order of court, reports should be made available to persons or agencies having a legitimate professional or academic interest in the information likely to be contained therein. Examples of such persons or agencies would be a physician or mental health professional appointed to assist the court in sentencing, an examining facility, a correctional institution, or a probation or parole department.

Standard 18-5.7. Disclosure of report to parties

(a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.

(b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford a reasonable opportunity for challenge and verification of material information in the report.

(c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

Standard 18-5.8. Disputes regarding information in report; stipulations; presentence conferences

(a) The rules of procedure should require each party to notify the opposing party, the court, and the preparer of the presentence report in writing of any part of the report which the party intends to controvert or supplement. Such notice should be required at a time sufficiently in advance

of the sentencing hearing to permit the preparer of the report to make an appropriate response.

(b) The rules should permit the parties to stipulate to a resolution of challenges to information in the report. The rules should provide that the resolution of any issue by stipulation must be preserved as part of the record of the sentencing proceedings.

(c) The rules should authorize a sentencing court to conduct a presentence conference to consider the possibility of a stipulation of the parties as to challenged information in the presentence report.

## C. Victims' Rights in Sentencing

Standard 18-5.9. Notice to victims

(a) The rules of procedure should establish a mechanism for providing notice to victims of offenses of all important steps in the sentencing process. Notices should include information about victims' rights to participate in sentencing proceedings.

(b) If a victim is dead or unable to participate in sentencing proceedings, victims' rights should be afforded to the victim's heirs or guardian.

Standard 18-5.10. Victims' statements prior to sentencing hearings

(a) The rules of procedure should authorize victims to make statements concerning the physical, psychological, economic, or social effects of the offense on the victim or the victim's family.

(b) The rules should require offices that prepare presentence reports to receive statements written by victims and to attach the statements to presentence reports.

Standard 18-5.11. Victims' statements at sentencing hearings

(a) The rules of procedure should ensure that victims are permitted to make oral statements at sentencing hearings concerning the physical, psychological, economic, or social effects of the offense on the victim or the victim's family.

(b) The rules should require that, on motion of either party or on the court's own motion, the sentencing hearing be continued to permit the parties reasonable opportunity to respond to new issues of fact raised by the victim's statement.

Standard 18-5.12. Evidentiary effect of victims' statements

(a) A victim should be permitted to make a statement prior to or at the sentencing hearing without being put under oath as a witness.

(b) Information in a victim's unsworn statement should not be used as the basis for a finding of fact by the sentencing court.

(c) The right of a victim to make an unsworn statement should not preclude a victim being called as a witness at the sentencing hearing.

## D. Sentencing Proceedings

Standard 18-5.13. Designation of sentencing judge

The rules of procedure should provide that the judge who presided in the guilt determination phase of a case should, if feasible, be the judge to preside in sentencing proceedings.

(i) If guilt was determined after a trial, the judge who presided at the trial should preside in sentencing proceedings unless there are compelling reasons in a specific case to provide otherwise.

(ii) If guilt was determined by plea, the judge who accepted the plea should preside in sentencing proceedings unless the system of rotating assignment of judges in a multi-judge court makes that unfeasible.

Standard 18-5.14. Time of sentencing

(a) The rules of procedure should ensure that sentencing proceedings take place as soon as practicable following determinations of guilt. Stated time limits, subject to extensions for cause, should be incorporated in the rules. A sentencing proceeding may be deferred to permit consolidation of multiple offenses.

(b) The rules should ensure that the calendar of sentencing proceedings is under the active control of the sentencing court.

Standard 18-5.15. Notice of possible departure from presumptive sentence

(a) The rules of procedure should require the parties, at a stated time before the sentencing hearing, to give notice in writing of intent to request the sentencing court to impose sanctions of lesser or greater severity or types of sanctions different from the presumptive sentence for the offense of conviction. The notice should state the grounds of the request.

(b) The rules should require a sentencing court, considering on its own initiative imposition of sanctions of lesser or greater severity or types of sanctions different from the presumptive sentence for the offense of conviction, to notify the parties and allow a reasonable time for response.

Standard 18-5.16. Consolidation of multiple offenses for sentencing; disposition of other charges

(a) The rules of procedure should provide that all outstanding convictions within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction be consolidated for sentencing in a single sentencing proceeding.

(b) The rules should permit a sentencing proceeding to be deferred to permit prompt disposition of other charges pending against the offender within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction and, if convictions ensue, consolidation of all convictions under (a).

