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**Testimony of the Drug Policy Foundation
Kevin B. Zeese
Vice President and Counsel**

On Amendments to the Sentencing Guidelines for 1994

Before The United States Sentencing Commission

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The Drug Policy Foundation is an organization made up of police officials, judges, doctors, academics, lawyers, business leaders and other citizens concerned about the lack of effectiveness of the current drug control strategy of the United States. The Foundation opposes extreme drug war measures but does not stand for legalization, decriminalization or other specific reforms. The Foundation is a forum for diverse views on alternatives to the war on drugs.

I. General Considerations

The Foundation supports reform in both the cocaine-crack ratio as well as the weight of marijuana plants. In this testimony I will primarily focus on the latter issue.

If the Commission decides to change either or both of these guidelines, such changes should be made retroactive. It is simply unjust to recognize that the guidelines were inappropriate or unjustified and to allow people to remain incarcerated based on those guidelines.

With regard to both issues there are some common themes. Both of these guidelines are inconsistent with two goals of the Sentencing Reform Act of 1984, Pub. Law No. 98-473, 98 Stat. 1937 (1984). One of the primary goals of the Act was to reduce sentencing disparity and thereby improve the quality of justice. As the Senate Report noted, "an unjustifiably wide range of sentences [has been imposed upon] offenders with similar histories, convicted of similar crimes, committed under similar circumstances." Senate Report No. 98-225, at 38 (1984). Both the crack-cocaine and

marijuana cultivation guidelines increase disparity, and result in people who have committed similar crimes being punished disproportionately.

Another problem with both of the current guidelines on these two issues is honesty in sentencing. The crack-cocaine disparity is simply dishonest. Both crack and cocaine are the same psychoactive substance, have similar effects and deserve to be treated equally. With regard to marijuana plants, the marijuana plant simply does not produce one kilogram of marijuana. There is no basis for this number in the literature on marijuana cultivation — whether produced by government or private agencies. The figure is dishonest and should not be the basis for determining length of incarceration.

Finally, both of the current guidelines result in inappropriately harsh sentences and therefore loss of respect for the law. In the case of the crack-cocaine guideline, sentencing disparity is particularly acute because treating crack offenders more harshly than powdered-cocaine offenders has significant racial overtones. As a number of courts have noted, African-Americans are being punished more often and more severely because crack is more common in their communities.

II. Appropriate Weight for Marijuana Plants

The Sentencing Commission should be commended for considering changes in the sentencing of people who cultivate marijuana. Marijuana is not as controversial a drug as crack, cocaine or heroin and, therefore, is often ignored. In fact, in 1992 there were 4,313 marijuana offenders in the federal system. Therefore, a significant number of people are affected by the marijuana sentencing guidelines. Thus, it is appropriate for the Commission to focus on the sentencing of marijuana offenders under the guidelines.

There are several problems with the current approach taken by the guidelines with regard to marijuana plants.

1. The current approach creates a cliff effect for people involved in cultivation of over 49 plants. The current guidelines treat 49 and fewer plants as having a standardized yield of 100 grams per plant, unless the plant actually produced a greater quantity. When a case involves more than 49 plants, the guidelines adopt a one kilogram-per-plant standard yield. Thus, there is a steep cliff at this level with a jump in the sentencing guideline from 10 months to 33 months.
2. The current approach creates disparity between people possessing or trafficking in harvested marijuana and those growing marijuana. The current guideline approach creates a ten-fold disparity between people committing similar offenses.
3. The current approach presents certain problems when plants are particularly young. People who grow marijuana begin with a large number of seedlings. However, when the plant matures and its sex becomes evident, approximately half the plants are destroyed because they are males. Thus, an individual arrested growing 50 seedlings will be disproportionately punished in comparison with the actual crime committed.
4. The one-kilogram-per-plant ratio is simply not justified by any scientific evidence. This was noted in U.S. v. Osburn, 756 F. Supp. 571 (N.D. Ga., 1991) where the court concluded: "There is no rational basis to support the Commission's 1000 gram-per-plant ratio for plants in groups of 50 or more The record clearly demonstrates that a 1000 gram equivalency cannot be empirically supported." The evidence considered in the case included research conducted by the legal marijuana grower for the University of Mississippi, Dr. Mahmoud A. ElSohly, who testified he had never seen a plant that produced one kilogram. Dr. ElSohly grows marijuana for

research and medical purposes. See also, U.S. v. Lee, 762 F. Supp. 306 at 307 (D. Kansas, 1991) where the court concluded that "100 plants can never produce 100 kilograms."

