

**WRITTEN
STATEMENTS**

for the

**MARCH 24, 1994
PUBLIC HEARING**

UNITED STATES SENTENCING COMMISSION

U.S. Sentencing Commission
Public Hearing on Proposed Guideline Amendments
March 24, 1994

TAB

- | | | |
|---|------------|---|
| 1 | 9:00 a.m. | Marvin Miller
<i>National Organization for the Reform of Marijuana Laws</i> |
| | | Julie Stewart
Peggy Edmundson
Alice O'Leary
<i>Families Against Mandatory Minimums</i> |
| | | Reverend Andrew Gunn
<i>Clergy for Enlightened Drug Policy</i> |
| 2 | 10:15 a.m. | Tom Hillier
<i>Federal Public and Community Defenders</i> |
| 3 | 10:30 a.m. | Nkechi Taifa
<i>American Civil Liberties Union</i> |
| 4 | 10:45 a.m. | Dr. John Morgan

Dr. John Beresford
<i>Committee on Unjust Sentencing</i> |
| 5 | 11:10 a.m. | Reverend Jesse L. Jackson
<i>National Rainbow Coalition</i> |
| | 11:25 a.m. | BREAK |
| 6 | 11:40 a.m. | K.M. Hearst
<i>U.S. Postal Service</i> |
| 7 | 11:55 a.m. | Mary Lou Soller
<i>American Bar Association</i> |
| | 12:10 p.m. | LUNCH |

9 1:00 p.m.

Barbara Piggee
Families Against Discriminative Crack Laws

Shyrl Worth
Neighborhood Families Against Unjust Crack Laws

Dr. Arthur Curry
Dr. Robert Lantz
Families Against Mandatory Minimums

10 1:45 p.m.

Alan Chaset
National Association of Criminal Defense Lawyers

11 12:00 p.m.

Kevin Zeese
Drug Policy Foundation

12 2:15 p.m.

Marjorie Peerce
New York Council of Defense Lawyers

2:30 p.m.

BREAK

13 2:45 p.m.

Careen Winters
Maureen Winters
Joseph Timilty
Donna Messenger
Ed Rosenthal
Margaret Williams

14 4:00 p.m.

Professor Jonathan Turley
The Project for Older Prisoners

Ruth Dodd

THE LAW OFFICES OF
MARVIN D. MILLER
1203 DUKE STREET
ALEXANDRIA, VIRGINIA 22314

058-94

MAILING ADDRESS:
P.O. BOX 663
ALEXANDRIA, VIRGINIA 22313

24 March 1994

TELEPHONE:
(703) 548-5000
FAX (703) 739-0179

UNITED STATES SENTENCING COMMISSION
1 Columbus Circle, N.E.
Suite 2-500
Washington, D. C. 20002-8002

Dear Commissioners:

On behalf of the National Organization for the Reform of Marijuana Laws (NORML) and its Legal Committee, I appreciate this opportunity to bring some of our concerns to your attention. I have been involved in the representation of individuals accused of growing marijuana for more than twenty (20) years. I am also a board member of the Virginia College of Criminal Defense Attorneys.

I wish to invite you to look at the manner by which the weight of marijuana plants is calculated under the current Guidelines. The method currently employed is not accurate. It creates false sentencing disparities.

Our experiences have shown us that the total number of plants an individual has planted is not normally indicative of the actual yield. Many horticultural experts who work in commercial plant nurseries have indicated in discussions and in testimony that it is not uncommon to lose up to twenty (20) percent of the plants when one is growing seedlings. More importantly, most marijuana experts agree that when growing plants, it is possible for as many as fifty (50) percent of the plants to be male plants. Using conservative numbers derived from these facts, eighty (80) seedlings could easily yield no more than forty (40) actual usable plants. Certainly, they would not yield eighty plants at 100 grams each or eighty (80) plants at 1000 grams each.

-All experts, including those from law enforcement recognize that only the female plant produces intoxication. The male plant is undeniably of no value to the marijuana smoker. This is one issue where gender is a critical fact.

Another fact to consider is that most marijuana users these days use only the buds of the plant. The leaves are generally discarded. The stalks themselves have no value at all.

Under Section 2D1.1 of the Guidelines, the whole plant, including unusable stalks and roots can apparently be included in

the weight. Using such a weight creates an invalid computation which bears no relationship to the individual defendant's actual intent or ability insofar as growing usable marijuana is concerned. For example, if more than fifty (50) plants are involved, even seedlings that cannot be determined to be nonusable male or usable female, then the result is an arbitrary tenfold increase from 100 grams per plant to 1,000 grams (one kilogram) per plant. Such a quantum leap is simply unrealistic. It certainly bears no honest relationship to what is intended or the realistic end result.

Applicable Note 1 in the Commentary to Guideline Section 2D1.1 ought to make it clear that the only portion of the plant to be considered when computing weight is the female plant's buds and perhaps the leaves. Roots, stalks and male plants clearly ought to be excluded. Making such an amendment to the commentaries would create a more honest system of computation.

Given the Commission's desire for practical sentencing considerations dealing with practical situations, it is not reasonable to ascribe one hundred (100) grams for each and every plant seized from someone who is growing marijuana. Mature plants are easily distinguishable between male and female. The automatic ten (10) fold increase which comes into play in cases involving over fifty (50) plants also ought to be amended to be more in keeping with practical situations.

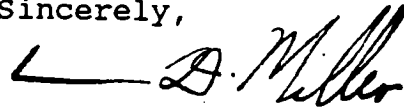
Many individuals who are not distributors but who merely grow for personal use, including medical use, may have fifty (50) plants, hoping that twenty (20) or so will survive and be female with an actual yield of a high quality personal supply of flower buds. Those plants that fail, the male plants and all but the buds of the female are discarded. There is no provision in the current federal law for this situation. The result is disparity in sentencing whereby personal users are wrongly treated as commercial dealers. Courts used to be able to make those distinctions but they are no longer real participants in sentencing. (Courts can almost always depart up and be affirmed but downward departures are nearly always overruled on appeal).

— Since the Guidelines tie judges hands, they should permit courts to make honest distinctions that they are not currently allowed to make. This can be achieved by giving consideration to the purpose for which the plants are being grown as well as to the actual or reasonably foreseeable yield of usable plant material.

You are urged to reconsider the manner of determination and the weight the Guidelines ascribe so that it can be brought in line with the practical realities of what is actually occurring in these situations. By making this charge, the Commission will be taking a step towards real truth in sentencing.

Lastly, it should be known that the Commission's opposition to mandatory minimums is appreciated by both law enforcement and the defense. Many prosecutors and law enforcement agents recognize that these minimums create unreasonably harsh sentencing disparities. This is particularly so for the low level defendant who has no one to turn in. The big guy gets a reduction and low sentence while the little guy gets the big time. Elimination of mandatory minimums would help end this unfair difference in sentencing.

Sincerely,

A handwritten signature in dark ink, appearing to read "L. D. Miller". The signature is written in a cursive, flowing style with a long horizontal stroke at the beginning.

MARVIN D. MILLER

059-94
TESTIMONY BY: REVEREND ANDREW L. GUNN
President, Clergy for Enlighten Drug Policy
Pastor, St. Luke's UMC, Washington, D.C.

DATE: Thursday, March 31, 1994

TO: U.S. SENTENCING COMMISSION

Members of the Commission, we know that in order to have peace and tranquility in our land, we have to have good laws. Laws that are based on common sense and fairness and justice. Our democracy has elected officials to make those laws. When these elected officials create laws out of fear or anger, or vindictiveness, then we no longer have good and just laws.

I am here this morning to witness to the growing number of clergy and citizens who have become more and more disenchanted with the criminal justice system and the law and the way it is being enforced. There is growing anger towards mandatory sentences. Particularly against those who are non-violent offenders. There is growing hostility, resentment and disrespect for the injustices of our mandatory sentences and the legal manipulation of the law by legal professionals, and by the seizure laws and the drug laws that often are counter-productive and are doing more harm than good.

We citizens are spending 23 billion dollars on prisons and law enforcement with little positive results. The "Draconian" mandatory sentences are unfair and unjust, and they lack, in many cases, common sense. They do far more harm than good in the long run. They destroy families and individuals. We have demonized drug offenders and the whole drug problem. During the time of Christ, those who had leprosy were demonized; but Jesus did not demonize them, instead he healed them and helped them. I am the

President of Clergy for Enlighten Drug Policy and we receive letters from all over the country. Here is one from Columbia County Jail, Bloomsburg, PA. This woman is in jail for two and a half years. She is a widow with three children. She writes, "Where I live the courts prove over and over that violent crimes are the thing to do. A drunken woman serves eleven and a half months for vehicle homicide. A man kills an infant and gets three years. It really makes a person wonder what is wrong with the system. It is obvious that any alcohol related crime or crimes against innocent children will get you a slap on the wrist. Yet a drug offender who hurts no one gets a very stiff mandatory sentence".

As a citizen and as a clergy man, I am against alcohol, nicotine, marijuana, cocaine and all the other hard drugs. But on the other hand we recognize that alcohol, if appropriately used on social occasions, is acceptable. And that marijuana and cocaine can and should be used for medical reasons. In my judgement, we need to rethink our failed drug policies. They have become an excuse for police violence and corruption. In sentencing, the sentencing guidelines must be based on accurate facts. I am told that one thousand grams per marijuana plant is totally unreasonable and way off the mark. It should be one hundred grams per plant. Thus on this matter the guidelines should be changed and made retroactive. I've seen a chart where there is a cliff between certain numbers of plants of marijuana plants. I hope the Commission will consider rectifying this so that there are not these steep cliffs. I thank the Commission for this opportunity to appear before them and bring to you my testimony. Thank you very much.



1001 CONNECTICUT AVENUE, NW • SUITE 1010 • WASHINGTON, DC 20036 • T 202-483-5500 • F 202-483-0057

March 18, 1994

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

Dear Commissioners:

Thank you for taking the time to review the proposed "marijuana amendment." The weight equivalency issue is certainly one that deserves our attention.

Unfortunately, I will be out of town for most of the day on Thursday, March 24, so I probably will not be able to testify before the Commission. Hence, I have summarized NORML's request and arguments below, which I hope you will have an opportunity to review before the hearing.

NORML asks that the U.S. Sentencing Commission promulgate the following provisions as an amendment to the U.S. Sentencing Guidelines:

1. A female marijuana plant should be equated to 100 grams of marijuana, regardless of how many plants are grown.
2. Male plants should not be counted. Consequently, grown male plants should not factor into the equation, and half of a plot of seedlings should be discarded because 50% are assumed to be male.
3. All changes made to the U.S. Sentencing Guidelines should apply retroactively.

The overall logic of NORML's argument is as follows:

1. Weight-based sentencing can never be a perfect way of administering justice, but if we are to use a weight per plant ratio, equating each female marijuana plant and seedling to 100 grams is at least realistic.
2. The 100 grams per plant formula would continue the existing sentencing structure used for 49 or less plants, which more closely reflects the potential yield of a plant than the 1,000 grams per plant ratio. As you know, "the equivalency of 100 grams of marijuana per plant used in offenses involving fewer than fifty plants was developed after a review by the Commission of information relating to the actual yield of marijuana plants under a variety of conditions." [1]
3. The U.S. Sentencing Commission originally adopted the 1,000 grams per plant ratio from the Congressional enactment of a conversion system to be used (and is used) in mandatory minimum sentencing. U.S. Senator Joseph Biden explained at the time of the enactment that the 1,000 grams per plant ratio was designed to curtail "unnecessary debate" between prosecutors and defendants. There is no suggestion

060-94

that the 1,000 grams per plant ratio was based on realistic science, or that it was intended to punish growers more severely than possessors of the finished product.
[2]

4. The timing of the arrest creates a "cliff" in sentencing. A defendant who is arrested before harvesting 60 plants is eligible for a 63-month sentence, but if he or she were arrested the day after harvesting the plants and sentenced on the total weight of smokeable material, he or she would receive a much shorter sentence.

5. Using the 100 grams per plant ratio for 49 or less plants, while using the 1,000 grams per plant ratio for 50 or more plants, creates another cliff. Those arrested with 49 plants or seedlings receive 10-16 months, while those arrested with 50 plants or seedlings receive 33-63 months.

6. In a nutshell, the 1,000 grams per plant ratio:

- was originally implemented in the U.S. Sentencing Guidelines because Congress used the ratio to simplify sentencing procedures and guidelines for mandatory minimums;
- was not originally based on scientific evidence, and in fact is unreasonable based on the actual potential of a plant's yield; and
- is punishing growers ten times as severely as possessors of the finished product.

Hence, the only reason to maintain the present ratio would be to purposefully impose harsher sentences on growers because they are supposedly "more culpable" than others who are caught with already-packaged marijuana.

Growers are not more culpable. A person with 60 plants is not more likely to be a dealer than someone who possesses 60,000 grams (60 x 1,000 grams) of cured, dried marijuana. (This is 125 pounds of marijuana.) In fact, a person with 60 plants isn't more likely to be a dealer than someone with 6,000 grams (60 x 100 grams), or 12.5 pounds of packaged marijuana. Many people grow for personal use, and many others are forced to grow for medicinal use.

7. Changing the U.S. Sentencing Guidelines to reflect the 100 grams per plant formula will allow judges to give probation sentences for cases they deem special, such as medical cases.

[1] U.S. Sentencing Commission, "Proposed Guideline Amendments for Public Comment," December 1993.

[2] *U.S. v. John Marshall*, Appeal from the United States District Court for the District of Nebraska, filed July 19, 1993, docket number 92-3398.

Summary:

The way the U.S. Sentencing Guidelines now read, an individual who is arrested with 120 seedlings--regardless of how puny, and whether or not they were being grown as medicine--will receive a mandatory minimum sentence of 5 years.

If the U.S. Sentencing Guidelines are changed to reflect the fact that half of these seedlings--if they even live--will grow up to be male and therefore not smokeable, the individual would be sentenced for 60 plants. Using the 1,000 grams per plant formula, this would be the equivalent of possessing 125 pounds of packaged, dried, smokeable marijuana. (60 plants x 1,000 grams = 60,000 grams = 2,000 ounces = 125 pounds)

If the U.S. Sentencing Guidelines are further changed to reflect a more accurate portrayal of a marijuana plant's actual yield, the individual would be sentenced instead as if he or she possessed 12.5 pounds of packaged marijuana. (60 plants x 100 grams = 6,000 grams = 200 ounces = 12.5 pounds)

While it is unlikely that a person who is growing 120 plants and seedlings will ever be able to harvest even 12.5 pounds of smokeable marijuana, this is at least more reasonable than if they were sentenced for having the equivalent of a full 125 pounds of marijuana--or, for that matter, sentenced for a mandatory minimum of 5 years in federal prison.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard Cowan".

Richard Cowan
National Director

ELECTRONIC VERSION

BNA OPINIONS
Date Filed 7-19-93

Re'd JUL 19 1993

CA8

No. 92-3398

United States of America,

Appellant,

v.

John Marshall,

Appellee.

*
*
*
*
* Appeal from the United
* States District Court for
* the District of Nebraska
*
*
*
*

Submitted: April 15, 1993

Filed: July 19, 1993

Before McMILLIAN and BEAM, Circuit Judges, and SACHS,* Senior
District Judge.

SACHS, District Judge

The Government appeals from the district court's sua sponte departure downward in the sentencing of this drug case involving a large number of marijuana plants. Under a plea agreement, defendant pled guilty to the manufacture and possession with intent to manufacture in excess of 100 marijuana plants. In return for the guilty plea the United States agreed to make a non-binding recommendation at sentencing that the court impose its sentence at

*The Honorable Howard F. Sachs, Senior United States District Judge for the Western District of Missouri, sitting by designation.

30719016

the low end of the applicable Sentencing Guideline range. Under the presentence report the imprisonment range was 97 to 121 months, calculated on a conversion ratio of one plant to one kilogram. On its own motion the court departed downward and imposed a 66 month sentence.

The district court at sentencing observed that "the determination that he should be charged with 416 kilograms of marijuana simply just doesn't make sense to me." In following the Guidelines to determine the Total Offense Level, and thereafter departing downward, the judge added that he viewed the classification as "arbitrary and capricious" when the conversion ratio is one kilogram to a plant, for 50 or more plants, but only 100 grams per plant for 49 or fewer plants.

We are compelled to reverse for resentencing, although we acknowledge skepticism about the rationale used by the Sentencing Commission. Disagreement with the Guidelines does not justify a departure. United States v. Muzika, 986 F.2d 1050, 1054 (7th Cir. 1993); United States v. Jones, 905 F. 2d 867, 870 (5th Cir. 1990) ; United States v. Lopez, 875 F.2d 1124, 1126 (5th Cir. 1989). An impression that an arbitrary and capricious factor has become embedded in the Guidelines may well, however, justify further consideration, on remand, of the constitutional validity of the Guideline provision, irrespective of the widespread (if occasionally grudging) judicial acceptance of the marijuana plant conversion ratio.¹

¹As will be further indicated, we are inclined to believe that there may be an acceptable rationale for "going light" on minor offenders, with 49 or fewer plants. See, e.g., United States v. Webb, 945 F.2d 967 (7th Cir. 1991), cert. denied, 112 S.Ct. 1228 (1992). We do not question and are in no position to question rulings in this circuit and elsewhere that would justify a more severe penalty for growers than for possessors of the finished product. Where we do suggest there may be room for further development of the issues would relate to (1) what rationale, if any, there is for penalizing growers on a ten-to-one ratio, if that

If, on remand and further study, defendant wishes to challenge the marijuana plant conversion ratio as arbitrary and capricious, and violative of substantive due process, an orderly presentation should be made, after adequate notice (unless the matter can be submitted on motions and briefs). Without legal challenge from or adopted by defendant, however, the district court is obligated to follow the Guidelines.

Because our suggestion that further challenge may be fruitful could be baffling, in light of the widespread validation of the conversion ratio, some further indication of what troubles us may be appropriate, as well as some indication of why we believe the issue may remain open in this circuit.

To begin with the final point, it will be acknowledged that shortly before the sentencing below there was a ruling in this circuit that it was not irrational to equate one marijuana plant with one kilogram of marketable marijuana. United States v. Smith, 961 F.2d 1389, 1390 (8th Cir. 1992). The rationale given was that Congress intended "heightened culpability of growers" and "may have equated one plant with one kilogram based on culpability not weight." A member of this panel joined that ruling on the issue, which has been declared "foreclosed" in this circuit. United States v. Johnston, 973 F.2d 611, 613 (8th Cir. 1992). It will be observed, however, that the law in this circuit simply addresses

is occurring, and (2) whether there is reason to believe that Congress and the Sentencing Commission actually intended such disparity in punishment, as between growers and possessors. It seems quite possible, from the limited information we have, that "arbitrary and capricious" punishment is occurring, probably unintended by the original enacting parties. We believe there is some novelty in these points, which are not discussed in what may be the most thorough appellate survey of the conversion ratio controversy. United States v. Lee, 957 F.2d 778, 783-5 (10th Cir. 1992).

the rationality of heightened culpability, not the surprising degree of disparity.²

Turning to the source of the marijuana plant conversion ratio, it appears the Sentencing Commission adopted a ratio derived from congressional enactment of a conversion system usable in establishing minimum sentence qualifications. Derivation from 21 U.S.C. § 841(b)(1)(A), (B) and (D) is noted in the Sentencing Commission's "Background" statement on page 89 of the 1991 Guidelines Manual (applicable in this case). Senator Biden explained that the Congressional action was designed to curtail "unnecessary debate" between prosecutors and defendants, and stated, without explanation, that "[T]he bill uses 1,000 plants as the equivalent of 1,000 kilograms." 134 Cong. Rec. S17368 (daily ed. Nov. 10, 1988).

There is no suggestion evident to us that it was intended to punish growers more severely than possessors of the finished product. As recently as May of 1991, a district judge was given to understand that "one marijuana plant can reasonably be expected to produce a kilogram of a mixture or substance containing marijuana." United States v. Lewis, 762 F. Supp. 1314, 1316 (E.D. Tenn.), aff'd. without opinion, 951 F.2d 350 (6th Cir. 1991).³ On the other hand, we find a Drug Enforcement Administration estimate of an average

²We acknowledge, however, that this circuit's ruling sustaining the even more extraordinary disparity in punishment between possession of cocaine powder and cocaine base, on a cruel and unusual punishment challenge, may tend to discourage further challenge of the marijuana plant conversion ratio. See United States v. Buckner, 894 F.2d 975, 980-1 (8th Cir. 1990). With so much at stake, however, in this and other cases, we are reluctant to say that full exploration of the issues is unwarranted, either in this case or in connection with the crack cocaine punishments, which continue to perplex many sentencing judges. We do not invite mere repetition of prior rejected arguments, without new facts or legal analysis.

³The current published view of the Sentencing Commission is that "the average yield from a mature marihuana plant equals 100 grams of marihuana." 1991 Guidelines Manual, 89.

plant yield of 400 grams, and a "possible" yield of 1000 grams. 54 Fed. Reg. 9121, 9136 (1989) (Sentencing Commission Notice).