(c) The rules should provide that, notwithstanding other venue requirements, a sentencing proceeding may be deferred to permit an offender, charged with other offenses within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction in the same state, to enter a plea of guilty to some or all of those charges in the sentencing court for purposes of consolidation of offenses in the sentencing proceeding.

(i) The rules should provide that permission to plead guilty in the sentencing court shall not be allowed without the written consent of the official responsible for prosecution of the charge.

(ii) The rules should provide that submission of a guilty plea under these circumstances is a waiver by the defendant of venue

provisions that would otherwise apply and, where formal charges have not yet been filed, a waiver of the right to a formal charge.

Standard 18-5.17. Sentencing hearing

(a) The rules of procedure should provide that counsel for both parties, the offender, and the victim have the opportunity to present submissions material to the sentence to the sentencing court.

(i) Both parties should be permitted to present evidence and information, to confront and cross-examine witnesses for the other side, and to offer rebuttal evidence and information to that adduced by the other side, contained in the presentence report, or otherwise presented to the sentencing court.

(ii) Both parties should be permitted to present argument on (A) the relevance and accuracy of any evidence or information presented to the sentencing court, (B) the application to the sentence determination of statutes and guidance by the agency performing the intermediate function, and (C) the type of sanction and the level of severity of sanction appropriate to the sentence determination.

(iii) The victim should be permitted the right to make an unsworn statement.

(iv) The offender should be permitted the right of allocution.

(b) The rules should require the prosecutor and the defense counsel to disclose to the court any agreement, in connection with a plea of guilty or nolo contendere, that included a provision on the sentence.

Standard 18-5.18. Findings of the sentencing court

(a) The rules of procedure should provide that the sentencing court resolve issues of fact material to the sentence to be imposed.

(i) The standard of proof on all issues of fact should be by a preponderance of the evidence.

(ii) The court may treat the unchallenged factual information in a presentence report as accurate.

(iii) The court may consider facts proven at the trial of the offender or facts established on the record of the acceptance of a plea.

(b) The rules should provide that the sentencing court make express findings on all disputed issues of fact material to the determination of the sentence imposed.

(c) The rules should provide that the sentencing court should integrate the sanctions of a current sentence with the remaining operative sanctions under any prior sentence of the offender.

Standard 18-5.19. Imposition of sentence

(a) The rules of procedure should provide that sentence be imposed in open court in the presence of the offender.

(b) The rules should provide that a sentencing court, when imposing sentence, should state or summarize the court's findings of fact, should state with care the precise terms of the sentence imposed, and should state the reasons for selection of the type of sanction and the level of severity of the sanction in the sentence.

(i) The statement of reasons may be relatively concise when the level of severity and type of sanction are consistent with the presumptive sentence, but the sentencing court should always provide an explanation of the court's reasons sufficient to inform the parties, appellate courts, and the public of the basis for the sentence.

(ii) If the sentencing court imposes a sanction other than total confinement, or in addition to total confinement, the court should ensure that the offender is informed, in detail, of the offender's responsibilities and obligations and, in general, of possible consequences of noncompliance with the terms of the sentence.

(iii) If the sentencing court imposes a sanction of total confinement, the court should inform the offender of the amount of credit the offender is entitled to receive for time already spent in custody and should ensure that the record accurately reflects time served.

(c) The rules should require the sentencing court to inform the offender of the right to appeal and of the time limits and procedures for initiating an appeal.

(d) The rules of procedure, or other rule of court, should require the attorney representing an offender at a sentencing proceeding to advise the

offender regarding possible appeal and to take the necessary steps to protect an offender's decision to initiate an appeal.

Standard 18-5.20. Record of sentencing proceedings

The rules of procedure should require a sentencing court to make a complete record of the sentencing proceeding. The record should include the following:

(i) A verbatim account of the entire sentencing proceeding, including all testimony received, statements made by defense counsel, the prosecutor, the offender, or the victim, and the statements of the sentencing court imposing and explaining the reasons for the sentence;

(ii) A verbatim account of such parts of the trial on the issue of guilt, or proceedings leading to the acceptance of a plea of guilty, as are material to the sentencing decision; and

(iii) A copy of the presentence report and of any other reports or documents made available to or used by the sentencing court in determining the sentence.