Therefore, the Foundation makes three recommendations:

1. Apply the 100 grams-per-plant equivalency currently used in cases involving 49 plants and under to all marijuana cultivation cases with regard to female plants. In Osburn, Dr. ElSohly testified that "a sentencing scheme based on 100 grams-per-plant would be reasonable. . . ." Osburn at 573. The 100-gram equivalency has been accepted by the courts. U.S. v. Streeter, 907 F.2d 781 (8th Cir., 1990); U.S. v. Bradley, 905 F.2d 359 (11th Cir., 1990).
2. Male plants produce marijuana with extremely low levels of it's psychoactive ingredient, THC, and are generally discarded by growers. Male plants should not be counted in determining sentences.
3. Only 50 percent of seedlings should be counted using the 100 grams per plant equivalency, because generally half of all plants are males, which will be destroyed.

III. The Cocaine-to-Crack Ratio

The 100-to-1 ratio between powdered cocaine and crack cocaine should be amended so that powdered cocaine and crack cocaine are treated equally. There is no scientific basis for treating one unit of crack as 100 units of powdered cocaine. This ratio has been described by a leading pharmacologist as "arbitrary, capricious and scientifically and medically wrong. It is doesn't reflect the reality of the molecule. It is not a different drug." Ronald Siegel, New England Journal of Medicine, as quoted in USA Today, May 26, 1993, at 1.

The initial justification for treating powdered cocaine and crack cocaine differently was based on the alleged violence caused by crack. Research conducted in recent years shows that crack is not a violence-inducing drug to any degree different from powdered cocaine. In a study of 414 drug-related homicides in New York City involving 490 perpetrators and 434 victims, the research found that only one homicide could be described as caused by crack intoxication. Paul Goldstein et al., "Most Drug-Related Murders Result from Crack Sales, Not Use," The Drug Policy Letter, March/April 1990, 6-9.

With the institution of the disparity in treatment of crack and powdered cocaine users, there has been a dramatic shift in the federal prison population with regard to race. African-American offenders grew from 10 percent of the mandatory minimum drug offenders in 1984 to 28 percent by 1990. The difference in the average sentence between whites and blacks was 11 percent in 1986, and, by 1990, the average sentence for black offenders was 49 percent higher than white offenders. There is also great disparity between whites, blacks and Hispanics when it comes to the likelihood of receiving a mandatory sentence. Federal Judicial Center, "The General Effect of Mandatory Minimum Prison Terms," 1992.

With regard to powder cocaine and crack laws, the racial disparity is striking. A U.S. Sentencing Commission report found that in FY 1992, of all of the defendants sentenced for crack violations 92.6 percent were black, as compared with 4.7 percent who were white. In addition, 45.2 percent of defendants sentenced for powdered cocaine were white, as compared with 20.7 percent of black defendants. Of particular note, all of the defendants sentenced for simple possession of crack were black. These figures are consistent with figures contained in the U.S. Department of Justice's Sourcebook of Criminal Justice Statistics table entitled "Defendants

Sentenced for Drug Trafficking Under U.S. Sentencing Commission Guidelines." According to the table, in 1992, 91.5 percent of those sentenced for crack were black, while 3 percent were white; and 30.9 percent of those sentenced for powdered cocaine were black compared with 32 percent who were white.

While federal courts have refused to find an equal protection violation due to this disproportionate impact, courts have acknowledged that the racially disproportionate impact exists. Courts have merely said that showing a racially disproportionate impact is not enough. See, e.g. U.S. v. Galloway, 951 F.2d 64 (5th Cir., 1992); U.S. v. Simmons, ___F.2d___ (8th Cir., May 15, 1992) No. 91-1368.

Thus, in addition to making no pharmacological sense, the differentiation between crack and powdered cocaine sentences has a significant racially disproportionate effect. For these reasons, the Foundation recommends treating powdered cocaine and crack equally. As with the previous recommendation, the Foundation urges the Commission to make these changes retroactive.

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