On remand it may be developed that Congress did not have the DEA information when it amended the statute in question. But if Congress did in fact have the 400 gram average yield estimate before it, it may be presumed that Congress did intend to punish growers more severely, as the courts have surmised, but only on a ratio of about 2 1/2 to one, not far from the "treble damage" type of punishment that is frequently used. Our limited examination of the issues reveals nothing to suggest that there was a Congressional intent to adopt a harsh ten-to-one punishment ratio, applicable to marijuana plant growers, as the Sentencing Commission seems to have assumed.⁴

If it develops that the only available legislative history is the one-sentence statement of a conclusion by Senator Biden, one might suppose that the Senator meant, and his colleagues understood, that there was, for practical purposes, a rough equivalence between a marijuana plant and a kilogram of finished marijuana. Somewhat less likely would be an understanding by the Senator that the ratio is unfavorable to growers, but within sufficiently conventional bounds so that he and his colleagues would not think the matter controversial enough to mention. Most unlikely, however, is that a ten-to-one ratio, as used by the Sentencing Commission, was being knowledgeably but silently adopted by Congress as an appropriate standard for purposes of punishment.

In offering the above observations we of course do not intend to prejudge any issue, legal or factual, that may be developed before the district court on remand.

⁴Several years of inaction arguably suggests Congressional and Sentencing Commission satisfaction with the current situation, but it does not eliminate the force of inertia in governmental affairs.

The judgment is reversed for reconsideration of the sentencing decision.

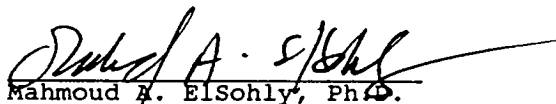
A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MJ
POTENCY

QUARTERLY REPORT
POTENCY MONITORING PROJECT
REPORT #46
April 1, 1993 - June 30, 1993


Mahmoud A. ElSohly, Ph.D.
Director
NIDA Marijuana Project


Samir A. Ross, Ph.D.
Laboratory Supervisor
NIDA Marijuana Project

Research Institute of Pharmaceutical Sciences
School of Pharmacy
University of Mississippi
University, MS 38677

TABLE OF CONTENTS

List of Figures.....	ii
Summary.....	iii
Introduction.....	1
Table 1. Normalized versus Non-normalized Cannabinoid Averages of illicit <u>Cannabis</u> Samples by Year Seized.....	3
Table 2. Comparison of Non-normalized Δ^9 -THC Concentration in Different Forms by Year Confiscated, 1974-1993.....	4
Table 3. Normalized Δ^9 -THC Averages of Illicit <u>Cannabis</u> Samples Analyzed through June 30, 1993 by Year Seized and Description.....	6
Table 4. Normalized Δ^9 -THC Averages of illicit <u>Cannabis</u> Samples Analyzed through June 30, 1993 by Year Seized and Source.....	7
Table 5. Domestic Cultivation of <u>Cannabis</u> Samples Analyzed through June 30, 1993	8
Table 6. Arithmetic Cannabinoid Averages of Domestic <u>Cannabis</u> Samples by Year Seized.....	9
Table 7. Δ^9 -THC Averages (Non-normalized) for Domestically Cultivated <u>Cannabis</u> Samples Analyzed through June 30, 1993 by Year Seized and Description.....	12
Table 8. Δ^9 -THC Averages (Non-normalized) for Non-Domestically Cultivated <u>Cannabis</u> Samples Analyzed through June 30, 1993 by Year Seized and Description.....	13
Table 9. Δ^9 -THC Averages (Non-normalized) for Domestically Cultivated <u>Cannabis</u> Samples Analyzed through June 30, 1993 by Year Seized and Source of Confiscation.....	14
Table 10. Δ^9 -THC Averages (Non-normalized) for Non-Domestically Cultivated <u>Cannabis</u> Samples Analyzed through June 30, 1993 by Year Seized and Source of Confiscation.....	15
Table 11. Average Concentrations of Four Cannabinoids Found in All Hashish Samples Analyzed by Project through June 30, 1993.....	16
Table 12. Average Concentrations of Four Cannabinoids Found in All Hash Oil Samples Analyzed by the Project through June 30, 1993	17
Table 13. Number of Seizures and Normalized Average Δ^9 -THC Concentrations of all Samples Received from Each DEA Laboratory and Analyzed by the Project through June 30, 1993	18
Table 14. Number of Seizures and Normalized Average Δ^9 -THC Concentrations of Samples Received from Each Laboratory and Analyzed by the Project April 1, 1993 through June 30, 1993	19

LIST OF FIGURES

- Figure 1. Normalized and Non-normalized percent Δ^9 -THC versus Year of Confiscation.....5
- Figure 2. Domestic Cannabis-Percent Δ^9 -THC (dry weight) versus Year of Confiscation (arithmetic averages, number of seizures in parentheses).....10
- Figure 3. Non-Domestic Cannabis-Percent Δ^9 -THC (dry weight) versus Year of Confiscation (arithmetic averages, number of seizures in parentheses).....11

INTRODUCTION

As of June 30, 1993, samples from 21076 seizures of marijuana, hashish and hash oil have been analyzed. Of these 19858 were marijuana, 887 were hashish and 331 were hash oil. Composite analytical data on these samples show the following:

% by Dry Weight of Δ^9 -THC in all
Samples analyzed by the Project
as of June 30, 1993

	<u># Of Samples Analyzed</u>	<u>Arithmetic Average</u>	<u>Highest Concentration</u>	<u>Lowest Concentration</u>
Marijuana	19858	2.93	29.86	Trace*
Hashish	887	3.43	28.23	Trace
Hashish Oil	331	16.52	43.18**	0.04

For this report period April 1, 1993 through June 30, 1993, samples from 1989 seizures have been analyzed -- 1943 marijuana, 35 hashish, and 11 hash oil.

Composite analytical data on the samples analyzed during this quarter is as follows:

% by Dry Weight of Δ^9 -THC in samples
analyzed between April 1, 1993 to June 30, 1993

	<u>Arithmetic Average</u>	<u>Highest Concentration</u>	<u>Lowest Concentration</u>
Marijuana	3.28	26.16	0.10
Hashish	5.34	28.23	0.22
Hashish Oil	15.31	36.36	3.91

*Less than 0.0095%

**Highest hash oil analyzed as confiscated material

Cannabis plant material, categorized by physical description of the samples, showing the high and low Δ^9 -THC concentration is as follows:

% by Dry Weight of Δ^9 -THC in all
Samples analyzed by the Project
as of June 30, 1993

	<u># Of Samples Analyzed</u>	<u>Arithmetic Average</u>	<u>Highest Concentration</u>	<u>Lowest Concentration</u>
Loose Plant Material	14401	2.51	29.86	Trace*
Kilobricks	2932	2.73	16.85	0.01
Buds	1808	4.69	29.86	0.01
Sinsemilla	679	7.88	20.06	0.19
Thai Sticks	38	3.74	8.92	0.05

% by Dry Weight of Δ^9 -THC in samples
analyzed between April 1, 1993
June 30, 1993

	<u># Of Samples Analyzed</u>	<u>Arithmetic Average</u>	<u>Highest Concentration</u>	<u>Lowest Concentration</u>
Loose Plant Material	1052	2.94	26.16	0.10
Kilobricks	794	3.03	8.40	0.20
Buds	81	9.01	26.16	0.50
Sinsemilla	14	9.66	19.14	2.09
Thai Sticks	0	0.00	0	0

*Less than 0.0095%

Δ^9 -THC concentrations by year confiscated are shown in Table 2.

Table 1. Normalized versus Non-normalized Cannabinoid Averages of
Illicit Cannabis Samples by Year Seized

NORMALIZED

cannabinol

<u>Year</u>	<u>No. Of Seizures</u>	<u>% Δ^9-THC</u>	<u>% CBD</u>	<u>% CBC</u>	<u>% CBN</u>	<u>Kilograms</u>
74	113	0.36	0.00	0.08	0.44	18013.328
75	150	0.48	0.00	0.09	1.17	67159.536
76	210	0.98	0.00	0.12	0.62	101190.992
77	251	1.76	0.00	0.10	0.74	173611.056
78	132	1.72	0.01	0.12	1.27	154532.064
79	221	1.53	0.02	0.12	1.40	71859.168
80	153	1.96	0.01	0.16	0.69	44094.656
81	250	2.11	0.02	0.18	0.98	147438.416
82	482	3.34	0.11	0.17	0.74	299883.264
83	1227	3.44	0.02	0.16	0.54	776255.744
84	1118	3.96	0.07	0.13	0.47	1258949.630
85	1613	2.63	0.14	0.09	0.52	729123.584
86	1554	2.24	0.06	0.11	0.44	669372.672
87	1699	2.23	0.23	0.11	0.33	620931.840
88	1823	3.84	0.18	0.14	0.54	352152.832
89	1270	2.66	0.20	0.16	0.60	179098.240
90	1260	3.83	0.11	0.18	0.37	52982.432
91	2505	3.78	0.17	0.17	0.27	76269.056
92	3409	1.90	1.24	0.09	0.23	682670.592
93	284	4.36	0.07	0.15	0.15	81438.768

NON-NORMALIZED AVERAGES

<u>Year</u>	<u>No. Of Seizures</u>	<u>% Δ^9-THC</u>	<u>% CBD</u>	<u>% CBC</u>	<u>% CBN</u>
74	113	0.89	0.03	0.08	0.49
75	150	0.71	0.03	0.10	0.55
76	210	0.72	0.00	0.09	0.37
77	251	0.91	0.08	0.10	0.43
78	132	1.37	0.01	0.12	0.67
79	221	1.67	0.02	0.12	0.24
80	153	2.06	0.10	0.14	0.47
81	250	2.37	0.36	0.16	0.38
82	482	3.05	0.34	0.19	0.33
83	1227	3.23	0.22	0.17	0.30
84	1118	3.29	0.24	0.17	0.34
85	1613	2.82	0.28	0.14	0.23
86	1554	2.30	0.29	0.15	0.21
87	1699	2.93	0.30	0.17	0.30
88	1823	3.29	0.28	0.15	0.30
89	1270	3.07	0.37	0.14	0.22
90	1260	3.36	0.38	0.18	0.19
91	2505	3.00	0.45	0.19	0.16
92	3409	3.13	0.24	0.20	0.34
93	284	4.73	0.17	0.15	0.20

Table 2. Comparison of Non-normalized Δ^9 -THC Concentrations in Different Forms by Year Confiscated 1974 - 1993*

<u>Year</u>	<u>Loose Material</u>	<u>Kilobrick</u>	<u>Buds</u>	<u>Sinsemilla</u>	<u>Thai Sticks</u>	<u>Hashish</u>	<u>Hash Oil</u>
74	1.30	0.40	---**	---**	0.54	0.86	15.88
75	1.03	0.47	1.34	---**	---**	2.31	13.09
76	1.87	0.54	3.03	---**	---**	3.28	18.82
77	1.27	0.53	1.38	3.20	4.91	1.81	18.89
78	1.47	0.96	2.11	6.28	0.49	2.15	21.31
79	1.57	0.79	3.03	3.66	0.13	2.32	20.91
80	1.02	0.63	3.81	6.40	0.05	2.58	16.56
81	1.48	0.78	3.52	6.38	---**	2.91	17.45
82	2.63	---**	5.14	7.10	4.60	2.69	19.88
83	2.94	---**	4.99	7.47	4.17	5.47	21.36
84	2.91	4.07	4.37	6.67	5.71	5.75	16.75
85	2.44	3.80	4.88	7.28	6.26	6.49	15.08
86	1.96	2.98	5.09	8.43	4.22	2.63	16.51
87	2.59	3.32	4.47	7.93	4.45	2.62	13.36
88	2.77	3.53	5.18	7.62	3.36	3.35	8.52
89	2.49	3.85	3.89	6.95	---**	7.06	11.96
90	2.79	3.76	4.27	10.10	0.12	5.30	16.60
91	2.27	3.11	4.40	10.53	---**	5.21	13.07
92	2.67	3.08	5.80	8.57	---**	6.18	14.36
93	4.13	4.06	10.64	8.91	---**	---**	26.78

* All figures are given as percent by dry weight.

** No samples analyzed which were confiscated in this year.

The above averages are not normalized by weight of seizure, but are simple arithmetic means calculated by dividing the sum of the Δ^9 -THC concentrations of each form by the number of seizures of that form. These figures should be more useful in spotting trends than the normalized averages. The normalized averages (as found in Table 5) should give a better representation of what was on the street in the given years.

Figure 1: Normalized & Non-normalized THC%
versus Year of Confiscation

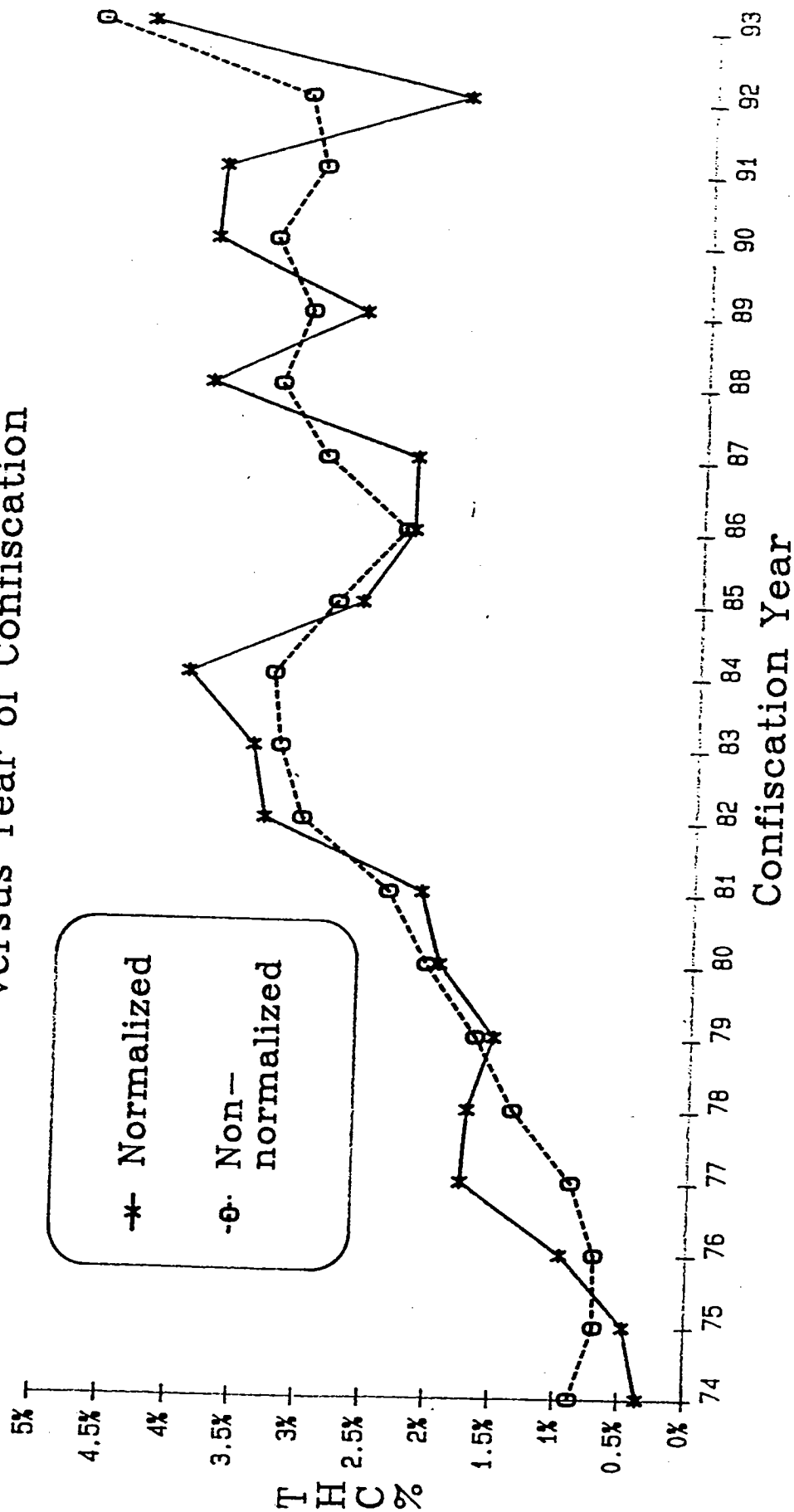


Table 3. Normalized Δ^9 -THC Averages* of Illicit Cannabis Samples Analyzed through June 30, 1993 by Year Seized and Description

YR	BD	KB	MH	SM	TS	YR/TOTAL
76	3.03 (1)	0.85 (182)	1.60 (27)	0.00 (0)	0.00 (0)	0.98 (210)
77	0.53 (7)	0.47 (165)	2.28 (63)	4.25 (15)	4.91 (1)	1.76 (251)
78	2.44 (25)	1.54 (60)	1.52 (43)	6.28 (1)	0.40 (3)	1.72 (132)
79	3.35 (11)	1.26 (18)	0.55 (181)	3.52 (10)	0.13 (1)	1.53 (221)
80	4.26 (6)	0.91 (5)	0.65 (114)	3.60 (27)	0.05 (1)	1.96 (153)
81	4.46 (33)	0.81 (3)	1.64 (182)	4.10 (32)	0.00 (0)	2.11 (250)
82	2.91 (50)	0.00 (0)	3.36 (410)	4.64 (14)	5.33 (8)	3.34 (482)
83	3.90 (126)	0.00 (0)	3.43 (1076)	5.62 (18)	5.19 (7)	3.44 (1227)
84	4.53 (178)	3.84 (22)	3.72 (879)	5.56 (36)	7.63 (3)	3.96 (1118)
85	5.25 (106)	4.43 (73)	2.59 (1381)	6.48 (52)	6.26 (1)	2.63 (1613)
86	3.58 (68)	3.94 (97)	2.21 (1351)	10.62 (32)	3.56 (6)	2.24 (1554)
87	4.37 (109)	2.67 (194)	1.95 (1350)	5.84 (43)	3.62 (3)	2.23 (1699)
88	5.86 (153)	3.96 (139)	3.80 (1431)	6.29 (98)	2.11 (2)	3.84 (1823)
89	4.31 (196)	3.53 (54)	2.52 (934)	5.62 (86)	0.00 (0)	2.66 (1270)
90	4.60 (117)	4.52 (111)	3.69 (969)	7.28 (61)	0.12 (1)	3.83 (1260)
91	5.84 (375)	3.47 (507)	3.43 (1548)	9.21 (75)	0.00 (0)	3.78 (2505)
92	7.77 (216)	2.91 (1039)	1.34 (2074)	5.84 (76)	0.00 (0)	1.90 (3409)
93	9.22 (25)	4.63 (117)	2.18 (139)	2.52 (2)	0.00 (0)	4.36 (284)
**4.57(1808) 2.51 (2932) 2.67(11401) 5.88(679) 5.64(38) 2.84(19858)						

Description Key:

Description; code for the physical description of samples as follows:

MH - Marijuana; marijuana in the form of loose Cannabis plant material with leaves, stems and seeds; includes cigarettes and those samples which cannot be described otherwise.

KB - Kilobrick; marijuana compressed into the form of a kilobrick (classical Mexican packaging); has leaves, stems and seeds.

BD - Buds; marijuana in the form of buds of flowering tops of the Cannabis plant with seeds.

SM - Sinsemilla; marijuana in the form of Sinsemilla; i.e., flowering tops of the female Cannabis plant with no seeds.

TS - Thai Sticks; marijuana in the form of Thai Sticks, leafy material tied around a small stem.

* All figures are given as percent by dry weight.

** Averages include 397 samples analyzed which were seized prior to 1976. The number in parentheses indicated the number of samples analyzed.

Table 4. Normalized Δ^9 -THC Averages* of Illicit Cannabis Samples Analyzed through March 31, 1993 by Year Seized and Source

YR	FG	PD	PM	PS	ST	YR/TOTAL
76	2.96 (5)	0.00 (0)	0.98 (205)	0.00 (0)	0.00 (0)	0.98 (210)
77	0.78 (4)	0.42 (1)	1.76 (241)	2.06 (2)	1.32 (3)	1.76 (251)
78	0.78 (5)	0.74 (1)	1.72 (109)	4.85 (17)	0.00 (0)	1.72 (132)
79	1.76 (162)	3.76 (3)	1.53 (48)	4.27 (6)	0.31 (2)	1.53 (221)
80	5.11 (31)	1.71 (21)	1.96 (77)	2.25 (13)	0.46 (11)	1.96 (153)
81	1.79 (1)	0.46 (6)	2.14 (177)	1.64 (16)	0.52 (50)	2.11 (250)
82	0.00 (0)	2.21 (130)	3.60 (226)	0.00 (0)	1.63 (126)	3.34 (482)
83	0.00 (0)	1.41 (13)	3.46 (824)	0.00 (0)	1.89 (390)	3.44 (1227)
84	0.00 (0)	0.00 (0)	4.07 (787)	0.00 (0)	1.41 (331)	3.96 (1118)
85	0.00 (0)	0.00 (0)	2.80 (770)	0.00 (0)	1.10 (843)	2.63 (1613)
86	0.00 (0)	0.00 (0)	2.38 (752)	0.00 (0)	1.64 (802)	2.24 (1554)
87	0.00 (0)	0.00 (0)	2.34 (1146)	0.00 (0)	1.98 (553)	2.23 (1699)
88	0.00 (0)	0.00 (0)	3.84 (1264)	0.00 (0)	4.50 (559)	3.84 (1823)
89	0.00 (0)	0.00 (0)	2.75 (751)	0.00 (0)	0.01 (519)	2.66 (1270)
90	0.00 (0)	0.00 (0)	3.83 (771)	0.00 (0)	3.96 (489)	3.83 (1260)
91	0.00 (0)	0.00 (0)	3.78 (1562)	0.00 (0)	5.08 (943)	3.78 (2505)
92	0.00 (0)	0.00 (0)	3.73 (2388)	0.00 (0)	0.97 (1021)	1.90 (3409)
93	0.00 (0)	0.00 (0)	4.62 (263)	0.00 (0)	2.07 (20)	4.36 (284)

**1.79 (290) 0.87(207) 3.10 (12604) 3.69 (54) 1.33(6703) 2.84(19858)

Source:

PM - Potency Monitoring; designates those samples received through the DEA under the scope of the Potency Monitoring Program.