Standard 18-5.21. Sentence reports

(a) The rules of procedure should require that, following sentencing in all cases, a designated court official compile a standardized report that includes:

(i) Offense of conviction and the initial charge,

(ii) Characteristics of the offense and victim information,

(iii) Personal characteristics of the offender,

(iv) Disposition by bench trial, jury trial, or plea, and

(v) The sentence imposed.

(b) The rules should establish appropriate measures to protect the privacy of offenders or victims with regard to information, included in sentence reports, that is not otherwise a matter of public record.

## PART VI. SENTENCING DISCRETION

Standard 18-6.1. General principles

(a) The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized. The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account.

(b) A sentencing court should be guided in exercise of its sentencing discretion by standards promulgated by the agency performing the intermediate function. Courts should give serious consideration to the goal of avoidance of unwarranted and inequitable disparities in sentences.

Standard 18-6.2. Considering types of sanctions; composite sentences

(a) A sentencing court should consider all permitted types of sanctions and, subject to the guidance of the agency performing the intermediate function, should select the type of sanction or sanctions that is most appropriate for the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account.

(b) In shaping a sentence that is a composite of different types of sanctions, a sentencing court should determine the level of severity for each type of sanction so that the composite sentence is no more severe than necessary to achieve the societal purposes for which it is imposed and does not result in unwarranted and inequitable disparities in sentences.

Standard 18-6.3. Using presumptive sentences: mitigating and aggravating factors and personal characteristics of individual offenders; criminal history

(a) In determining the sentence of an offender, a sentencing court should consider first the level of severity and the types of sanctions that are consistent with the presumptive sentence. The court should then consider any modification indicated by factors aggravating or mitigating the gravity of the offense or the degree of the offender's culpability, by personal characteristics of an individual offender that may be taken into account, or by the offender's criminal history.

(b) Following guidance of the agency performing the intermediate function, a sentencing court should take into account an offender's acknowledgment of responsibility or cooperation with the prosecution.

Standard 18-6.4. Sentencing to total confinement

(a) A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary. A court may select a sanction of total confinement in a particular case if the court determines that -

(i) the offender caused or threatened serious bodily harm in the commission of the offense,

(ii) other types of sanctions imposed upon the offender for prior offenses were ineffective to induce the offender to avoid serious criminal conduct,

(iii) the offender was convicted of an offense for which the sanction of total confinement is necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law, or

(iv) confinement for a very brief period is necessary to impress upon the offender that the conduct underlying the offense of conviction is unlawful and could have resulted in a longer term of total confinement.

(b) A sentencing court should not select a sanction of total confinement because of community hostility to the offender or because of the offender's apparent need for rehabilitation or treatment.

Standard 18-6.5. Sentencing for more than one offense

(a) A sentencing court should impose a sanction appropriate to the offense of conviction and should not consider other offenses of which the defendant was not charged, which were dismissed prior to determination of guilt, or of which the defendant was acquitted.

(b) In sentencing an offender convicted of multiple offenses, a sentencing court ordinarily should impose a consolidated set of sentences that appropriately takes into account the offender's current offenses and criminal history.

(c) In sentencing an offender for offenses that were part of an episode,

(i) a sentencing court should not increase the severity of the sentence or change the type of sanction merely as a result of the number of counts or charges made from a single episode, and

(ii) where the separate offenses are not merged for sentencing, a sentencing court should consider imposition of sanctions of a type and level of severity that take into account the connections between the separate offenses and, in imposing sanctions of total confinement, ordinarily should designate them to be served concurrently.

(d) In sentencing an offender for an offense graded by the amount of money or property involved, a sentencing court ordinarily should determine the appropriate sentence by treating the offenses as a single offense and determining its gravity by cumulating the amounts of money or property in the separate offenses.

(e) In sentencing an offender for multiple offenses not within (c) or (d), a sentencing court should be guided by the presumptive sentence derived by reference to the sentence appropriate for the most serious current offense. Under guidance from the agency performing the intermediate function, a sentencing court may impose an enhanced sentence by treating other current offenses as part of an offender's criminal history or as factors aggravating the most serious offense.

(f) When multiple sentences of total confinement are to be served consecutively, a sentencing court should impose sentences that do not exceed a total term reasonably related to the gravity of the offenses.

(g) In sentencing an offender who is subject to service of a prior sentence, a sentencing court should take into account the unexecuted part of the prior sentence in shaping a consolidated set of sentences.

## PART VII. CHANGE OF SENTENCE

### A. Reduction in Severity or Modification

Standard 18-7.1. Authority to reduce the severity of sentences

(a) The rules of procedure should authorize a sentencing court, upon motion of either party or on its own motion, to reduce the severity of any sentence. The rules should restrict the time for reduction in severity of a sentence to a specified period after imposition of a sentence.

(b) The rules should prohibit ex parte communications with the sentencing court regarding reduction of sentence and should ensure that both parties receive notice of any proposed reduction.

(c) The rules should prohibit reduction in the severity of a sentence unless the sentencing court reopens the sentencing hearing and follows the procedures in Standards 18-5.17 through 18-5.21.

Standard 18-7.2. Authority to modify requirements or conditions of sentences in light of changed circumstances

(a) The rules of procedure should authorize a sentencing court, at any time during the period that the court has retained jurisdiction over a sentenced offender, to modify the requirements or conditions of a sanction to fit the present circumstances of the offender. Such sentences include:

(i) a sentence to a compliance program,

(ii) a sentence involving an economic sanction,

(iii) a sentence to an acknowledgment sanction, or

(iv) an intermittent confinement sanction.

(b) The rules should provide that any modification of the requirements or conditions of a sentence under this authority may not increase the overall severity of an offender's sentence.

(c) The rules should provide that either party may move for modification of sentence or the sentencing court may act on its own motion. The rules should prohibit ex parte communications with the sentencing court regarding modification of a sentence and should ensure that both parties receive notice of any proposed modification with opportunity to respond.

Standard 18-7.2. Authority to modify requirements or conditions of sentences in light of changed circumstances

(a) The rules of procedure should authorize a sentencing court, at any time during the period that the court has retained jurisdiction over a sentenced offender, to modify the requirements or conditions of a sanction to fit the present circumstances of the offender. Such sentences include:

(i) a sentence to a compliance program,

(ii) a sentence involving an economic sanction,

(iii) a sentence to an acknowledgment sanction, or

(iv) an intermittent confinement sanction.

(b) The rules should provide that any modification of the requirements or conditions of a sentence under this authority may not increase the overall severity of an offender's sentence.

(c) The rules should provide that either party may move for modification of sentence or the sentencing court may act on its own motion. The rules should prohibit ex parte communications with the sentencing court regarding modification of a sentence and should ensure that both parties receive notice of any proposed modification with opportunity to respond.

## B. Resentences Following Violation of Initial Sentences

Standard 18-7.3. Legislative authority to resentence offenders for violation of the requirements or conditions of sentences

(a) The legislature should authorize a sentencing court to resentence an offender, previously sentenced to a compliance program or a sentence involving an economic sanction, an acknowledgment sanction, or an intermittent confinement sanction, upon finding that the offender has committed a substantial violation of a material requirement or condition of the previous sentence.

(b) The legislature should provide that the effect of noncompliance or nonpayment should be determined after offenders' defaults and after examination of the reasons therefor.

(c) The legislature should provide that the sanctions available to a sentencing court imposing a resentence include all sanctions that were available at the time of the initial sentencing, although separate guidance by the agency performing the intermediate function may be appropriate.

(d) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the authority to resentence offenders.

(i) A sentencing court should consider first whether an offender's noncompliance or nonpayment is excusable and whether substantial performance of the initial sentence can be achieved by exercise of legal power to compel or induce performance, particularly by use of measures, including civil contempt, for enforcement of economic sanctions.

(ii) A sentencing court should not sentence an individual offender to total confinement unless the conditions of Standard 18-6.4 are met. Incarceration should not automatically follow noncompliance. In the event of nonpayment of an economic sanction, total confinement should not be imposed unless the offender wilfully refused to pay or failed to make sufficient bona fide efforts lawfully to acquire the resources to pay.

(iii) A sentencing court should determine explicitly the extent to which an offender's substantial compliance with the requirements or conditions of the initial sentence is to be credited toward the requirements or conditions of a resentence. In determining the severity of a resentence, a sentencing court should take into account an offender's substantial compliance with the initial sentence that cannot be credited toward a resentence.

(e) The legislature should prohibit sentencing courts from setting the terms of a resentence prior to finding of a violation of a requirement or condition of the initial sentence. The initial sentence should not specify the terms of a resentence in the event that the offender violates the primary sanction.

Standard 18-7.4. Procedures regarding violations of requirements or conditions of sentences

(a) The legislature should provide that offenders should ordinarily be called by summons to appear before the sentencing court to respond to charges of violation of a requirement or condition of sentence.