PS - Psychiatric; received through a psychiatrist or other MD from a patient having psychiatric or medical problems related to marijuana use.

PD - Police Department; designates those samples received from police department; e.g., samples received from the Gulfport, Miss., police chief would be classified as PD; place seized would be Gulfport, Miss.

ST - State Crime Labs; designates those samples received from state crime labs or other state agencies. In the overall printout, samples received from state agencies will be classified by the state's 2- letter abbreviation as used by the U.S. Postal Service.

FG - Fugitive; designates samples received when no arrests were made.

* All figures are given as percent by dry weight.

** Averages include 397 samples analyzed which were seized prior to 1976. The number in parentheses indicates the number of samples analyzed.

Table 5. Domestic Cultivation*

Cannabis Samples Analyzed through June 30, 1993

0.0%	of 113	samples seized in 1974	was known to be Domestic
6.0%	of 150	samples seized in 1975	was known to be Domestic
0.0%	of 210	samples seized in 1976	was known to be Domestic
6.4%	of 251	samples seized in 1977	was known to be Domestic
9.1%	of 132	samples seized in 1978	was known to be Domestic
6.3%	of 221	samples seized in 1979	was known to be Domestic
22.9%	of 153	samples seized in 1980	was known to be Domestic
51.6%	of 250	samples seized in 1981	was known to be Domestic
29.0%	of 482	samples seized in 1982	was known to be Domestic
31.5%	of 1227	samples seized in 1983	was known to be Domestic
29.6%	of 1118	samples seized in 1984	was known to be Domestic
52.2%	of 1613	samples seized in 1985	was known to be Domestic
51.3%	of 1554	samples seized in 1986	was known to be Domestic
32.2%	of 1699	samples seized in 1987	was known to be Domestic
28.7%	of 1823	samples seized in 1988	was known to be Domestic
40.1%	of 1270	samples seized in 1989	was known to be Domestic
36.6%	of 1260	samples seized in 1990	was known to be Domestic
37.5%	of 2505	samples seized in 1991	was known to be Domestic
30.0%	of 3409	samples seized in 1992	was known to be Domestic
25.0%	of 284	samples seized in 1993	was known to be Domestic

**34.3% of a total of 19858 samples seized was known to be Domestic

* Includes only those samples known to be domestically cultivated. In many cases, this is unknown; therefore, these figures probably represent a low estimate.

**Percentages given are of the number of Cannabis samples analyzed by the Project which were seized in the given year.

Table 6. Arithmetic Cannabinoid Averages of Domestic Cannabis Samples by Year Seized

<u>Year</u>	<u>No. of Seizures</u>	<u>%Δ^9-THC</u>	<u>% CBD</u>	<u>% CBC</u>	<u>% CBN</u>
75	9	1.24	0.00	0.19	0.02
77	16	3.02	1.18	0.25	0.19
78	12	1.85	0.01	0.13	0.16
79	14	3.74	0.22	0.20	0.19
80	35	4.64	0.38	0.18	0.10
81	129	2.92	0.62	0.18	0.07
82	140	2.57	0.80	0.16	0.09
83	387	1.98	0.46	0.14	0.07
84	331	2.55	0.48	0.19	0.17
85	842	2.21	0.44	0.15	0.10
86	797	1.86	0.43	0.16	0.08
87	547	2.46	0.62	0.21	0.12
88	524	2.69	0.45	0.15	0.12
89	509	2.01	0.59	0.12	0.08
90	461	2.63	0.68	0.19	0.03
91	940	2.58	0.87	0.21	0.03
92	1022	2.95	0.45	0.30	0.03
93	71	6.52	0.16	0.17	0.06

Figure 2: Domestic Cannabis THC% versus Year of Confiscation

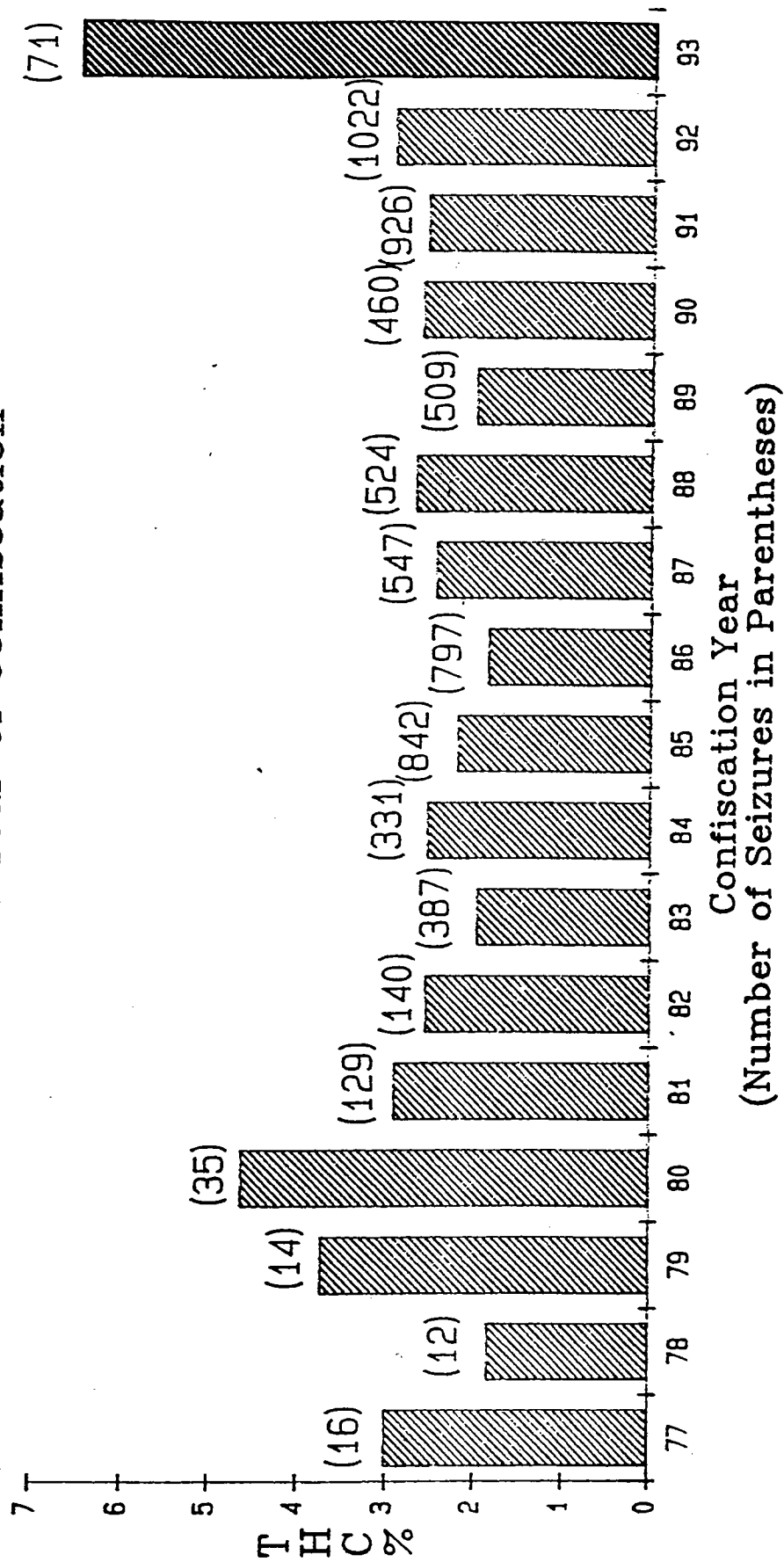


Figure 3: Non-Domestic Cannabis THC% versus Year of Confiscation

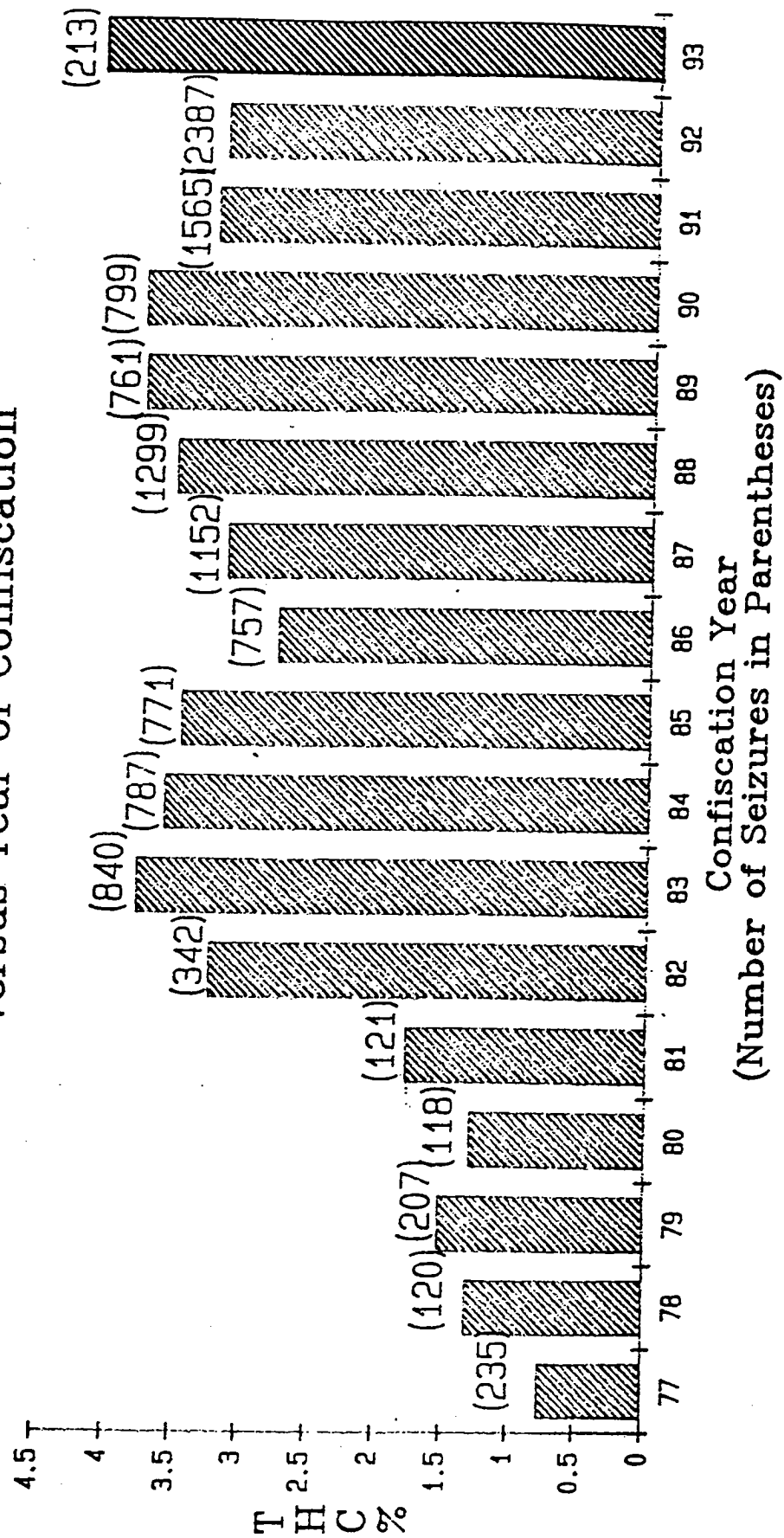


Table 7. Δ^9 -THC Averages (non-normalized*) for Domestically Cultivated Cannabis Samples Analyzed through June 30, 1993 by Year Seized and Description .

YR	BD	KB	MH	SM	TS	YR/TOTAL
75	0.00 (0)	0.00 (0)	1.24 (9)	0.00 (0)	0.00 (0)	1.24 (9)
77	0.00 (0)	0.00 (0)	0.31 (1)	3.20 (15)	0.00 (0)	3.02 (16)
78	1.68 (1)	0.00 (0)	1.42 (10)	6.28 (1)	0.00 (0)	1.85 (12)
79	0.00 (0)	0.00 (0)	3.95 (4)	3.66 (10)	0.00 (0)	3.74 (14)
80	0.00 (0)	0.00 (0)	0.72 (11)	6.44 (24)	0.00 (0)	4.64 (35)
81	2.87 (19)	0.00 (0)	1.62 (80)	6.42 (30)	0.00 (0)	2.92 (129)
82	11.30 (1)	0.00 (0)	2.04 (127)	7.48 (12)	0.00 (0)	2.57 (140)
83	4.14 (11)	0.00 (0)	1.80 (370)	9.23 (6)	0.00 (0)	1.98 (387)
84	3.04 (25)	0.00 (0)	2.05 (276)	6.83 (30)	0.00 (0)	2.55 (331)
85	4.31 (35)	0.00 (0)	1.86 (767)	7.07 (40)	0.00 (0)	2.21 (842)
86	6.64 (16)	0.00 (0)	1.60 (761)	8.38 (19)	0.00 (0)	1.86 (797)
87	4.32 (27)	3.32 (6)	2.07 (489)	7.78 (25)	0.00 (0)	2.46 (547)
88	4.20 (49)	0.00 (0)	1.72 (406)	7.33 (69)	0.00 (0)	2.69 (524)
89	2.03 (69)	0.00 (0)	1.28 (383)	6.86 (57)	0.00 (0)	2.01 (509)
90	3.14 (60)	2.18 (1)	1.58 (355)	10.46 (44)	0.00 (0)	2.63 (461)
91	4.21 (212)	0.00 (0)	1.56 (682)	10.10 (46)	0.00 (0)	2.58 (940)
92	6.66 (91)	5.47 (2)	2.32 (883)	7.72 (43)	0.00 (0)	2.95 (1022)
93	11.28 (22)	0.00 (0)	4.04 (47)	15.30 (1)	0.00 (0)	6.52 (71)
	*4.46 (638)	3.67 (9)	1.83 (5680)	7.60 (473)	0.00 (0)	2.48 (6805)

Description Key:

Description; code for the physical description of samples as follows:

MH - Marijuana; marijuana in the form of loose Cannabis plant material with leaves, stems and seeds; includes cigarettes and those samples which cannot be described otherwise.

BD - Buds; marijuana in the form of buds of flowering tops of the Cannabis plant with seeds.

SM - Sinsemilla; marijuana in the form of sinsemilla; i.e., flowering tops of the female Cannabis plant with no seeds.

* Weight of Seizure not known. Figures are percent by dry weight.

** Averages include 19 samples which were seized prior to 1975. The number in parentheses indicates the number of samples analyzed.

Table 8. Δ^9 -THC averages (non-normalized*) for Non-Domestically Cultivated Cannabis Samples Analyzed through June 30, 1993 by Year Seized and Description

YR	BD	KB	MH	SM	TS	YR/TOTAL
75	1.34 (3)	0.47 (88)	1.00 (50)	0.00 (0)	0.00 (0)	0.68 (141)
76	3.03 (1)	0.54 (182)	1.87 (27)	0.00 (0)	0.00 (0)	0.72 (210)
77	1.38 (7)	0.53 (165)	1.29 (62)	0.00 (0)	4.91 (1)	0.77 (235)
78	2.12 (24)	0.96 (60)	1.49 (33)	0.00 (0)	0.49 (3)	1.32 (120)
79	3.03 (11)	0.79 (18)	1.51 (177)	0.00 (0)	0.13 (1)	1.53 (207)
80	3.81 (6)	0.63 (5)	1.05 (103)	6.11 (3)	0.05 (1)	1.30 (118)
81	4.40 (14)	0.78 (3)	1.37 (102)	5.71 (2)	0.00 (0)	1.78 (121)
82	5.02 (49)	0.00 (0)	2.89 (283)	4.83 (2)	4.60 (8)	3.25 (342)
83	5.07 (115)	0.00 (0)	3.54 (706)	6.59 (12)	4.17 (7)	3.80 (840)
84	4.58 (153)	4.07 (22)	3.50 (603)	5.87 (6)	5.71 (3)	3.60 (787)
85	5.17 (71)	3.80 (73)	3.15 (614)	7.95 (12)	6.26 (1)	3.48 (771)
86	4.61 (52)	2.98 (97)	2.42 (590)	8.50 (13)	4.22 (6)	2.77 (757)
87	4.52 (82)	3.32 (188)	2.88 (861)	8.14 (18)	4.45 (3)	3.15 (1152)
88	5.64 (104)	3.53 (139)	3.19 (1025)	8.30 (29)	3.36 (2)	3.54 (1299)
89	4.90 (127)	3.85 (54)	3.34 (551)	7.13 (29)	0.00 (0)	3.78 (761)
90	5.47 (57)	3.78 (110)	3.49 (614)	9.17 (17)	0.12 (1)	3.78 (799)
91	4.65 (163)	3.11 (507)	2.82 (866)	11.20 (29)	0.00 (0)	3.26 (1565)
92	5.17 (125)	3.07 (1037)	2.94 (1191)	9.67 (33)	0.00 (0)	3.20 (2387)
93	5.93 (3)	4.06 (117)	4.17 (92)	2.52 (1)	0.00 (0)	4.13 (213)
**4.82(1170) 2.72(2923) 2.95 (8715) 8.52 (206) 3.74 (38) 3.15(13053)						

Description Key:

Description; code for the physical description of samples as follows:

MH - Marijuana; marijuana in the form of loose Cannabis plant material with leaves, stems and seeds; includes cigarettes and those samples which cannot be described otherwise.

BD - Buds; marijuana in the form of buds of flowering tops of the Cannabis plant with seeds.

SM - Sinsemilla; marijuana in the form of sinsemilla; i.e., flowering tops of the female Cannabis plant with no seeds.

* Weight of Seizure not known. Figures are percent by dry weight.

** Averages include 19 samples which were seized prior to 1975. The number in parentheses indicates the number of samples analyzed.

Table 9. Δ^9 -THC averages (non-normalized*) for Domestically Cultivated Cannabis Samples Analyzed through March 31, 1993 by Year Seized and Source of Confiscation

YR	FG	PD	PM	PS	ST	YR/TOTAL
75	0.00 (0)	0.00 (0)	1.24 (9)	0.00 (0)	0.00 (0)	1.24 (9)
77	0.00 (0)	0.00 (0)	3.20 (15)	0.31 (1)	0.00 (0)	3.02 (16)
78	0.00 (0)	0.74 (1)	1.68 (1)	1.98 (10)	0.00 (0)	1.85 (12)
79	3.48 (11)	4.71 (3)	0.00 (0)	0.00 (0)	0.00 (0)	3.74 (14)
80	6.48 (20)	1.56 (10)	0.00 (0)	2.67 (1)	3.62 (4)	4.64 (35)
81	1.79 (1)	0.00 (0)	3.33 (88)	0.00 (0)	2.04 (40)	2.92 (129)
82	0.00 (0)	2.04 (7)	5.12 (15)	0.00 (0)	2.28 (118)	2.57 (140)
83	0.00 (0)	1.40 (2)	1.11 (1)	0.00 (0)	1.99 (384)	1.98 (387)
84	0.00 (0)	0.00 (0)	0.00 (0)	0.00 (0)	2.55 (331)	2.55 (331)
85	0.00 (0)	0.00 (0)	3.21 (2)	0.00 (0)	2.21 (840)	2.21 (842)
86	0.00 (0)	0.00 (0)	5.98 (3)	0.00 (0)	1.85 (794)	1.86 (797)
87	0.00 (0)	0.00 (0)	3.15 (15)	0.00 (0)	2.44 (532)	2.46 (547)
88	0.00 (0)	0.00 (0)	0.00 (0)	0.00 (0)	2.69 (524)	2.69 (524)
89	0.00 (0)	0.00 (0)	0.00 (0)	0.00 (0)	2.01 (509)	2.01 (509)
90	0.00 (0)	0.00 (0)	0.00 (0)	0.00 (0)	2.63 (461)	2.63 (461)
91	0.00 (0)	0.00 (0)	0.00 (0)	0.00 (0)	2.58 (940)	2.58 (940)
92	0.00 (0)	0.00 (0)	0.83 (2)	0.00 (0)	2.95 (1020)	2.95 (1022)
93	0.00 (0)	0.00 (0)	6.85 (51)	0.00 (0)	5.67 (20)	6.52 (71)
**3.89 (48) 2.26 (25) 4.23 (202) 1.90 (12) 2.42 (6518) 2.48 (6805)						

Description Key:

Description; code for the physical description of samples as follows:

- PM - Potency Monitoring; designates those samples received through the DEA under the scope of the Potency Monitoring Program.
- PS - Psychiatric; received through a psychiatrist or other MD from a patient having psychiatric or medical problems related to marijuana use.
- PD - Police Department; designates those samples received from police department; e.g., samples received from the Gulfport, Miss., police chief would be classified as PD; place seized would be Gulfport, Miss.
- ST - State Crime Labs; designates those samples received from state crime labs or other state agencies. In the overall printout, samples received from state agencies will be classified by the state's 2-letter abbreviation as used by the U.S. Postal Service.
- FG - Fugitive; designates samples received when no arrests were made.

* Weight of seizures not known. Figures are percent by dry weight.

** Averages include 19 samples analyzed which were seized prior to 1975. The number in parentheses indicated the number of samples analyzed.

Table 10. Δ^9 -THC averages (non-normalized*) for Non-Domestically Cultivated Cannabis Samples Analyzed through June 30, 1993 by Year Seized and Source of Confiscation

YR	FG	PD	PM	PS	ST	YR/TOTAL
75	0.73 (11)	0.00 (0)	0.49 (115)	0.00 (0)	2.05 (15)	0.68 (141)
76	2.96 (5)	0.00 (0)	0.67 (205)	0.00 (0)	0.00 (0)	0.72 (210)
77	0.78 (4)	0.42 (1)	0.76 (226)	3.82 (1)	1.00 (3)	0.77 (235)
78	0.78 (5)	0.00 (0)	1.24 (108)	3.04 (7)	0.00 (0)	1.32 (120)
79	1.54 (151)	0.00 (0)	1.20 (48)	4.28 (6)	0.29 (2)	1.53 (207)
80	1.45 (11)	0.66 (11)	1.27 (77)	2.29 (12)	0.63 (7)	1.30 (118)
81	0.00 (0)	0.71 (6)	1.72 (89)	1.73 (16)	2.96 (10)	1.78 (121)
82	0.00 (0)	2.40 (123)	3.77 (211)	0.00 (0)	2.53 (8)	3.25 (342)
83	0.00 (0)	3.03 (11)	3.82 (823)	0.00 (0)	1.73 (6)	3.80 (840)
84	0.00 (0)	0.00 (0)	3.60 (787)	0.00 (0)	0.00 (0)	3.60 (787)
85	0.00 (0)	0.00 (0)	3.48 (768)	0.00 (0)	1.88 (3)	3.48 (771)
86	0.00 (0)	0.00 (0)	2.78 (749)	0.00 (0)	1.44 (8)	2.77 (757)
87	0.00 (0)	0.00 (0)	3.20 (1131)	0.00 (0)	0.75 (21)	3.15 (1152)
88	0.00 (0)	0.00 (0)	3.59 (1264)	0.00 (0)	1.62 (35)	3.54 (1299)
89	0.00 (0)	0.00 (0)	3.75 (751)	0.00 (0)	5.69 (10)	3.78 (761)
90	0.00 (0)	0.00 (0)	3.79 (771)	0.00 (0)	3.70 (28)	3.78 (799)
91	0.00 (0)	0.00 (0)	3.26 (1562)	0.00 (0)	0.16 (3)	3.26 (1565)
92	0.00 (0)	0.00 (0)	3.20 (2386)	0.00 (0)	2.26 (1)	3.20 (2387)
93	0.00 (0)	0.00 (0)	4.13 (212)	0.00 (0)	0.00 (0)	4.13 (213)

**1.58 (242) 2.04 (182) 3.22 (12402) 2.52 (42) 2.08 (185) 3.15 (13053)

Description Key:

Description; code for the physical description of samples as follows:

- PM - Potency Monitoring; designates those samples received through the DEA under the scope of the Potency Monitoring Program.
- PS - Psychiatric; received through a psychiatrist or other MD from a patient having psychiatric or medical problems related to marijuana use.
- PD - Police Department; designates those samples received from police department; e.g., samples received from the Gulfport, Miss., police chief would be classified as PD; place seized would be Gulfport, Miss.
- ST - State Crime Labs; designates those samples received from state crime labs or other state agencies. In the overall printout, samples received from state agencies will be classified by the state's 2-letter abbreviation as used by the U.S. Postal Service.
- FG - Fugitive; designates samples received when no arrests were made.

* Weight of seizures not known. Figures are percent by dry weight.

** Averages include 19 samples analyzed which were seized prior to 1975. The number in parentheses indicated the number of samples analyzed.

Table 11. Average Concentrations* of Four Cannabinoids Found in All Hashish Samples Analyzed by the Project through June 30, 1993

<u>Year</u>	<u>Seizures</u>	<u>%Δ^9-THC</u>	<u>%CBD</u>	<u>%CBC</u>	<u>%CBN</u>
74	53	0.86	1.99	0.28	2.28
75	88	2.31	2.60	0.38	1.67
76	52	3.28	3.23	0.37	2.54
77	44	1.81	2.94	0.22	1.72
78	51	2.15	4.03	0.23	2.07
79	43	2.32	5.45	0.16	1.76
80	37	2.58	7.58	0.38	1.88
81	13	2.91	6.51	0.28	1.90
82	32	2.69	6.73	0.10	1.45
83	47	5.47	6.15	0.13	1.62
84	59	5.75	3.25	0.31	1.59
85	41	6.49	2.30	0.34	1.33
86	53	2.63	1.10	0.30	1.27
87	63	2.62	1.63	0.19	1.24
88	43	3.35	2.22	0.21	1.70
89	19	7.06	5.08	0.32	1.56
90	38	5.30	4.90	0.42	1.50
91	31	5.21	3.58	0.50	1.78
92	44	6.18	2.60	0.68	3.72
93***					
TOTAL	**887	3.43	3.50	0.30	1.83

* All figures are given as percent by dry weight.

** Averages include 36 samples analyzed which were confiscated prior to 1974.

*** No 1993 hashish seizures.

The above averages are not normalized.

Table 12. Average Concentrations* of Four Cannabinoids Found in All Hash Oil Samples Analyzed by the Project through June 30, 1993

<u>Year</u>	<u>No. Of Seizures</u>	<u>% Δ^9-THC</u>	<u>% CBD</u>	<u>% CBC</u>	<u>% CBN</u>
74	19	15.88	10.87	1.41	3.91
75	29	13.09	6.71	0.86	4.21
76	18	18.82	10.25	1.16	5.07
77	17	18.89	6.83	0.57	4.98
78	9	21.31	6.06	1.39	5.07
79	9	20.91	0.57	1.54	6.00
80	8	16.56	8.67	1.02	5.30
81	5	17.45	10.16	1.35	3.63
82	8	19.88	8.28	1.58	4.34
83	30	21.36	3.25	1.47	4.57
84	33	16.75	1.36	1.06	4.31
85	25	15.08	0.42	0.96	5.08
86	23	16.51	2.10	1.52	3.18
87	22	13.36	0.29	0.99	3.95
88	16	18.52	1.46	0.65	2.22
89	9	11.96	1.59	0.85	4.85
90	12	16.60	0.86	0.74	1.81
91	10	13.07	3.26	0.95	2.25
92	19	14.36	1.08	1.46	4.25
93	1	26.78	0.00	0.00	2.65
TOTAL	**331	16.52	4.01	1.11	4.18

* All figures are given as percent by dry weight.

** Averages include 9 samples analyzed which were seized prior to 1974.

The above averages are not normalized.

Table 13. Number of Seizures and Normalized Average Delta-9-THC Concentrations of All Samples Received from each DEA Laboratory and Analyzed by the Project through June 30, 1993

LAB	Cannabis			Hashish			Hash Oil			Total
	No. of Of Seizures	% Δ^9 -THC Content	No. of Seizures	% Δ^9 -THC Content	No. of Seizures	% Δ^9 -THC Content	No. of Seizures	% Δ^9 -THC Content	No. of Seizures	
STRL	168	3.56	153	3.62	26	5.33				347
NERL	599	2.64	155	2.78	49	20.10				803
MARL	77	2.82	12	0.48	1	16.15				90
SERL	2253	3.05	157	2.32	161	18.56				2571
NCRL	743	2.68	46	2.96	21	20.70				810
SCRL	3289	3.18	42	1.51	18	16.06				3349
SWRL	4311	2.94	139	3.94	21	11.13				4471
WRL	958	5.93	163	5.56	27	24.32				1148
OTHER	7460	1.34	20	0.94	7	28.09				7487
TOTAL	19858		887		331					21076

KEY: STRL - Special Testing and Research Laboratory
 NERL - Northeast Regional Laboratory
 MARL - Mid-Atlantic Regional Laboratory
 SERL - Southeast Regional Laboratory
 WRL - Western Regional Laboratory
 SCRL - South Central Regional Laboratory
 NCRL - North Central Regional Laboratory
 SWRL - Southwest Regional Laboratory

Table 14. Number of Seizures and Normalized Average Delta-9-THC Concentrations of Samples Received from Each DEA Laboratory and Analyzed by the Project April 1, 1993 through June 30, 1993

LAB	Cannabis		Hashish		Hash Oil		Total
	No. of Of Seizures	% Δ^9 -THC Content	No. of Seizures	% Δ^9 -THC Content	No. of Seizures	% Δ^9 -THC Content	No. of Seizures
STRL	0	0.00	8	5.42	1	3.91	9
NERL	103	2.38	3	1.68	0	0.00	106
SERL	175	4.09	20	4.44	9	32.51	204
NCRL	88	2.62	0	0.00	0	0.00	88
SCRL	404	3.60	1	0.22	0	0.00	405
SWRL	799	4.05	0	0.00	1	15.72	800
WRL	120	3.65	3	5.58	0	0.00	123
OTHER	254	1.70	0	0.00	0	0.00	254
TOTAL	1943		35		11		1989

KEY: STRL - Special Testing and Research Laboratory
 NERL - Northeast Regional Laboratory
 SERL - Southeast Regional Laboratory
 WRL - Western Regional Laboratory
 SCRL - South Central Regional Laboratory
 NCRL - North Central Regional Laboratory
 SWRL - Southwest Regional Laboratory

COMMENT ON U.S. SENTENCING GUIDELINE PROPOSALS
March 24, 1994

Amendment 33: Drug Trafficking (Sec. 2D1.1)

33(B). Changing the marijuana ratio from 1000 grams per plant.

Families Against Mandatory Minimums (FAMM) urges the Sentencing Commission to adopt the weight of 100 grams per marijuana plant regardless of number, eliminate the inclusion of male plants, and make both changes retroactive.

Historical precedence

In its original sentencing scheme, the U.S. Sentencing Commission recognized that marijuana plants should be treated separately from harvested marijuana for sentencing purposes. The 1987 Sentencing Commentaries Drug Quantity Table shows that marijuana plants were ascribed a weight of 100 grams each. (See attached copy.) Under the 1987 guidelines, a defendant convicted of growing 200-399 plants received the same sentence as a defendant convicted of possessing 20-39 kilos of harvested marijuana. Both defendants were sentenced at level 18. In other words, it was understood that marijuana plant yield is one tenth the weight of a kilo of harvested marijuana.

By 1989, the U.S. Sentencing Guideline tables reflect the change in sentencing that the Commission adopted to correspond to the statutory sentencing change of 1,000 grams per plant. The change undermined the honesty in sentencing sought by the Commission and introduced a number of new disparities into the sentencing guidelines.

Scientific evidence

The best-known expert in marijuana yield is professor Mahmoud ElSohly from the University of Tennessee, who grows marijuana for the government. Dr. ElSohly's research since 1975 proves that it is impossible to grow a marijuana plant that produces 1000 grams of useable product.

In his most recent research done between 1990-91, Dr. ElSohly's 24 marijuana plants averaged a yield of 222.37 for one type of marijuana and 273.7 grams for another. Dr. ElSohly's plants were grown outside and situated three feet apart. His research showed that the farther apart the marijuana was planted, the greater the yield.

Dr. ElSohly also found that the average weight of all dry leaves (the smokeable product) amounted to 27 percent of the weight of a dry plant. The rest of the weight is stems and stalk, which are not consumed.

Dr. ElSohly does not grow male marijuana plants. His most recent report makes it clear that male marijuana plants are inconsequential to marijuana cultivation: "At approximately ten weeks from planting, male plants began to appear in the field and were removed *as a matter of routine.*" (emphasis added)

Dr. ElSohly has testified for the government in a number of drug cases, and has testified for the defense in 4-5 cases. In one of those cases, (U.S. v. Osborn 2:90 CR-13-WCO) Dr. ElSohly testified that he had never seen or grown a marijuana plant that produced one kilogram. The biggest single plant he grew produced about 2 pounds. But even under ideal conditions, ElSohly testified that he would not expect to get an average yield of 1 kilogram of marijuana per plant because that would mean some plants would weigh as much as 5 pounds which, he concluded, is not possible.

At the Osborn trial, ElSohly stated that "a sentencing scheme based on 100 grams per plant would be reasonable, but a scheme based on one kilogram or 1,000 grams per plant would be very unreasonable."

Marijuana cultivation

There are a number of ways to grow marijuana that result in varying yields. The yield of a plant is increased by the amount of growing room it has and the individual attention it receives. It is also effected by the type of seed used, the length of the growing season, and whether it is grown indoors or outdoors. The goal of the grower is to cultivate female plants with flowering tops, known as "buds." At harvest, the buds and the leaves are collected and dried, to be smoked.

Female marijuana plants are genetically programmed to fruit, or bud, when the amount of daily light falls below 12 hours, which in nature occurs in the autumn. Indoors, the budding process can be initiated early, or delayed, by artificially altering the duration of the light. If a plant receives 18 hours or more of light per day, it continues to grow but does not bud. In this way, a grower can keep his plants in the vegetative state until the plants become quite large, before reducing the duration of light to initiate the budding process. Conversely, a grower can initiate the budding process while the plants are still relatively small, simply by reducing the amount of light the plants receive.

The budding process begins after the plants have grown large enough to exhibit their sex, roughly 4-6 weeks after planting.

At that point the males plants are discarded, and the female plants are either encouraged to grow taller or to bud. Depending on the method of cultivation, a plant may be anywhere from a few weeks old and 6 inches tall, to 12-16 weeks old and 6 feet tall, before the budding process is initiated by the grower. The budding process takes between 7 and 10 weeks to produce harvestable yield.

Some growers "clone" their female marijuana plants to reach the budding stage more quickly. The clone is a leafy stem of the female marijuana plant that is stuck into a growing medium (often rock wool) that quickly roots and begins to bud. Although the clones bud more quickly than plants grown from seeds, they remain small and the total yield from cloned plants is significantly less than that from seeded plants.

Disparity caused by 1,000 gram weight

Assigning a weight of one kilogram to each marijuana plant over the number 49, introduces unintended disparity into the sentencing guidelines.

The most obvious disparity caused by the 1 kilo/1 plant ratio affects the defendant who is arrested with 50 plants and is subject to a 33 month sentence, at level 20. If he had had one plant less, he would have received a sentence of 10 months, at level 12. Should one marijuana plant be responsible for a 23 month difference in sentence? This kind of sentencing "cliff" is exactly what the Commission has tried to avoid in it's calibrated sentencing grid. The Commission has criticized a similar cliff caused by the 5 year mandatory minimum for 5 grams of crack cocaine, where 1/100 of a gram less results in a sentence of one year.

Another unintended disparity caused by the unrealistic weight of 1,000 grams per plant, occurs because of the timing of the arrest. If John is growing 102 marijuana plants in his garden when he is arrested, he is subject to a 63 month guideline sentence, at level 26. However, if John is arrested one week after harvesting his marijuana, with a total yield of 11 kilograms of dried marijuana, he is subject to a 21 month sentence, at level 16. The Commission could not have intended the timing of an arrest to be a determining factor in the defendant's sentence.

Nor could the Commission have intended to punish growers ten times more harshly than possessors of harvested marijuana. If Mary is growing 75 marijuana plants for her own use and is arrested, she can be sentenced to 51 months, at level 24. The total realistic yield of her marijuana patch (assuming all plants were female) could be 8 kilos of marijuana. If Bill is arrested with 75 kilos of packaged marijuana in his trunk, he can receive the same 51 month sentence, even though his actual yield was 67

kilos greater than Mary's.

The one kilo per plant ratio also exaggerates the disparity in sentence for growers who employ different methods of cultivation. For instance, Bob might use the "sea of green" method that involves growing 1,000 little plants or clones that will yield 25 grams per plant, for a total of 25 kilos. Dave may grow 300 larger plants that yield 100 grams per plant, for a total of 30 kilos. Bob's sentence will be 121 months, while Dave's sentence will be 63 months, even though Dave's plants would have produced more useable yield than Bob's. This problem would not be eliminated by changing the ratio because Bob still grew more plants, but the difference in their sentences would be narrower.

SOLUTIONS

The U.S. Sentencing Commission can address the disparities outlined above by adopting the 100 gram uniform weight for all marijuana plants regardless of number. The 100 gram weight continues the existing guideline structure for 49 plants or less which, as the Commission recognized in 1987, is a more realistic estimate of actual marijuana plant yield.

The Commission can also exclude male marijuana plants from the total count, because male plants are never used. If the marijuana is in seedling stage at the time of arrest and the sex cannot be determined, 50 percent of the plants should be excluded.

The rationale behind excluding male plants is the same as for excluding the waste water from the total weight of the methamphetamine, for sentencing purposes. The Commission recognized that the defendant should not be sentenced for a non-consumable by-product of the drug. The same is true of the male marijuana plants. No one grows male plants to harvest and smoke. Dr. ElSohly stated that "as a matter of routine" the male plants were weeded out. Yet, growers who are arrested before the plant sex has been determined, are sentenced for a by-product of the drug that is not consumed.

Lastly, the Commission should make these changes retroactive to effect defendants currently serving guideline sentences based on the unrealistic and unfair sentencing ratio of one plant equals one kilo, after plant number 49.

The retroactivity of last year's LSD amendment did not overwhelm the courts, nor did it release from prison anyone who is a danger to society. The same would be true of the retroactive application of a change in the marijuana guidelines. Many of the people serving marijuana sentences are restricted by the mandatory minimum sentence and would not be eligible for a reduction in any case.