(b) The legislature should authorize arrest of an individual offender pursuant to a warrant of arrest if the court issuing the warrant finds probable cause to believe that:

(i) the offender has committed a substantial violation of a material requirement or condition of a sentence, and

(ii) the offender is not likely to respond to a summons to appear before the sentencing court.

(c) The legislature should authorize arrest without a warrant when the officer making the arrest has reasonable cause to obtain a warrant of arrest and reasonably believes that arrest is necessary to prevent the offender's flight.

(d) Legislation or a rule of procedure should direct that, upon arrest and detention of an offender for alleged violation of a sentence not involving total or intermittent confinement, a preliminary hearing should be held promptly to determine whether there is probable cause to believe that the offender has committed a substantial violation of a material condition of the sentence and that continued detention of the offender is necessary.

(e) Legislation or a rule of procedure should direct sentencing courts to hold hearings, within a reasonable time after preliminary determinations of probable cause, and promptly make final determinations whether the offender committed the alleged violation, provided, however, that final determination of an allegation of the commission of another offense should be made as provided in (h).

(f) The rules of procedure should provide that, at the preliminary or final hearing:

(i) the offender should receive adequate notice of the alleged violation, including a description of the surrounding facts and circumstances, and of the offender's rights at the hearing;

(ii) the offender should be entitled to representation by counsel and, if indigent, to have counsel appointed; and

(iii) both the prosecution and the offender should be permitted to subpoena witnesses, call and cross-examine witnesses, offer other evidence, and present arguments.

(g) The rules should provide that, with respect to the final hearing:

(i) the offender is entitled to discovery of all evidence intended to be used by the prosecution to show that a violation has occurred and to access to all official records concerning the offender's case;

(ii) the prosecution must establish a violation by a preponderance of the evidence;

(iii) the offender should be allowed to show mitigating circumstances or other reasons why the violation should not result in a resentence;

(iv) the sentencing court should make explicit findings on all material issues of fact, and a statement of the court's reasons for its determination;

(v) the sentencing court should make and preserve a full and complete record of the hearing; and

(vi) the offender has the right to appeal a resentence to the same extent as any other sentence.

(h) When an alleged violation is based solely on the alleged commission of another offense, the rules should provide that the final hearing on the alleged violation ordinarily should be held after disposition of the new criminal charge.

## PART VIII. APPELLATE REVIEW OF SENTENCES

Standard 18-8.1. Jurisdiction to review sentences; reviewing courts

(a) The legislature should authorize appellate courts to entertain appeals of sentences. This should include:

(i) Review of a sentence imposed upon conviction based on a plea of guilty or the equivalent;

(ii) Review of a resentence following violation of the requirements or conditions of a prior sentence; and

(iii) Review of a resentence following reversal of a prior sentence by an appellate court and remand for resentencing.

(b) The legislature should authorize appellate review of sentences in the same courts empowered to entertain appeals from convictions. Specialized courts to review sentences only should not be established.

Standard 18-8.2. Purposes of appellate review

(a) The legislature should identify the following objectives of sentence review:

(i) To determine whether a sentence is unlawful or excessively severe under applicable statutes, provisions guiding sentencing courts, rules of court, or prior appellate decisions;

(ii) To determine whether the action of the sentencing court was an abuse of discretion; and

(iii) To interpret statutes, provisions guiding sentencing courts, and rules of court as applied to particular sentencing decisions and to develop a body of rational and just principles regarding sentences and sentencing procedures.

(b) Reviewing courts, and particularly the highest court of the state, should seek to make effective the legislature's public policy choices regarding sentencing. Reviewing courts should also seek, through caselaw, to develop principles for composite sentences.

Standard 18-8.3. Appeals by defense or prosecution

The legislature should authorize appeals from sentence at the initiative of the offender or the prosecution.

Standard 18-8.4. Disposition by reviewing court

(a) The legislature should authorize reviewing courts to:

(i) Affirm the sentence under review;

(ii) Reverse the sentence under review and remand the case to the sentencing court for resentencing;

(iii) Substitute for the sentence under review any other disposition that was available to the sentencing court.

(b) A reviewing court should set forth the basis for its decisions.

## PART IX. DISPUTED TERMS OF TOTAL CONFINEMENT

Standard 18-9.1. Mechanism for resolving disputes about the length of a total confinement sentence

The legislature should designate an agency in the executive branch to resolve disputes about the correct date of release of offenders serving sentences of total confinement.