SENTENCING COMMENTARIES

DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above)

Level 36

3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marihuana, 30,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil

Level 34

1-2.9 KG Heroin or equivalent Schedule I or II Opiates, 5-14.9 KG Cocaine or equivalent Schedule I or II Stimulants, 50-149 G Cocaine Base, 1-2.9 KG PCP or 100-299 G Pure PCP, 10-29 G LSD or equivalent Schedule I or II Hallucinogens, 4-1.1 KG Fentanyl or 100-299 G Fentanyl Analogue, 1000-2999 KG Marihuana, 10,000-29,999 Marihuana Plants, 200-599 KG Hashish, 20-59.9 KG Hashish Oil

Level 32**

700-999 G Heroin or equivalent Schedule I or II Opiates, 3.5-4.9 KG Cocaine or equivalent Schedule I or II Stimulants, 35-49 G Cocaine Base, 700-999 G PCP or 70-99 G Pure PCP, 7-9.9 G LSD or equivalent Schedule I or II Hallucinogens, 280-399 G Fentanyl or 70-99 G Fentanyl Analogue, 700-999 KG Marihuana, 7000-9999 Marihuana Plants, 140-199 KG Hashish, 14-19.9 KG Hashish Oil

Level 30

400-699 G Heroin or equivalent Schedule I or II Opiates, 2-3.4 KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9 G Cocaine Base, 400-699 G PCP or 40-69 G Pure PCP, 4-6.9 G LSD or equivalent Schedule I or II Hallucinogens, 160-279 G Fentanyl or 40-69 G Fentanyl Analogue, 400-699 KG Marihuana, 4000-6999 Marihuana Plants, 80-139 KG Hashish, 8.0-13.9 KG Hashish Oil

Level 28

100-399 G Heroin or equivalent Schedule I or II Opiates, 5-1.9 KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G Cocaine Base, 100-399 G PCP or 10-39 G Pure PCP, 1-3.9 G LSD or equivalent Schedule I or II Hallucinogens, 40-159 G Fentanyl or 10-39 G Fentanyl Analogue, 100-399 KG Marihuana, 1000-3999 Marihuana Plants, 20-79 KG Hashish, 2.0-7.9 KG Hashish Oil

Level 26**

80-99 G Heroin or equivalent Schedule I or II Opiates, 400-499 G Cocaine or equivalent Schedule I or II Stimulants, 4-4.9 G Cocaine Base, 80-99 G PCP or 8-9.9 G Pure PCP, 800-999 MG LSD or equivalent Schedule I or II Hallucinogens, 32-39 G Fentanyl or 8-9.9 G Fentanyl Analogue, 80-99 KG Marihuana, 800-999 Marihuana Plants, 16-19.9 KG Hashish, 1.6-1.9 KG Hashish Oil

Level 24

60-79 G Heroin or equivalent Schedule I or II Opiates, 300-399 G Cocaine or equivalent Schedule I or II Stimulants, 3-3.9 G Cocaine Base, 60-79 G PCP or 6-7.9 G Pure PCP, 600 -799 MG LSD or equivalent Schedule I or II Hallucinogens, 24-31.9 G Fentanyl or 6-7.9 G Fentanyl Analogue, 60-79 KG Marihuana, 600-799 Marihuana Plants, 12-15.9 KG Hashish, 1.2-1.5 KG Hashish Oil

Level 22

40-59 G Heroin or equivalent Schedule I or II Opiates, 200-299 G Cocaine or equivalent Schedule I or II Stimulants, 2-2.9 G Cocaine Base, 40-59 G PCP or 4-5.9 G Pure PCP, 400-599 MG LSD or equivalent Schedule I or II Hallucinogens, 16-23.9 G Fentanyl or 4-5.9 G Fentanyl Analogue, 40-59 KG Marihuana, 400-599 Marihuana Plants, 8-11.9 KG Hashish, 8-1.1 KG Hashish Oil, 20 KG+ Schedule III or other Schedule I or II controlled substances

Level 20

GUIDELINES

20-39 G Heroin or equivalent Schedule I or II Opiates, 100-199 G Cocaine or equivalent Schedule I or II Stimulants, 1-1.9 G Cocaine Base, 20-39 G PCP or 2-3.9 G Pure PCP, 200-399 MG LSD or equivalent Schedule I or II Hallucinogens, 8-15.9 G Fentanyl or 2-3.9 G Fentanyl Analogue, 20-39 KG Marihuana, 200-399 Marihuana Plants, 5-7.9 KG Hashish, 500-799 G Hashish Oil, 10-19 KG Schedule III or other Schedule I or II controlled substances	Level 18
10-19 G Heroin or equivalent Schedule I or II Opiates, 50-99 G Cocaine or equivalent Schedule I or II Stimulants, 500-999 MG Cocaine Base, 10-19.9 G PCP or 1-1.9 G Pure PCP, 100-199 MG LSD or equivalent Schedule I or II Hallucinogens, 4-7.9 G Fentanyl or 1-1.9 G Fentanyl Analogue, 10-19 KG Marihuana, 100-199 Marihuana Plants, 2-4.9 KG Hashish, 200-499 G Hashish Oil, 5-9.9 KG Schedule III or other Schedule I or II controlled substances	Level 16
5-9.9 G Heroin or equivalent Schedule I or II Opiates, 25-49 G Cocaine or equivalent Schedule I or II Stimulants, 250-499 MG Cocaine Base, 5-9.9 G PCP or 500-999 MG Pure PCP, 50-99 MG LSD or equivalent Schedule I or II Hallucinogens, 2-3.9 G Fentanyl or 5-9 G Fentanyl Analogue, 5-9.9 KG Marihuana, 50-99 Marihuana Plants, 1-1.9 KG Hashish, 100-199 G Hashish Oil, 2.5-4.9 KG Schedule III or other Schedule I or II controlled substances	Level 14
Less than the following: 5 G Heroin or equivalent Schedule I or II Opiates, 25 G Cocaine or equivalent Schedule I or II Stimulants, 250 MG Cocaine Base, 5 G PCP or 500 MG Pure PCP, 50 MG LSD or equivalent Schedule I or II Hallucinogens, 2 G Fentanyl or 500 MG Fentanyl Analogue; 2.5-4.9 KG Marihuana, 25-49 Marihuana Plants, 500-999 G Hashish, 50-99 G Hashish Oil, 1.25-2.4 KG Schedule III or other Schedule I or II controlled substances, 20 KG+ Schedule IV	Level 12
1-2.4 KG Marihuana, 10-24 Marihuana Plants, 200-499 G Hashish, 20-49 G Hashish Oil, 50-1.24 KG Schedule III or other Schedule I or II controlled substances, 8-19 KG Schedule IV	Level 10
250-999 G Marihuana, 3-9 Marihuana Plants, 50-199 G Hashish, 10-19 G Hashish Oil, 125-449 G Schedule III or other Schedule I or II controlled substances, 2-7.9 KG Schedule IV, 20 KG+ Schedule V	Level 8
Less than the following: 250 G Marihuana, 3 Marihuana Plants, 50 G Hashish, 10 G Hashish Oil, 125 G Schedule III or other Schedule I or II controlled substances, 2 KG Schedule IV, 20 KG Schedule V	Level 6

* The scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity. If a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity.

** Statute specifies a mandatory minimum sentence.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841, 960.

Application Notes:

1. "Similar drug offense" as used in §2D1.1(a)(1) means a prior conviction as described in 21 U.S.C. §§ 841(b) or 962(b).



Families Against Mandatory Minimums

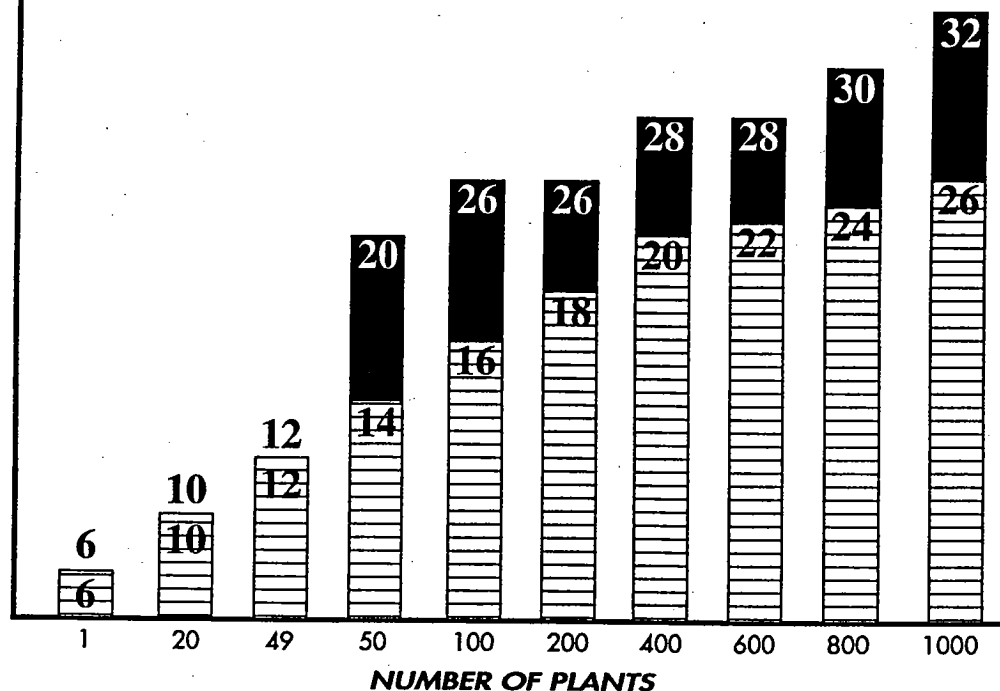
GUIDELINE CHANGES FOR MARIJUANA

SENTENCING GUIDELINES FOR CRIMINAL HISTORY CATEGORY 1

Sentence Range	Guideline Level
121-151 mos.	32
97-121 mos.	30
78-97 mos.	28
63-78 mos.	26
33-41 mos.	20
27-33 mos.	18
21-27 mos.	16
15-21 mos.	14
10-16 mos.	12
6-12 mos.	10
0-6 mos.	6

CURRENT SENTENCE
 1-49 plants = 100 grams per plant
 50+ plants = 1 Kilogram per plant

ALTERNATE SENTENCE
 All numbers of plants weighed at 100 grams per plant



Comparison of Guideline Weights and Sentencing Ranges
for Selected Numbers of Marijuana Plants

Number of Plants	Current guideline weight	Current offense level	Current sentencing range	Proposed sentencing range
1	100 grams	6	0-6 mos	
10-20	1-2 kgs	10	6-12 mos	
40-49	4-4.9 kgs	12	10-16 mos	
50-59	50-59 kgs	20	33-41 mos	15-21 mos
80-99	80-99 kgs	24	51-63 mos	15-21 mos
100-399	100-399 kgs	26	63-78 mos	21-27 mos
400-699	400-699 kgs	28	78-97 mos	33-41 mos
700-999	700-999 kgs	30	97-121 mos	41-51 mos
1,000 to 3,000	1000 to 3,000 kgs	32	121-151 mos	63-78 mos

1001 Pennsylvania Avenue, N.W. • Suite 200 South • Washington, D.C. 20004 • (202) 457-5790 • Fax (202) 457-8564

San Francisco, CA Seattle, WA Miami, FL Atlanta, GA Cedar Rapids, IA Los Angeles, CA
 Indianapolis, IN Detroit, MI Austin, TX Portland, OR Greeley, CO Tucson, AZ Honolulu, HI

Marijuana Cases

Robert Evans was convicted for aiding and abetting the manufacture of 90 marijuana plants. Robert's sentence started at level 24, but was dropped to level 17 after factoring in acceptance of responsibility and minimal role deductions. He is now serving a 24 month sentence. If the marijuana guideline changes retroactively, Robert will be eligible for a reduction in sentence to probation. He is 30 years old, a first offender, and has a high school education.

Harold Prentzel was convicted for growing 80 marijuana plants in his home in Alaska. At sentencing, the judge followed the guidelines and sentenced him at level 22, to 50 months in prison. If the guidelines change to 100 grams per plant, Harold would be eligible to be resentenced to 15 months. Harold is 35 years old, married, and has a 7 month old baby. He attended college but did not graduate.

Dan Bolger plead guilty to growing 36 marijuana plants, but was convicted of growing 149 plants. On a motion from the government, the judge sentenced Dan at level 25, for 57 months in prison. If the guidelines change, Dan will be eligible for a reduction in sentence to 21 months. Dan is a 28 year old, first offender. Before his incarceration he taught music at the VA Hospital in Pennsylvania, was engaged, and had attended college for three years.

Donald Clark is serving a life sentence for a marijuana growing conspiracy involving 1 million plants. Of the 11 defendants charged in the case, he was the only one to take his case to trial. The others plead guilty and received between 3 and 11 years in prison. If the guideline ratio for marijuana plants changes, Donald will be eligible for a reduction in sentence to 24 years, at level 40. Donald is 52 years old. In 1985 he was arrested by the state of Florida for the same offense for which the federal government indicted him in 1990. He owned a watermelon farm in Myakka, Florida at the time of his arrest.

Amendment 33(A) Changing the crack cocaine/powder cocaine ratio.

Families Against Mandatory Minimums (FAMM) urges the Sentencing Commission to adopt a one to one ratio for crack and powder cocaine, retroactively. At a minimum, FAMM proposes that crack and powder cocaine sentences be addressed in the same manner as ice and methamphetamine. Because ice is a derivative form of methamphetamine, but arguably more potent, the guidelines require a two level increase for ice from the original sentence for methamphetamine. The same formula could easily be applied to crack cocaine sentencing.

Scientific evidence

The Commission has heard copious evidence from experts across the country about the pharmacological similarity between crack cocaine and powder cocaine. At the Sentencing Commission hearing on crack cocaine last year, a criminologist, a pharmacologist, and a D.C. narcotics officer all testified that crack is the same drug as cocaine. Other scientists in other forums have come to the same conclusion. The question is settled over whether powder cocaine and crack cocaine are the same drug.

Does crack create more violence?

Law enforcement agents argue that crack cocaine is a more dangerous drug, so it should be penalized more severely than powder cocaine. It is true that the neighborhoods in which crack cocaine is dealt are often more dangerous than the suburbs in which powder cocaine thrives. However, if the defendant is involved in a violent offense in conjunction with his crack offense, the sentencing guidelines provide ample enhancement to adequately punish him for his violent behavior.

Clearly, not all crack cocaine offenses involve violence. According to a Bureau of Justice Statistics 1991 survey of state prison inmates, prisoners who had used crack before their offense were less likely to be in prison for a violent offense than those who had used other drugs or no drug. The survey found that of the percentage of the prisoners who used crack in the month before their offense, 33 percent were incarcerated for a violent offense, compared with 39 percent who used powder cocaine, and 48 percent who used any other drug.

To use the 100 to 1 ratio for all defendants arrested for crack cocaine, because some of the defendants are violent, is to insist that the unjustness of a sentence in particular circumstances be ignored.

Racial disparity caused by application of 100 to 1 ratio

There is no doubt about the racial make-up of the defendants most often convicted of crack cocaine offenses. In 1992, 91.3 percent of those sentenced for crack offenses were African-American. Of the hundreds of crack cases that FAMM has on file, only four defendants are White.

In a nation in which the achievement of racial justice is not only a goal but a necessity, the evidence of sentencing disparity caused by the crack cocaine/powder cocaine ratio, is disconcerting and alarming. Although the Commissioners cannot correct the racial inequity of the statutory mandatory minimums for crack cocaine, they can alleviate the extreme disparity caused by the additional years the guidelines add to the defendants mandatory sentence.

Court decisions

Judges who recognized the inequity of the crack cocaine sentencing laws are trying to find ways to circumvent them. Two recent court decisions about crack cocaine held that the sentences were unconstitutional.

On January 26, 1994, Senior Judge Louis Oberdorfer of the U.S. District court for the District of Columbia declared that the mandatory crack sentences as applied to two defendants before him, violated the Eight Amendment's proscription against cruel and unusual punishment. On February 11, 1994, Judge Clyde S. Cahill of the U.S. District Court for the Eastern District of Missouri used the 14th Amendment's guarantee of equal protection under the law, as grounds for holding the sentencing disparity unconstitutional.

Two other judicial milestones occurred earlier when the Minnesota Supreme Court in 1991 held that the distinction in penalty between crack and powder cocaine violated that state's constitution on equal protection grounds. And on July 29, 1993, federal judge Lyle Strom from Omaha, Nebraska departed downwards from the sentencing guidelines on grounds that he did not deem Congress contemplated such a disparate impact of harsher sentences for Blacks.

It's clear that the courts are seeking means to bring crack cocaine sentences in line with the culpability of the defendant. The Commission can provide that tool for judges by changing the crack cocaine ratio under the guidelines.

Crack Cases

Derrick Curry is serving a 19 1/2 year sentence for a conspiracy involving two kilos of crack cocaine. The FBI admitted that Derrick was a "flunky" in the operation that was run by his friend. At his sentencing, Derrick was given a two-point reduction for being a "minor" participant and a two-point increase for obstruction of justice (the government argued that he perjured himself on the stand when he denied any involvement in the offense.) Derrick was sentenced at level 38. If the crack cocaine guideline ratio changes, Derrick will be eligible for a reduction in sentence to 78 months, at level 28. However, because the mandatory minimum sentence trumps the guideline sentence, Derrick's sentence cannot go below 10 years. The change would effectively reduce his sentence by 9 1/2 years. Derrick is 20 years old, a first offender, and was in college when arrested.

Joseph Felton is serving a 30 month sentence for distributing 1.2 grams of crack cocaine. Undercover agents purchased crack three times from Joseph before arresting him. If the guidelines for crack cocaine changes, Joseph will be eligible for a reduction in sentence to at least 10 months, at level 12, and likely he could go below that. Joseph is 52 years old, a first offender, and has an 8th grade education.

Steven Cook is serving a 19 1/2 year sentence for a crack cocaine conspiracy involving 32 kilos. Steven was responsible for between 500 grams and 1.5 kilos, and was sentenced at the top of the guideline range at level 36. Of his 32 codefendants, Steven was one of 10 who went to trial. If the sentencing guidelines change for crack cocaine, Steven will be eligible for a reduction in sentence to 78 months at level 26. However, the 10 year mandatory minimum sentence for 50 grams or more of crack cocaine will prevent Steven's sentence from dropping below 10 years. The change would effectively reduce his sentence by 9 1/2 years. Steven is 25 years old, a first offender, and was in college prior to his arrest.

Preston Gilyard is serving a 12 year, 7 month sentence for possession with intent to distribute 250 grams of crack cocaine. If the guideline sentence for crack changes, Preston will be eligible for a reduction in sentence to 33 months. However, the 10 year mandatory minimum sentence prevents him from receiving a sentence below 10 years. The change would effectively reduce his sentence by 2 years and 7 months. Preston is 27 years old, a first offender, and has a high school degree.

Amendment 16: Aging and Infirm Prisoners

Families Against Mandatory Minimums urges the Commission to include age and infirmity as extraordinary and compelling reasons to depart from the sentencing guidelines.

FAMM has received dozens of letters from inmates who are elderly or infirm who ask why they are required to die in prison. Many of them ask simply to die at home with their families. Human decency dictates that old and sick individuals who are not a threat to society, be sentenced to home confinement in lieu of incarceration. The Commission can show tremendous compassion and common sense by including age and infirmity in the list of compelling reasons for judges to depart from the guidelines.

Medical cases

Zodenta McCarter is a 65-year old, first offender, serving a sentence of 97 months for conspiracy to manufacture and distribute marijuana. Zodenta is illiterate and grew up in the back woods of Tennessee. She was convicted on the testimony of two informants who were arrested with the marijuana but received immunity for their testimony. Zodenta suffers from high blood pressure, arterial blockage, incipient diabetes, arthritis, and intermittent bleeding from a partial hysterectomy. She is also on medication for a recent exposure to tuberculosis in the prison.

James Dodd is a 66-year old, first offender serving a 24 year sentence for possession and importation of cocaine. James had open heart surgery in 1992 (before his incarceration) replacing his aortic valve with a St. Jude mechanical valve. He suffers from arthritis and other difficulties related to his surgery. James is a retired Pan Am pilot. He is incarcerated at FCI Ft. Worth.

Louis Nash is a 75-year old man serving a 21 year, 8 month sentence for a marijuana conspiracy. He has two prior offenses for loan-sharking and a state drug charge. He suffers from heart trouble, hyper-tension, hernias, an ulcer, and has had pneumonia since his incarceration. His hearing is extremely poor and he is confined to a wheelchair. His daughter is concerned at the lack of medical attention he receives in prison, "If the government is unwilling to provide this care, then release him to us to care for him." He is incarcerated at FCI Ft. Worth.

DeWayne Murphy is a 35-year old, first offender serving a 48 month sentence for possession with intent to distribute 500 grams of methamphetamine. At the time of his sentencing, DeWayne was on a heart transplant list. The BOP does not provide heart transplants as part of its medical program, so DeWayne's condition continues to deteriorate. He now spends 14 hours a day in the hospital wearing an oxygen mask. He has been denied a compassionate release. DeWayne is incarcerated at FMC Rochester.

Robert Lee Edward is a 53-year old, first offender serving a 97 month sentence for a cocaine conspiracy. In 1989 Robert had a heart attack and was on several different medications which he was unable to take during his initial three days of custody. Six days later, after he was released on bond, he had another heart attack, which required open-heart surgery and a double by-pass. Before his incarceration, Robert ran a junk yard and raised 9 kids. He is now incarcerated at FCI Talladega.

Hector Alvarez is a 64-year old inmate at FCI Talladega. His own words speak louder than FAMM's:

"On January 29, 1991, at about 2:30 p.m., as I had just finished performing my duty in the dining hall, I began feeling a bad pain in my chest, so I sat down and took a Nitrostat pill to relieve the pain from my heart which has given me the same problems for a long time.

I kept feeling bad so I took another pill with the hope that my pain would stop. Even so, the pain did not stop and I began feeling nausea and my head was spinning.

Although I had already performed my duty, the officer on duty ordered me to clean the cart covers. I told the lady officer that I was feeling bad, and as I was talking to her I reached in my pocket and showed her the doctor's written statement saying: 'Only light work.' (I am 64 years old and ill.)

The lady officer, without saying a word, she radioed through her walkie-talky to have some guards come get me and lock me up in segregation. But the other officer who was nearby, he realized I was really ill, so he got a wheelchair and rushed me to the institution hospital where, after ascertaining that I was feeling really bad, I was rushed to the 'citizen hospital' in down town Talladega where I had several tests and radio-cardiograms and where I was under close care.

On April 28th, 1991, I felt bad again because of my heart, so I was rushed to the 'citizen hospital' in Talladega where I went through lots of tests, radio-cardiograms, etc...where I was under intensive care for five days. In the ten months that I have been at Talladega, I went to the hospital four time for the same problems.

Some of the officers in the dining hall they keep telling me to do work I cannot do, and they stop such harassment only when they see me turning pale and falling down. How long can I last? At this point, I only hope in a 'miracle' from 'God,' since my fellow men seem so inclined to destroy me."

Members of the Sentencing Committee

My name is Peggy Edmundson, I live in rural southwest Missouri and most of my life in N.W. Arkansas. My husband, Eric, and I own 40 acres with an older home, to which we have done extensive remodeling on. Doing most of the work ourselves. The past 12 years we have worked diligently to establish a secure home and surround ourselves with the things we enjoy doing the most. Including, gaining the respect of our friends and neighbors. All of whom know they can call on us any time they need help. From pulling a calf at 3:00 A.M. to keeping watch on their home while they are away.

My husband, Eric, was a respected electronics and design engineer with Clarke Industries in Springdale AR making \$45,000. a year. Designing from the ground up Clarke's most profitable floor polishing machine to date, along with Clarke's main line of marble finishing and polishing machines. Being frugal by nature Eric devoted all his time and money into our future and our farm. Eric grew up in Boy Scouts and received the high rank of Life Scout. He has always maintained high morals. Honesty, helpfulness, and kindness were second nature to him.

In the Summer of 1993, it seemed everything was going our way. Eric was going to China to confirm a deal with a company to make handles for the machines he designed. I was able to stay home and care for the farm, working our garden, orchard, and honey bee's. Also, helping my mother care for my father who 5 years ago was disabled by a stroke which left him unable to speak or care for himself, and is now bed fast.

On the afternoon of August 18, 1993, our world was turned upside down. A confidential informant, for reasons we will never understand or know, gave information to local authorities that we grew marijuana. After 4 months of investigation with no results the DEA was called in with their thermal imaging technology. With this covert information and the information from their confidential informant a search warrant was obtained.

We were not home at the time the search warrant was served. Thanks to our good neighbors and friends, who informed us of what was going on and we were not arrested at the scene. We were unable to go home for two days, while we retained an attorney and arranged to turn ourselves in.

Local and State police and DEA agents, including helicopters, did an intensive search of our property. They discovered our wine cellar and behind it Eric's small (7x10) grow room in which 47 marijuana plants, in various stages of growth, were taken. Along with 4 plants that had been grown outside. A total of 51 marijuana plants. Why our case was selected for Federal prosecution was a question our attorney asked often, and has yet to hear an explanation. Despite repeated requests the U.S. Attorney declined to permit Eric and our attorney to examine the evidence

alleged to have been taken. We would have liked to know the actual weight since so many of the plants were very small with only 6-8 leaves. Because Eric cloned his plants he always had mature, adolescent , and infant plants.

Always having more infant plants due to mortality. This process seemed better than buying it on the street as Eric did not believe in buying or selling marijuana. He grew only for himself. Due to his very demanding and high stress job, Eric chose marijuana over alcohol and tobacco or going to doctors for legal drugs such as tranquilizers or sleeping pills.

Federal Sentencing Guide lines call for the infliction of mandatory prison terms for cultivation of 50 or more plants. Cultivation of 49 or fewer results in eligibility for probation and a lesser prison term. In Eric's case just two small plants were responsible for Eric receiving a sentence of 24 months in the U.S. Federal Penitentiary in Leavenworth Kansas. Two less plants he could have been sentenced to 10 months or less. Those two plants made a fourteen month difference in my husbands sentence. The guidelines should be changed so that all plants are weighted at 100 grams and this unfair cliff would be eliminated. Eric's sentence would have been no more than ten months. If all plants were weighted at 100 grams.

I personally don't choose to smoke marijuana or use any other drugs, which was proven through drug tests. However, I plead guilty to a misdemeanor charge of possession in a plea bargain agreement, because it was in my home. I, too, could have been sent to prison if I had not plea bargained for probation. I am now faced with living alone without Eric's income for the next 24 months, along with the financial burden of of a \$10,000 loan we borrowed to clear the criminal forfeiture that was brought against our property. Unfortunately the cost of upkeep, utilities, insurance, and taxes, did not go down along with our income. The closest neighbor is a quarter mile down the winding dirt road and I am left feeling alone and cheated by the judicial system.

Who has benefited from this? Society has lost a productive, intelligent, hard working individual and our overcrowded prison system has gained a non-violent marijuana grower, who grew for personal use only. The DEA and it's war on drugs along with local and state authorities lost 4 months of investigative time and money to stop one personal use marijuana grower. Please consider the lives of the real productive people, like Eric and myself, that your decisions affect. Please help to restore the principals of freedom and justice our country was founded on. Please explain to me why two small plants would make a 14 month difference in a sentence?

Thank You.

063-91

Statement of

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington

on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission
Washington, D.C.

March 28, 1994

Table of Contents

Amendment 1 (computer-related offenses)	1
Amendment 2 (consolidation of public corruption offense guidelines)	3
Amendment 3 (offense levels in bribery and gratuity offense guidelines)	4
Amendment 4 (multiple bribes and gratuities)	5
Amendment 5 (treatment of public officials in public corruption cases)	6
Amendment 6 (definition of "payment" in public corruption cases)	8
Amendment 7 (departures in public corruption cases)	10
Amendment 8 (§ 2D1.1)	11
Amendment 9 (aggravating role guideline)	14
Amendment 10 (mitigating role guideline)	15
Amendment 11 (§ 2S1.1)	17
Amendment 12 (more than minimal planning; loss in theft and fraud cases)	18
Amendment 13 (career offender guideline)	20
Amendment 14 (departures)	24
Amendment 15 (consolidation of guidelines)	26
Amendment 16 (aging prisoners)	29
Amendment 17 (miscellaneous amendments).....	29
Amendment 18 (§ 1B1.3).....	35
Amendment 19 (retroactivity)	36
Amendment 20 (theft and fraud)	36
Amendment 21 (§ 2X1.1)	37
Amendment 22 (§ 5K2.13, p.s.)	38

Amendment 23 (§ 5G1.3)	40
Amendment 24 (§ 2D1.1)	42
Amendment 25 (§ 2P1.1)	43
Amendment 27 (§ 2K2.1 and 2K2.5)	45
Amendment 28 (§ 2K2.5)	47
Amendment 29 (gang membership)	48
Amendment 30 (§ 4A1.1 and chapter 5, part A)	48
Amendment 31 (§ 1B1.10, p.s.)	49
Amendment 33 (§ 2D1.1)	49
Amendment 34 (multiple victims)	49
Amendment 35 (organized scheme to steal mail)	53

My name is Thomas W. Hillier. I am the Federal Public Defender for the Western District of Washington, and I appear today to present the views of the Federal Public and Community Defenders.

There are presently Federal Public and Community Defender organizations serving 56 federal judicial districts. Federal Public and Community Defender organizations operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services to federal defendants financially unable to afford counsel. We appear before United States 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 federal criminal defendants. We represent persons charged with frequently-prosecuted federal crimes, like drug trafficking, and with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with white-collar crimes, like bank fraud, and persons charged with street crimes, like first degree murder. Federal Public and Community Defenders, therefore, have a great deal of experience with the guidelines. Based upon that experience, we are pleased to comment upon the proposed amendments to the Federal Sentencing Guidelines Manual that the Commission has published in the Federal Register.¹

**Amendment 1
(Computer-related offenses)**

Amendment 1 would revise the commentary to three guidelines to deal with computer-related cases. We believe that the amendment

¹58 Fed. Reg. 27,148 (1993).

makes some appropriate adjustments in the commentary, but we believe that parts of the commentary need to be modified or deleted.

Proposed new application note 5 to § 2B1.3 uses an unrealistic and inappropriate example. A valuable data base would be backed up much more frequently than once a year.

Proposed new application note 10(g) to § 2F1.1 indicates that an upward departure may be warranted for "a substantial invasion of a privacy interest." We believe that there should be additional language in new application note 10(g), either referencing or repeating the discussion of the term "a substantial invasion of a privacy interest" that this amendment adds to the commentary to § 2B1.1.

Proposed new application note 10(h) to § 2F1.1 indicates that an upward departure may be warranted if "the offense involved a conscious or reckless risk of harm to a person's health or safety." We oppose proposed new application note 10(h) as unnecessary and misleading.

The Commission, in response to a Congressional directive, added subsection (b)(4) of § 2F1.1, effective November 1, 1989.² Subsection (b)(4) calls for a two-level enhancement (or an offense level of 13 if the two-level enhancement does not yield an offense level of at least 13) "if the offense involved the conscious or reckless risk of serious bodily injury." We think that "risk of

²U.S.S.G. App. C, amend. 156. The Congressional directive is in the Major Fraud Act of 1988, Pub. L. No. 100-700, § 2(b), 102 Stat. 4632.

harm to a person's health or safety" is equivalent to a "risk of serious bodily injury." If the court finds that there was a conscious or reckless risk of harm to a person's health or safety, the court must apply subsection (b)(4). If the court applies subsection (b)(4), the court has no legal authority to depart.

Finally, application note 4 to § 2B1.3, after setting forth a factual scenario, states that an upward departure "would be warranted." Although the Commission has not published an amendment to that part of application note 4, we recommend that the phrase "would be warranted" be changed to "may be warranted." The Commission's practice has been to use "may," and we see no reason to deviate from that practice in application note 4.

Amendment 2
(Consolidation of public corruption offense guidelines)

Amendment 2(A) would consolidate § 2C1.3 and § 2C1.4 and also add a new cross reference calling for use of § 2C1.1, if the offense involved a bribe, or § 2C1.2, if the offense involved a gratuity. We do not oppose simply consolidating the guidelines, but we object to the cross-reference. The proliferation of cross-reference subsections is changing the nature of the guidelines from charge-offense with real offense elements, to predominantly real offense. The Commission's first effort to draft a set of guidelines incorporated a pure real offense system, but the Commission found that a real offense system was impractical and "risked return to wide disparity in sentencing practice".³ The

³U.S.S.G. ch. 1, pt. A(4)(a).

Commission then opted for the present system, one based on the offense charged but with "a significant number of real offense elements".⁴ The Commission, for good reasons, rejected a comprehensive real offense system and should not, ad hoc, abandon that decision. If the Commission wants to alter the system fundamentally, the Commission should tackle the issue directly 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.

Amendment 2(C) invites comment upon whether bribery and gratuity guidelines should be consolidated. In our view, bribery offenses should be punished differently from gratuity offenses. Bribery, which requires a corrupt intent and a quid pro quo, is the more serious offense, and the current guidelines reflect that. We doubt that a single consolidated guideline that maintains a distinction in punishment between bribery and gratuity offenses, will be any easier to apply than the present two guidelines. We oppose consolidating the bribery and gratuity guidelines.

Amendment 3
(Offense levels in bribery and gratuity offense guidelines)

Amendment 3 invites comment upon whether the offense levels in the bribery and gratuity guidelines should be increased to require sentences of imprisonment, as recommended by the Justice Department. Current offense levels generally will yield sentencing ranges that require a period of incarceration, even if probation is

⁴Id.

ordered. The Justice Department has presented no evidence that the present offense levels are inadequate. Given the crowded condition of federal prisons,⁵ increasing the prison population with nonviolent, often first-time offenders is unwise.

Amendment 4
(Multiple bribes and gratuities)

Amendment 4(A) sets forth two options for amending the bribery and gratuity guidelines in response to Commission data indicating that a majority of bribery and gratuity cases involve more than a single incident. Option 1 would retain the two-level adjustment if more than one bribe or gratuity is involved. Option 2 would delete those specific offense characteristics. We support option 2.

The seriousness of bribery and gratuity offenses is better captured by the amount of the bribe or gratuity than by the number of payments. It is not clear to us, for example, why a defendant who pays two bribes totalling \$25,000 should have a higher offense level (offense level 16) than a defendant who pays a single bribe of \$50,000 (level 15).

Amendment 4(B) invites comment upon revising "the discussion of the adjustments for multiple payments" in the commentary to the bribery and gratuity guidelines. Promulgation of option 2 of amendment 4(A) would call for deleting commentary concerning multiple payments.

⁵Federal Prisons are presently 37% over capacity. U.S. Dep't of Justice, Fed. Bur. of Prisons, Monday Morning Highlights (Mar. 14, 1994).

Amendment 5
(Treatment of public officials in public corruption cases)

Amendment 5(A) would make cumulative, rather than alternative, the specific offense characteristics in the bribery and gratuity guidelines for value of the payment and status as an elected or "high-level" public official. We oppose amendment 5(A) and suggest instead the deletion of the specific offense characteristic for status as an elected or high-level public official.

In our judgment, the seriousness of both bribery and gratuity offenses is best measured by the value of the bribe or gratuity. Except in very rare circumstances (which, of course, can be dealt with by departure), a large bribe is not paid for a small favor. The more important the favor sought, the more important the public official required to do the favor, and the greater the bribe will have to be.

Gratuity cases do not involve a corrupt intention or a quid pro quo, so the harm cannot be the extent to which the public trust has been betrayed. Rather, the harm is the likelihood that the recipient's judgment will be corrupted in the future and the appearance of impropriety. The greater the amount of the gratuity, the greater the likelihood of such corruption in the future and the more likely the gratuity will be perceived as improper.

For both bribery and gratuity cases, then, the amount of the payment is an appropriate measure of seriousness. The recipient's status as a high-level public official is accounted for by the specific offense characteristic for the amount of the payment. An additional enhancement for status as an elected or high-level

public official is inappropriate and unfair double counting. Making the two enhancements cumulative would only compound the unfairness. We suggest eliminating the status enhancement. Deleting the status enhancement will not depreciate the seriousness of bribery and gratuity offenses involving public officials. The base offense level for commercial bribery is eight, two levels less than the base offense level of § 2C1.1. While the base offense level for commercial bribery is one level more than the base offense level for a gratuity offense involving a public official, this is appropriate because the gratuity offense does not involve a corrupt intention or a quid pro quo.

Amendment 5(B) invites comment upon whether the definition of high-level public official should be revised. If there is to be an adjustment for defendant's status as a high-level official, we support adoption of a more objective definition. Because the status of most public officials is directly related to that official's salary, the best objective test probably is salary.

The present definition is overly broad. Not all elected offices are equivalent in importance. The adjustment currently applies if the defendant is a Member of Congress or the elected coroner of a county whose population is 6,000. Further, the definition of "official holding a high-level decision-making or sensitive position" in application note 1 to § 2C1.1 merely lists certain officials who are covered by the definition. There is no apparent principle that explains the inclusion of these officials or that would justify including or excluding other officials. In

short, the commentary does not clearly identify who qualifies for the eight-level enhancement.

Amendment 6
(Definition of "payment" in public corruption cases)

Amendment 6(B) invites comment upon whether application note 2 to § 2C1.1 should be revised "to address varying approaches among the circuits as to the extent to which the defendant is to be held accountable for relevant conduct of others."

Only four cases appear to bear upon the issue for comment,⁶ and only one of those may reach a result inconsistent with what the Commission intends in the guidelines. The facts of the case that may reach an inconsistent result are complex, and the basis for the sentence imposed is not fully explained.⁷ We believe that Commission action at this time would be premature.

⁶United States v. Muldoon, 931 F.2d 282 (4th Cir. 1991); United States v. Kant, 946 F.2d 267 (4th Cir. 1991); United States v. Ellis, 951 F.2d 580 (4th Cir. 1991), cert. denied, 112 S.Ct. 3030 (1992); United States v. Narvaez, 995 F.2d 759 (7th Cir. 1993).

⁷United States v. Ellis, supra note 6. In Ellis, the defendant was convicted of bribing state legislators to obtain enactment of legislation favorable to racetracks. The defendant was a 20% limited partner in a track that would benefit from the legislation. The district court held the defendant accountable for \$500,000 that he was promised if the legislation was enacted plus the defendant's 20% interest in the racetrack. The opinion does not indicate if that 20% was applied to the net worth of the track, the track's proceeds from racing, or the track's net profits. The government had argued that the court should have held the defendant accountable for the total profit to the two tracks that benefitted from the legislation (some \$11 million). The Fourth Circuit rejected the government's argument and sustained the district court. This result would be consistent with the guidelines if the defendant's partners in the track were not participants in the offense, and inconsistent otherwise. The report does not discuss whether the defendant's partners were participants.

Amendment 6(C) invites comment upon whether the commentary to § 2C1.1 should be amended to suggest that an upward departure may be warranted "if the offense involved ongoing harm, or a risk of ongoing harm" to a governmental entity or program. We oppose the amendment because we believe that the amount of the payment is the best measure of the seriousness of the offense. In addition, the proposed language is overly broad -- a risk of harm is all that is required, without regard to how serious or substantial the risk is. An agency is harmed by a bribery offense because the judgment of an official of the agency has been corrupted. The official who has taken a bribe is likely to be a target of further bribes, until no longer in office. Does this constitute a risk of ongoing harm?

Lastly, the amendment is unnecessary. Application note 5 to § 2C1.1 states that an upward departure may be warranted if the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office. How does "systematic or pervasive corruption" differ from "ongoing harm, or a risk of ongoing harm?" Further, § 5K2.7, p.s. (disruption of a governmental function) indicates that an upward departure may be warranted if the defendant's conduct resulted in "a significant disruption of a governmental function." That provision also states that "departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery and obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines

will reflect the appropriate punishment for such interference." Application note 5 can be consistent with § 5K2.7 if the term systematic and pervasive corruption (a relatively objective standard by comparison to the language of amendment 6(C)) is interpreted to be the unusual circumstances referred to in § 5K2.7. It probably is not possible to interpret the language of amendment 6(C) to be consistent with § 5K2.7.

Amendment 7
(Departures in public corruption cases)

Amendment 7 notes that 28 U.S.C. § 994(d) requires the Commission to assure that the guidelines are neutral as to race, sex, national origin, creed, and socioeconomic status. Amendment 7 also notes that some courts have based departures on cultural characteristics of a defendant or the collateral consequences to a defendant who is a public official. Amendment 7 then invites comment upon "how it might resolve these competing policy concerns." We do not see a need for Commission action.

The Commission has responded to 28 U.S.C. § 994(d) by providing that the factors set forth in section 994(d) "are not relevant in the determination of a sentence."⁸ We believe that federal judges, when imposing sentence, are mindful of the need to avoid discrimination based upon the factors set forth in section 994(d). An appeal is the way to resolve whether a particular sentence is based upon an improper factor. If a judge does impose

⁸U.S.S.G. § 5H1.10, p.s. The mandate to the Commission in 28 U.S.C. § 994(d) is to assure that "the guidelines and policy statements" are "entirely neutral" as to the listed factors. The Commission's policy statement thus goes beyond the mandate.

a sentence based upon an improper factor, the aggrieved party can appeal.

Amendment 8
(\$ 2D1.1)

Amendment 8(A) would revise the drug quantity table of § 2D1.1 to make the mandatory minimum levels 24 and 30, instead of 26 and 32, and to set the upper limit of the table at level 38. We support the amendment.

The Commission has based the drug quantity table on the mandatory minimum quantities established by Congress.⁹ In doing so, the Commission selected offense level 26 for five-year mandatory minimum quantities and offense level 32 for ten-year mandatory minimum quantities. The sentencing ranges for those offense levels, however, start above the five and ten years required by Congress. The Commission can continue to base the drug quantity table on the mandatory minimum quantities enacted by Congress by using offense levels 24 and 30 because the sentencing ranges for those offense levels include the five years and ten years mandated by Congress.

We support making level 38 the top level of the drug quantity table. At present, an organizer, leader, manager, or supervisor of a large scale drug offense receives no sentencing benefit from a plea of guilty. For example, a leader of a level 42 drug offense has an offense level of 46 (offense level of 42 from § 2D1.1

⁹Ronnie M. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50, 52-54 (1990).

enhanced four levels under § 3B1.1). If the defendant does not accept responsibility, life imprisonment is required in all criminal history categories. If the defendant pleads guilty and accepts responsibility, life imprisonment is still required in all criminal history categories because the defendant's offense level would be level 43. If the top of the drug quantity table were 38, that same defendant would have an adjusted offense level of 42, which could be reduced to level 39 by pleading guilty and accepting responsibility. Level 39 yields a guideline range of 262-327 months in criminal history category I and 360 months to life in criminal history category VI.

Amendment 8(B) contains two options for amending § 2D1.1 with regard to weapon use and assault. Option 1 would add two enhancements -- a four-level enhancement if a firearm was discharged or a dangerous weapon otherwise used, and a two-level enhancement if the offense resulted in serious bodily injury (other than serious bodily injury covered by subsections (a)(1) and (2)). Option 2 would add a special instruction calling for creation of an artificial count by applying the attempted murder or aggravated assault guideline if the offense involved attempted murder or aggravated assault, and not grouping the artificial count with the drug trafficking count.¹⁰ We oppose both options.

There has been no evidence of any problem with the gun

¹⁰Option 2 would also define the term "aggravated assault" to include discharge of a firearm under circumstances creating a risk of serious bodily injury, without regard to whether the defendant intended to create such a risk, or knew that such a risk would result.

enhancement of the drug trafficking guideline. 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 departing, we see no need to revise the gun enhancement. For similar reasons, we see no need to add an enhancement for serious bodily injury or the proposed special instruction.

Amendment 8(C) would cap the chapter two offense level for a defendant who receives a mitigating role adjustment. We support the amendment and suggest that the cap be level 30.

In our view, the guidelines result in inappropriately high offense levels for persons who are minimal or minor participants in most offenses. The large number of drug trafficking cases, however, makes the problem most acute with respect to drug offenses. Capping the offense levels for minor and minimal participants in drug trafficking offenses not only is consistent with the Commission's action in capping offense levels for minor and minimal participants in § 2D1.8 cases, but it also would result in more appropriate punishment for minor and minimal participants.

Amendment 8(D) invites comment upon whether the Commission should increase the enhancement for weapons, add an enhancement for violence, and use a broader range of quantity at each level in the drug quantity table. For a number of years, various Commissioners have stated that they believe that the drug guidelines are tied too closely to quantity. They have not, however, come forward with any

concrete proposal to remedy that perceived problem.

Quantity is not an inappropriate basis for measuring the severity of a drug trafficking offense. Congress has based mandatory minimum penalties primarily on quantity, so any proposal to use another measure of severity faces a difficult practical impediment. The offense levels produced by a revised guideline will have to yield offense levels high enough so that they are not routinely overridden by the mandatory minimums. Failure to yield such offense levels will result in increased and unjustified sentencing disparity. The difficulty in devising such a provision may explain why there has been talk but no concrete proposals have been put forth. We do not at this time support a broad redrafting of the drug trafficking guideline.

**Amendment 9
(Aggravating role guideline)**

Amendment 9 would revise § 3B1.1 by redefining the term "participant" and require that, to qualify for a three-level upward adjustment, the defendant manage or supervise four other participants. We support portions of this proposal.

We support the amendments to subsections (b) and (c). The changes to those subsections will prevent the odd result that a defendant who supervises one other person in an offense involving five persons gets a three-level enhancement, while a defendant who organizes and leads a four-person offense receives only a two-level enhancement. We also support the amendment to subsection (a), although we believe that the amendment should be modified. The amendment to subsection (b) deletes the phrase "or was otherwise

extensive." The amendment to subsection (a) does not. Subsections (a) and (b) should be coextensive, so we suggest modification of the amendment to subsection (a) so that it, too, deletes the phrase "or was otherwise extensive."

We also support the addition of new application note 4. A defendant should not receive adjustments under both the aggravating role and mitigating role guidelines. The sentencing court should weigh all of the circumstances to determine which of the two adjustments, if either, to apply. New application note 4 calls for such a result.

We oppose redefinition of the term "participant." We believe it inappropriate to include undercover law enforcement personnel as participants. The threat to society from a criminal enterprise penetrated by law enforcement is significantly less than the threat from a criminal enterprise that has not been so penetrated. In the former instance, law enforcement can act at any time to thwart the criminal enterprise from reaching its objectives, while in the latter instance law enforcement is virtually powerless until after the enterprise undertakes to accomplish its objectives. Sentencing policy should reflect the lesser threat. The cases where an innocent agent is utilized for criminal ends are few and can better be handled by departure.

Amendment 10
(Mitigating role guideline)

Amendment 10 would revise the introductory commentary to chapter 3, part B and § 3B1.2 and its commentary regarding who qualifies for a mitigating role adjustment. While there are parts

of the amendment that we support because they improve the guideline, there are other parts that we oppose as ill-advised.

We support the proposed revision of the introductory commentary to chapter 3, part B. The revised version would explain the relationship of the guidelines of chapter 3, part B, to the relevant conduct rule and the rationale behind those guidelines, and would make clear that the determination of whether a defendant qualifies for a mitigating role adjustment is to be based upon the defendant's behavior in relation to the relevant conduct for which the defendant is accountable. The court is not to look to some hypothetical offense to determine if the defendant qualifies for a mitigating role adjustment. The revised commentary is an improvement over the present introductory commentary.

We support the revised version of application note 1. The revised version, like the revised introductory commentary, underscores the role of the relevant conduct rule in applying the mitigating role adjustment.

We oppose revised application notes 2, 6, and 7. They are inconsistent with the approach to applying this guideline that is spelled out in the revised introductory commentary and revised application note 1. Whether a defendant qualifies for a mitigating role adjustment requires consideration of the defendant's conduct, the relevant conduct for which the defendant is being held accountable, and other relevant circumstances of the case. To single out certain factors supplants reasoned judgment of federal judges with rote application of a check list.

We support application note 3. The proposed language sets forth a principled basis for limiting a mitigating role adjustment.

We oppose revised application note 4 and new application note 5 for the same reason. A defendant's role in the offense turns upon the specific facts of the case. A defendant who possessed a gun, for example, can, in the context of the entire offense, be a minor participant in fact. The defendant's possession of the gun is a factor that will increase the defendant's offense level, so using gun possession to preclude a mitigating role adjustment is a form of unfair double counting.

We have no objection to new application note 8, although it seems somewhat insulting to federal judges to imply that they would find that a defendant qualified for a mitigating role adjustment "based solely on the defendant's bare assertion." It has not been our experience that a federal judge bases a determination upon a bare assertion, especially if that assertion comes from a defendant in a criminal case.

We support the amendment to the background note. The revision makes clear that the mitigating role determination is to be made solely on the basis of defendant's relevant conduct.

Amendment 11
(§ 2S1.1)

Amendment 11 would revise § 2S1.1 and § 2S1.2 to tie the offense levels more closely to the underlying offense. The amendment would consolidate the two guidelines, and the consolidated guideline would call for an offense level that is the greatest of three options -- (1) the offense level for the

underlying offense that produced the funds, if that offense level can be determined; (2) 12 plus an adjustment from the fraud table, if the defendant knew or believed the funds were the unlawful proceeds of an unlawful activity involving drug trafficking; and (3) eight plus an adjustment from the fraud table. The consolidated guideline also would have enhancements if (1) the defendant knew or believed that the transactions were designed to conceal the proceeds of criminal conduct or were to be used to promote further criminal activity; and (2) if the base offense level is determined by use of the offense level assigned to the underlying offense, the offense involved offshore transfer of funds or a sophisticated form of money laundering.

We find the consolidated guideline to be a reasonable method of determining offense severity, and we support this amendment.

Amendment 12

(More than minimal planning; loss in theft and fraud cases)

Amendment 12(A) -- More than minimal planning

Amendment 12(A) would revise the two-level enhancement found in several guidelines for "more than minimal planning." The amendment would authorize an enhancement when the offense involved "sophisticated planning" and would revise the commentary to explain when the enhancement should apply. We support this amendment.

The skill with which a defendant planned an offense is legitimately an aggravating factor. Skillful planning can make offense hard to detect and solve, and can make it less likely that defensive measures taken by potential victims will be effective. It is, therefore, appropriate to increase the offense levels of

those whose offenses were skillfully planned.

The Commission has attempted to do so by the enhancement for more than minimal planning. The Commission's attempt, unfortunately, has not worked out well. The term "more than minimal planning" is poorly defined, and as a result, the enhancement for "more than minimal planning" is routinely applied.¹¹ The shortcomings of the present definition are most pronounced in cases involving "repeated acts." The commentary defining more than minimal planning includes a statement that "'more than minimal planning' is deemed present in any case involving repeated acts over a period of time" That statement makes it possible to apply the enhancement in virtually every fraud or theft case where there was more than one theft or fraudulent representation -- even in simple cases which required little or no planning. We believe that the amendment will make clear that the two-level enhancement is to be based on the sophisticated nature of the offense rather than on the number of acts. Further, we believe that the amendment will avoid unwarranted disparity by ensuring that the enhancement will apply only to those who are particularly skillful at planning and executing offenses.

Amendment 12(B) would raise the base offense level of § 2B1.1 to six to conform with the base offense level of § 2F1.1. We do

¹¹From October 1, 1991 through September 30, 1992, the enhancement for more than minimal planning was applied in 71.2% of the sentences imposed under § 2F1.1 using the 1989-1991 guidelines, and in 78% of the cases sentenced under the 1988 guidelines. U.S. Sentencing Com'n, 1992 Annual Report, at table 56.

not oppose equalizing the two base offense levels. It is not clear, however, why the Commission did not seek comment on an equally valid way to make the base offense levels consistent -- reducing the base offense level of § 2F1.1 to four. There is no indication that the current base offense level of four in § 2B1.1 is inappropriate, and we fail to understand why it should be raised to six.

Amendment 12(C) asks for comment as to whether the loss tables should be revised to provide for a "more uniform slope." The options set forth would achieve more uniformity by increasing offense levels for loss. There is no evidence to suggest that increasing offense levels is necessary or appropriate.

We therefore oppose options 1 and 2. We believe, however, that the loss tables can be revised to address a real problem. 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. We believe that the loss tables can be improved by using two-level increments, as is done in the drug quantity table of § 2D1.1. The simplest way to achieve that result is to delete all entries in the tables that call for an odd-numbered enhancement.

Amendment 13
(Career offender guideline)

Amendment 13(B) -- Offense statutory maximum

Amendment 13(B) would amend the commentary in § 4B1.1 to

revise the definition of "offense statutory maximum" for purposes of the career offender guideline. As revised, the definition would state that "offense statutory maximum" means the maximum term of imprisonment before any enhancement based upon the defendant's prior convictions. We support this amendment.

The offense level and criminal history category under the career offender guideline is determined by the statutory maximum of the offense. To use the same prior convictions to enhance the statutory maximum and to increase substantially both the offense level and the criminal history category is inappropriate double-counting.

Amendment 13(C) -- Definition of prior felony convictions

Amendment 13(C) offers two options that would revise the definition of the term "two prior felony convictions" in subsection (3) of § 4B1.2. Option 1 would require that the two predicate convictions result from offenses separated by an intervening arrest. Option 2, in addition to the language in Option 1, would require that certain prior felony convictions be counted separately.

Congress in the Sentencing Reform Act of 1984 directed the Commission to insure that career offenders receive a sentence "at or near the maximum term authorized for categories of defendants."¹² The Commission has interpreted this phrase to require the career offender guideline to provide a sentence at or

¹²28 U.S.C. § 994(h) (enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2021).

near the statutory maximum.¹³ Such severe penalties should be reserved for those serious repeat offenders who have failed to respond to punishment.

Recidivist statutes have traditionally been based on the theory that a defendant who continues to commit crimes after being punished deserves harsher sanctions. We support Option 1 as a step toward focusing the application of the career offender penalties on three-time recidivists by requiring that predicate convictions be separated by an intervening arrest. As amended, the career offender guideline would apply to other than true recidivists (because there is no requirement that the offenses be separated by a conviction), but it would at least be limited to those defendants who continued to commit crimes after some criminal justice system intervention.¹⁴

We oppose Option 2. The exception to the intervening arrest requirement proposed in Option 2 is inconsistent with making the career offender guideline a recidivist provision. Instead, this would make the career offender provision a multiple offense enhancement for one category of offenses, and not for others.

Amendment 13(D) would add language to the commentary to § 4B1.2 to make clear that to be a crime of violence, a burglary must

¹³U.S.S.G. § 4B1.1, comment. (backg'd).

¹⁴The Commission has, in another context, considered arrest to be a significant contact with the criminal justice system. Amendment 382, which took effect November 1, 1991, revised the related case doctrine to provide that prior sentences cannot be considered related (and therefore must be counted separately when determining criminal history score) if they were for offenses that were separated by an intervening arrest.

be "of a dwelling (including any adjacent outbuilding considered part of the dwelling)." We support the amendment.¹⁵

As originally promulgated, the career offender guideline defined "crime of violence" to include all burglaries, but in 1989 the Commission revised the definition to include only burglary of a dwelling.¹⁶ By limiting the applicability of § 4B1.1 to burglaries of a dwelling, the Commission acted to effectuate the Congressional purpose of insuring that the harsh penalties called for by the career offender guideline be reserved for recidivist defendants with the most serious criminal records. Residential burglary traditionally has been considered a more serious offense than other types of burglary because of the increased threat to people in their own homes.

Amendment 13(E) would revise the commentary to § 4B1.2 to clarify that crimes of violence that "otherwise involve a serious risk of physical injury" be confined to those offenses that are similar to the enumerated offenses. We support this amendment.

If the goal of the career offender guideline is to punish those recidivist defendants with serious criminal records, then the applicability of the guideline should focus on those enumerated offenses. In the rare instance when the prior offense is clearly a crime of violence, but not similar to one of the enumerated

¹⁵We believe that the term "adjacent" in the phrase "any adjacent outbuilding" renders the parenthetical ambiguous and likely to foster litigation. We therefore recommend using the phrase "any attached building."

¹⁶U.S.S.G. App. C, amend. 268.

offenses, U.S.S.G. § 4A1.3 authorizes the court to depart accordingly.

Amendment 14
(Departures)

Amendment 14 would revise the introductory commentary to chapter five, part H, to state that although certain factors are not ordinarily relevant to a departure decision, "they may be relevant to this determination in exceptional cases." In addition, amendment 14 would revise § 5K2.0, p.s. to state that a factor not ordinarily relevant to a decision to depart may be relevant to such a decision if the factor is present to an unusual degree. Finally amendment 14 would revise the commentary to § 5K2.0 to set forth "a useful analytic framework for the consideration of circumstances that may warrant a departure from the applicable guideline range." We support the revisions of the introductory commentary and the text of § 5K2.0. We oppose the revision of the commentary to § 5K2.0.

We would have thought that logic and common sense indicate that a statement that a factor is not ordinarily relevant implies that there are circumstances when that factor is relevant. A Seventh Circuit case, however, has undercut our faith in logic and common sense by holding that "not ordinarily" really means never.¹⁷

¹⁷United States v. Thomas, 930 F.2d 526, 529-30 (7th Cir.), cert. denied, 112 S.Ct.171 (1991). In an appeal from the district court's sentence following the remand in Thomas, the Seventh Circuit suggested that it might no longer adhere to the earlier decision. United States v. Thomas, 11 F.3d 732, 736 (7th Cir. 1993) (noting that the prior decision in the case was based on language in § 5H1.6 that has been deleted).

We believe that the revision of the introductory commentary and the text of § 5K2.0 is necessary to make clear even to the Seventh Circuit that although a given factor is not ordinarily relevant to a departure decision, that factor can be relevant to such a decision in extraordinary circumstances.

We oppose the amendment to the commentary to § 5K2.0 because we do not believe it appropriate for the Commission to tell federal courts how to analyze a case to decide if a departure is warranted. The Commission's role is to set forth what factors have been considered, and the extent to which they have been considered. It is up to the sentencing court to determine if a factor present in the case was inadequately considered by the Commission. We also believe that some of the language set forth in the proposed new commentary is not a correct statement of the law. The second question, for example -- "Has the Commission forbidden departures based on those features?" -- assumes that the Commission has been delegated the authority to preclude a departure entirely. We do not believe that the Commission has such authority.

Congress has directed sentencing courts to impose a sentence called for by the guidelines unless there is an aggravating or mitigating circumstance that the guidelines do not adequately account for. At bottom, then, the sentencing court must determine whether it has the legal authority to depart, that is whether a circumstance of the case has been adequately accounted for by the guidelines. Such a determination can only be made in the context of an actual case -- as the Commission itself recognizes in the

text of § 5K2.0.¹⁸ Policy statements in chapter 5, part H, that state that a factor is not relevant to a departure decision either stem from a Congressional mandate to include such a statement (as in the case of § 5H1.10 (race, sex, national origin, creed, religion, and socio-economic status)) or else must be interpreted as a statement by the Commission that the factor involved has been considered by the Commission. A sentencing court, however, could depart if the court found that factor to be present to an unusual degree not contemplated by the Commission in formulating the guidelines.

Amendment 15
(Consolidation of guidelines)

The synopsis of amendment 15 claims that the purpose of the amendment is to "simplify further the operation of the guidelines." In many instances, the changes to the guidelines made by amendment 15 do much more than simplify application. Many of the consolidations also make a change in policy by expanding the use of cross-references, thereby shifting the guidelines closer toward a real offense sentencing system. The effect of the proliferation of cross-references is to reduce the government's burden of proof and to have facts found by a judge instead of a jury.

When formulating the initial set of guidelines, the Commission found that there was no practical way to construct a pure "real

¹⁸"The controlling decision as to whether and to what extent departure is warranted can only be made by the courts." See also U.S.S.G. ch. 6, pt. B, intro. comment. ("the policy statements [of chapter 6, part B] make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge").

offense" system, and instead "moved closer to a charge offense system."¹⁹ If the Commission wants to have a real offense system, it ought to do so directly, rather than on an ad hoc basis. The increased use of cross-references is rendering the count of conviction almost meaningless.

We support those parts of amendment 15 that simply consolidate. We oppose the following parts of amendment 15 because they also make a change in policy.

Amendment 15(A) would consolidate § 2A2.3 and § 2A2.4, the guidelines that apply to obstructing or impeding officers and minor assault. The consolidated guideline would include a cross-reference that calls for use of § 2A2.2 if the offense involves an aggravated assault. At present, § 2A2.4 has a cross-reference to § 2A2.2, but § 2A2.3, the guideline for minor assault, does not. The effect of this amendment is to make § 2A2.3 a mere conduit to § 2A2.2. We oppose this amendment for the reasons stated above.

Amendment 15(C) would consolidate § 2D2.1 (acquiring a controlled substance by forgery, fraud, deceit, or subterfuge) with § 2D2.1 (unlawful possession; attempt or conspiracy). The amendment would add a specific offense characteristic to § 2D2.1 to require an offense level of eight if the offense involved what is an essential element of 18 U.S.C. § 843(a)(3) -- acquiring a controlled substance by forgery, fraud, deception, or subterfuge. The amendment would make the statute obsolete by reducing the burden of proof to a mere preponderance for the essential element

¹⁹U.S.S.G. ch. 1, pt. A(4)(a).

that distinguishes simple possession from a violation of 18 U.S.C. § 843(a)(3).

Amendment 15(E) would consolidate § 2G1.2 (transportation of a minor for the purpose of prostitution or prohibited sexual conduct) with § 2G1.1 (transportation for the purpose of prostitution or prohibited sexual conduct). We oppose this amendment.

The consolidated guideline will result in rendering the offense of conviction irrelevant in many cases. For example, if a defendant is convicted of 18 U.S.C. § 2421 and the persons transported are 17 years old, the defendant's offense level is 14 if there were no threats, force or drugs involved. Under consolidated guideline, the defendant's offense level would be 16.

Amendment 15(F) would consolidate § 2N3.1 (odometer laws and regulations) with § 2F1.1 (fraud and deceit, forgery, counterfeit instruments). The cross-reference to § 2F1.1 will now apply in those cases where only one vehicle is involved. This amendment changes the treatment of one vehicle cases without any stated justification. We oppose this amendment.

Amendment 15(G) would consolidate § 2T2.2 (regulatory offenses) and § 2T1.1 (tax evasion; willful failure to file return). Regulatory offenses would now be subject to the tax table and the base offense level would be raised from four to six. Without some explanatory rationale for this shift in policy, we oppose this amendment.

**Amendment 16
(Aging prisoners)**

This amendment invites comment on whether and how the Commission should act to allow for greater sentencing flexibility or for modification of sentences for older, infirm defendants. We suggest that the Commission exercise its authority under 28 U.S.C. § 992(t) to describe circumstances based on health or age that would warrant modifying a sentence. The Commission should encourage the Bureau of Prisons and the courts to exercise their authority under 28 U.S.C. § 3582(c) to adjust sentences of defendants with deteriorating physical conditions. Because the Commission has no direct authority to shorten sentences, we suggest that the Commission provide for more flexibility at the initial sentencing so that the sentencing court can take into account more fully factors such as age and deteriorating health which are present or foreseeable at the sentencing.

**Amendment 17
(Miscellaneous amendments)**

Amendment 17(A) -- § 1B1.3

Amendment 17(A) would add commentary to § 1B1.3 to clarify that a defendant's relevant conduct does not include conduct of members of a conspiracy that occurred before the defendant joined the conspiracy. In addition, this amendment would add language to define "same course of conduct." We support this amendment.

The relevant conduct rule of § 1B1.3(a)(1)(B) makes a defendant, in the case of jointly undertaken criminal activity, accountable for conduct of others in furtherance of that activity

if the conduct was reasonably foreseeable. In ordinary usage, the term "foreseeable" refers to something that will occur in the future.²⁰ No one can "foresee" something that happened in the past. Thus, the literal meaning of § 1B1.3(a)((1)(B) is that a defendant is accountable for conduct that occurs after the defendant enters into the jointly undertaken activity if that conduct was reasonably foreseeable and in furtherance of the joint activity.

Several circuits, however, have chosen not to adopt ordinary usage and have held a defendant accountable for conduct taking place before the defendant entered the jointly undertaken criminal activity. In doing so, the Seventh Circuit acknowledged that "the concept of foreseeability (a forward-looking concept) must be turned around 180 degrees."²¹ The Seventh Circuit's approach has been sharply criticized by other circuits²² and seems to be at odds with the Commission's intention.²³ Amendment 17(A) will forestall

²⁰The American Heritage Dictionary 524 (2d college ed. 1991) (foresee means "to see or know beforehand").

²¹United States v. Edwards, 945 F.2d 1387 (7th Cir. 1991), cert. denied, 112 S.Ct. 1590 (1992).

²²See United States v. O'Campo, 973 F.2d 1015, 1024 (1st Cir. 1992) ("we decline to engage in a construction of the language of foreseeability that requires such a forced linguistic volte-face"); United States v. Petty, 992 F.2d 887, 890 (9th Cir. 1993) ("we do not see how a court has authority to turn a concept 'around 180 degrees'").

²³An earlier version of the relevant conduct rule for concerted activity had made a defendant accountable for what the defendant knew or reasonably should have known, but that language was deleted effective November 1, 1989, U.S.S.G. App. C, amend. 78, indicating that the Commission did not want such broad accountability.

further litigation on the issue.

We also support expanding the commentary to describe "same course of conduct." At present, there is no real definition of the term "same course of conduct," and the proposed language should help in the application of the guideline.

Amendment 17(C) -- § 2B5.1

Amendment 17(C) would amend § 2B5.1 (offenses involving counterfeit bearer obligations of the United States) to clarify that § 2B5.1(b)(2) can apply to photocopying of notes and that discarded or defective items are not to be counted when applying § 2B5.1(b)(1). We support the amendment. Technological improvements make it possible for a photocopy to produce items that are not "so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny." Items that are not intended for circulation pose no risk of harm and should not be used to calculate the severity of an offense.

Amendment 17(D) -- Hashish; moisture in marijuana

Amendment 17(D) would, inter alia, revise application note 1 to § 2D1.1 to state that for marijuana with a moisture content that renders the marijuana unsuitable for consumption, "an approximation of the weight of the marijuana without such excess moisture content is to be used." We support that revision.

The Commission last year amended application note 1 to state that the term "mixture or substance" does not include material that must be separated from the controlled substance before the

controlled substance can be used.²⁴ While the language added by that amendment should cover marijuana with excess moisture -- the moisture is a material that must be removed before the marijuana can be used -- in light of cases approving use of the weight of the moist marijuana, it seems advisable to include language specifically addressing marijuana.²⁵

Amendment 17(E) -- § 2D1.2 and § 3B1.2

Amendment 17(E) would revise commentary to § 2D1.2 to state that the aggravating role guideline applies independently of § 2D1.2. We oppose the amendment as unnecessary in view of the Commission's amendment last term to § 1B1.1.²⁶

Amendment 17(I) -- § 2K2.2

Amendment 17(I) would add an application note to § 2K2.1 to address the operation of the cross-reference provision of that guideline. The amendment would require that when § 2K2.1(c)(1) calls for application of another offense guideline, the entire guideline must be applied. Thus, any enhancement for use or possession of a weapon would be added.

²⁴U.S.S.G. App. C, amend. 484.

²⁵United States v. Garcia, 925 F.2d 170 (7th Cir. 1991); United States v. Pinedo-Montoya, 966 F.2d 591 (10th Cir. 1992). These cases were decided before the amendment 484 took effect. The Commission did not expressly refer to moisture in marijuana in the published materials concerning amendment 484, so specifically addressing the matter would forestall litigation over whether amendment 484 was intended to cover moisture in marijuana.

²⁶U.S.S.G. App. C, amend. 497. Amendment 497 added language to the commentary to § 1B1.1 that provides that "absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together)."

We oppose this amendment because it would allow conduct for which the defendant has not been convicted to be used as the primary measure of a defendant's offense level -- and then would add enhancements for the underlying offense that required the cross-reference in the first place. In a Second Circuit case, for instance, the defendant was acquitted of narcotics offenses and convicted of a weapon offense.²⁷ Section 2K2.1(c)(1) required the application of § 2D1.1, including the gun enhancement of § 2D1.1(b)(1). As the Second Circuit observed, "to add to the narcotics offense level, chosen only to reflect the circumstances of the weapons offenses, an increment for possessing weapons is tantamount to adding an increase on the basis that the defendant possessed weapons in the course of possessing weapons."²⁸

Amendment 17(J) -- § 2K2.4

Amendment 17(J) would amend application note 2 to § 2K2.4 by stating that when a sentence under § 2K2.4 is imposed with a sentence for an underlying offense, the court is not to apply any weapon enhancement when calculating the offense level of the underlying offense. The amendment also would add to application note 2 examples of guideline provisions that would not be applied. We support the amendment.

The purpose of application note 2 is to prevent unfair double counting. The changes made by amendment 17(J) will make § 2K2.4

²⁷United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992), cert. denied, 114 S.Ct. 163 (1993).

²⁸Id. at 390.

easier to apply and are consistent with the purpose of application note 2.

Amendment 17(M) -- § 3D1.2

Amendment 17(M) would add six offense guidelines to the list of offense guidelines subject to grouping under § 3D1.2(d). We support the amendment. The guidelines that would be added appear to us to meet the criteria of § 3D1.2(d), and their inclusion in the list will make application of the grouping rules easier.

Amendment 17(O) -- § 5G1.1 and § 5G1.2

Amendment 17(O) would revise the commentary to § 5G1.1 to state that when multiple terms of supervised release are imposed, they must run concurrently. Amendment 17(O) would also revise the commentary to § 5G1.2 to state that if a consecutive sentence is imposed under § 5G1.2(a), any term of supervised release following that term of imprisonment must run concurrently with any other term of supervised release to which the defendant is subject. We support the amendment.

The result called for by the new language is required by 18 U.S.C. § 3624(e). We believe it appropriate for the commentary to § 5G1.1 and § 5G1.2 to point this out.

Amendment 17(Q) -- § 7B1.1

Amendment 17(Q) presents two options for classifying false statements to probation officers for purposes of revocation of probation or supervised release. Option 1 would treat such a false statement as a Grade C violation. Option 2 would treat such a false statement as a Grade B violation. We support option 1.

False statements are rarely, if ever, prosecuted as felonies under 18 U.S.C. § 1001, so they can be most appropriately classified as Grade C violations. Because most false statements are never prosecuted, classifying them as Grade B violations would result in a tremendous deviation from current practice without any evidence that the current practice is inadequate.

Amendment 18
(§ 1B1.3)

Amendment 18, proposed by the Practitioners' Advisory Group, would amend § 1B1.3 to preclude consideration of acquitted conduct, except as a basis for an upward departure. We support the exclusion of acquitted conduct from the relevant conduct rule, but we oppose allowing acquitted conduct to be used as a basis for an upward departure. We have found that most people -- judges, clients, the public -- are dumbfounded by basing punishment on conduct for which a person has been found not guilty in a court of law. Most people equate an acquittal with vindication. While courts of the past were allowed to consider acquitted conduct when determining a sentence, those courts were not required to do so. Before the guidelines, courts were also allowed to consider factors that are now deemed "not relevant" or "not ordinarily relevant." The systematic use of acquitted conduct to determine a sentence cannot be justified solely on the argument that there is a lower burden of persuasion at sentencing.

The proposed amendment would help to restore some sense of fairness to the sentencing process. The use of acquitted conduct as a basis for departure, however, would be inconsistent with the

principle precluding the use of acquitted conduct and would lead to unwarranted disparate punishment.

**Amendment 19
(Retroactivity)**

Amendment 19 would revise § 1B1.10 and its commentary. We support the changes to subsection (a) of the guideline because they clarify that subsection. We also support the deletion of subsection (c). Deletion of subsection (c) will return a limited measure of discretion to the sentencing court.

The revision of subsection (b), while clarifying that subsection, continues a flawed policy by requiring the use of harsher provisions not in effect when the defendant committed the offense. We believe that the better approach is to use the Guidelines Manual originally used to sentence the defendant, modified by the amendments listed in § 1B1.10. We therefore suggest that the Commission revise subsection (b) as recommended by the Judicial Conference's Criminal Law Committee in amendment 31.

We oppose proposed changes to the commentary that are inconsistent with the above views on subsections (b) and (c).

**Amendment 20
(Theft and fraud)**

Amendment 20(A) would revise application note 7 to § 2F1.1 concerning loss. We consider the revision to be clarifying and editorial, and we support the amendment.

Amendment 20(B) invites comment on whether to conform the commentary to § 2B1.1 with the commentary to § 2F1.1 by stating

that (1) loss should be reduced to reflect the amount the victim has recovered before discovery of the offense, and (2) actual loss can significantly overstate or understate the seriousness of the defendant's conduct and may warrant a departure. We support the amendment. The severity of an offense covered by § 2B1.1 should be determined on the basis of the actual loss to the victim. Using other than actual loss artificially inflates the value of the loss and fosters unjustified disparity.

Amendment 20(C) invites comment on whether to revise the provisions in chapter 2, parts B and F, to clarify that interest is not included, under any circumstances, in loss. The Commission has adopted a policy that interest is not a component of loss.²⁹ Because there is at least one decision that is not consistent with this policy,³⁰ we believe it advisable for the Commission to reemphasize its policy.

Amendment 21
(§ 2X1.1)

Amendment 21 would revise § 2X1.1 by consolidating subsections (b)(1), (2), and (3) and would revise the commentary to set forth when this guideline, rather than an offense guideline of chapter 2, is to be used. We support the amendment.

Section 2X1.1 is the offense guideline for an attempt,

²⁹U.S.S.G. App. C, amend. 470 ("this amendment clarifies that interest is not included in the determination of loss").

³⁰United States v. Lowder, 5 F.3d 467, 470-71 (10th Cir. 1993). There is one other case excluding interest, but it was decided before the Commission adopted amendment 470. United States v. Jones, 933 F.2d 353 (6th Cir. 1991).

solicitation, or conspiracy not covered by another offense guideline in chapter 2. The revision of the text of the guideline would eliminate repetitious language and set forth more clearly the policy of subsection (b).

The revision of the commentary is necessary to cure an ambiguity. Section 2X1.1 applies only if the attempt, solicitation, or conspiracy is not covered by another chapter 2 offense guideline. How does the court determine if an attempt, for example, is covered by another chapter 2 offense guideline? The present version of § 2X1.1 is not as helpful as it could be in answering this question.

Application note 1 presently lists offense guidelines that expressly cover attempts, but the list is not comprehensive. Does § 2X1.1 apply if the attempted offense is covered by an offense guideline that is not included in the list in application note 1? The Commission has not set forth a principle for determining whether § 2X1.1 applies to such an offense. Amendment 21 would cure the ambiguity by revising application note 1 to state, in effect, that § 2X1.1 applies to an offense covered by a chapter 2 offense guideline that is not on the list unless the caption of that guideline states that the guideline applies to an attempt. This is a clear and workable rule.

Amendment 22
(§ 5K2.13, p.s.)

Amendment 22 sets forth two options for revising § 5K2.13, p.s. Option 1 would revise the policy statement to provide that a departure downward for diminished capacity may be warranted for a

defendant convicted of any offense if the circumstances of the offense and the defendant's characteristics do not indicate a need for incarceration to protect the public. Option 2 would revise the policy statement to provide that, absent extraordinary circumstances, a downward departure for diminished capacity is not warranted for a defendant convicted of a crime of violence. Option 2 would also require a finding that the circumstances of the offense and the defendant's characteristics do not indicate a need for incarceration to protect the public. We support option 1.

The present policy statement, unfortunately, introduced a unique term to guidelines lexicon, "non-violent offense." Predictably, there has been litigation as to what "non-violent offense" encompasses.³¹ The Commission has thus far given no guidance as to what it intends the term to mean. Amendment 22 would give such guidance.

We believe that option 1 sets forth the policy most consistent with what Congress intended in the Sentencing Reform Act of 1984. Under option 1, a court could depart in any case for the defendant's diminished capacity. Public safety is protected by the provision that the court consider the nature and circumstances of

³¹United States v. Chatman, 986 F.2d 1446, 1448-53 (D.C. Cir. 1993) (whether an offense is nonviolent requires the court to "consider all the facts and circumstances of a case"); United States v. Poff, 926 F.2d 588 (7th Cir.), cert. denied, 112 S.Ct. 96 (1991) (a nonviolent offense cannot be a crime of violence as defined in the career offender guideline). But see id. at 593-96 (Easterbrook, J. dissenting) ("the reasons behind § 5K2.13 combine with the presumption that different terms in a carefully drafted code such as the guidelines connote different things to lead me to conclude that 'non-violent offenses' refers to crimes that in the even did not entail violence").

the offense and the history and characteristics of the defendant and determine whether public safety requires incarceration. We believe that federal judges can be trusted to make such determinations responsibly.

We oppose option 2, which would preclude a diminished capacity departure if the defendant is convicted of a "crime of violence," as defined in the career offender guideline. The definition of crime of violence is overly broad and a defendant convicted of such an offense may present no serious threat to the public. In our experience, for example, persons with psychological problems who send threatening letters to public officials -- crimes of violence within the meaning of the career offender guideline -- frequently present no serious threat to the public. Such persons lack the capacity or intention to follow through on their threats, yet a downward departure would be precluded.

Amendment 23
(§ 5G1.3)

Amendment 23, proposed by the Probation Officers' Advisory Group, would revise § 5G1.3(c) to provide that in cases not covered by subsections (a) or (b), the sentence for the instant offense can run concurrently with or consecutive to the pending undischarged term of imprisonment. The amendment would also completely rewrite application note 3, deleting the illustrations. Revised application note 3 would suggest use of the grouping rules to determine the sentence that would have been imposed had all of the offenses been federal and sentence been imposed at one time, but would provide that this not be done if to do so would prolong or

complicate the sentencing process.³² We oppose the amendment.

The amendment would leave completely unstructured a sentencing determination that can have significant consequences. The present standard of "reasonable incremental punishment" would be replaced by unfettered discretion of the kind that Congress sought to eliminate when enacting the Sentencing Reform Act of 1984. The amendment thus would undercut one of the important goals of sentencing, avoiding unjustified disparity.

There are two steps involved in applying § 5G1.3(c). The first is to determine what is an incremental punishment. Under the guideline as presently written, this is determined by treating the instant offense and the offenses with undischarged terms of imprisonment as if they were all federal offenses for which sentence was about to be imposed. The grouping rules of chapter 3, part D, are used to determine the guideline range that would have applied, and the court determines what sentence would have been imposed. Under the present guideline, if collecting the information necessary to carry out this step would unduly complicate or prolong the sentencing process, this step (and, consequently, the next step as well) need not be taken, and the court can use some other way to determine what constitutes "reasonable incremental punishment."

³²The proposed standard "prolongs or complicates" is inappropriate. Anything that a probation officer is required to do to prepare a presentence report -- such as verify a defendant's employment -- will prolong the sentencing process. The formulation in present application note 3, "unduly complicates or prolongs," is more appropriate.

The second step is to fashion a sentence in the instant case that results in the total punishment that the court has determined to be appropriate. There are ways of doing this that cannot be thwarted, for example, by a state's action to shorten prison terms to relieve a prison overcrowding problem.³³

We believe that § 5G1.3(c) as presently written avoids unjustified disparity and is not as difficult to apply as has been claimed. While this amendment, if promulgated, might make a probation officer's job easier, the cost -- inconsistent and unjustifiably disparate results -- is too high.

Amendment 24
(§ 2D1.1)

Amendment 24 would revise application note 12 to the drug trafficking guideline to state that in an offense involving negotiations for a controlled substance, the quantity under negotiation is to be used to determine the offense level unless the completed transaction establishes a greater quantity. Amendment 24 would also amend application note 12 to state that when the quantity used to determine the offense level is based upon a negotiated amount, the sentencing court is to exclude any amount that the defendant was not reasonably capable of producing or did not intend to produce. We support this amendment.

If a drug trafficking case involves negotiating a quantity, § 2D1.1 bases offense severity upon the amount under negotiation.

³³Letter from John Steer, General Counsel, United States Sentencing Commission, to Tony Garoppolo, Deputy chief U.S. Probation Officer, Eastern District of New York (Jan. 6, 1994).

This, we believe, is a fair way to determine offense severity, but only if the defendant was reasonably capable of trafficking in the quantity under negotiation and the defendant actually intended to traffick in that quantity. If the defendant was not reasonably capable of trafficking in the quantity under negotiation, then the defendant's intention is irrelevant. Likewise, if the defendant did not intend to deliver (or purchase) the amount under negotiation, then the defendant's reasonable capability is irrelevant. Amendment 24 would revise application note 12 to embody this policy.

Amendment 25
(§ 2Pl.1)

Amendment 25 would revise § 2Pl.1(b)(3), which reduces a defendant's offense level by four levels if the defendant "escaped from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility." Option 1 would revise § 2Pl.1(b)(3) to be consistent with § 2Pl.1(b)(2) and apply to escape from any "non-secure custody." Option 2 would revise subsection (b)(3) to preclude application of the adjustment to failure to return from a furlough. Under both options, as is presently the case, there would be no downward adjustment if the defendant while in escape status committed a offense punishable by imprisonment for more than one year. We support option 1.

The base offense level of the escape guideline assumes escape from a secure facility. The Commission has authorized two downward adjustments if the escape was from other than a secure facility.

The greater reduction authorized by § 2P1.1(b)(2) applies if the defendant escapes from "non-secure custody" and returns to custody within 96 hours. The lesser reduction authorized by § 2P1.1(b)(3) applies if the defendant escapes from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility, and does not return to custody within 96 hours. A problem arises when a defendant who has been furloughed fails to return from furlough.

The definition of non-secure custody in application note 1 includes failing to return from furlough, so the greater reduction of § 2P1.1(b)(2) applies. The wording of § 2P1.1(b)(3), however -- "non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility" -- appears to preclude application of the lesser reduction.³⁴

The Commission has never indicated why the scope of subsection (b)(3) should be narrower than the scope of subsection (b)(2). We see no significant difference between walking away from a halfway

³⁴See *United States v. Tapia*, 981 F.2d 1194, 1197-98 (11th Cir.), cert. denied, 113 S.Ct. 2979 (1993) (subsection (b)(3) inapplicable where defendant walked away from work detail outside security perimeter of prison camp); *United States v. Shaw*, 979 F.2d 41, 44 (5th Cir. 1992) (subsection (b)(3) inapplicable where defendant walked away from prison camp); *United States v. Brownlee*, 970 F.2d 764, 765 (10th Cir. 1992) (prison camp not a "similar facility" within meaning of subsection (b)(3)); *United States v. McGann*, 960 F.2d 846 (9th Cir.), cert. denied, 113 S.Ct. 276 (1992) (same). But see *United States v. Hillstrom*, 988 F.2d 448 (3d Cir. 1993) (the Commission's inclusion of the 'similar facility' language [of subsection (b)(3)] indicates that the Commission intended the courts to determine on a case-by-case basis whether the conditions as a specific prison camp are sufficiently similar [to a community corrections center, community treatment center, or halfway house] to warrant a sentence reduction under § 2P1.1(b)(3)").

house and failing to return on time from a furlough. Neither does the Commission when it comes to the greater reduction. We support making subsections (b)(2) and (b)(3) consistent, as proposed in option 1.

**Amendment 27
(\$ 2K2.1 and 2K2.5)**

Amendment 27, published at the request of the Department of Justice, would add identical specific offense characteristics to § 2K2.1 and § 2K2.5. The new specific offense characteristics would increase the defendant's offense level by four levels if a defendant committed the offense "as a member of, on behalf of, or in association with a criminal gang." The term "criminal gang" would 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 controlled substance offenses as defined in § 4B1.2."

We oppose the amendment, which is similar to a proposal rejected by the Commission last year. The Commission's own working group on violent crime in 1992 issued a report that revealed the many difficulties involved in establishing a suitable definition of "gang".³⁵ Neither law enforcement nor academic communities have reached a consensus about how to define those terms. The

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).

The second step is to fashion a sentence in the instant case that results in the total punishment that the court has determined to be appropriate. There are ways of doing this that cannot be thwarted, for example, by a state's action to shorten prison terms to relieve a prison overcrowding problem.³³

We believe that § 5G1.3(c) as presently written avoids unjustified disparity and is not as difficult to apply as has been claimed. While this amendment, if promulgated, might make a probation officer's job easier, the cost -- inconsistent and unjustifiably disparate results -- is too high.

**Amendment 24
(§ 2D1.1)**

Amendment 24 would revise application note 12 to the drug trafficking guideline to state that in an offense involving negotiations for a controlled substance, the quantity under negotiation is to be used to determine the offense level unless the completed transaction establishes a greater quantity. Amendment 24 would also amend application note 12 to state that when the quantity used to determine the offense level is based upon a negotiated amount, the sentencing court is to exclude any amount that the defendant was not reasonably capable of producing or did not intend to produce. We support this amendment.

If a drug trafficking case involves negotiating a quantity, § 2D1.1 bases offense severity upon the amount under negotiation.

³³Letter from John Steer, General Counsel, United States Sentencing Commission, to Tony Garoppolo, Deputy Chief U.S. Probation Officer, Eastern District of New York (Jan. 6, 1994).

larger the group and the more diverse its membership, the more likely the group would be considered a "gang" under the suggested definition. Applying such a broad definition poses serious constitutional problems as well.³⁹

Amendment 28
(§ 2K2.5)

Amendment 28, published at the request of the Department of Justice, invites comment on whether to expand § 2K2.5 by adding enhancements to raise the offense level "if the firearm was discharged or loaded or if the defendant possessed both a firearm and ammunition in a school zone." The amendment also asks for comment on whether § 2K2.5 should include enhancements now found only in § 2K2.1, such as an enhancement based on the number of weapons possessed. Finally, the amendment invites comment on whether to raise the base offense level of § 2K2.1 from 12 to 14 "for persons who sell firearms with knowledge or reason to believe that the recipient is a felon or other prohibited person or an underage person."

We do not believe that any change in § 2K2.5 is warranted. The Department of Justice has presented no evidence of any problems with § 2K2.5. The guideline already has cross-references to deal with cases where the defendant possessed a weapon in connection with another offense, or an attempt to commit another offense.

³⁹Last year's working group report discussed 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.

Amendment 29
(Gang membership)

Amendment 29, published at the request of the Department of Justice, invites comment on whether to add an enhancement "applicable to members of criminal organizations who expressly agree, or require others to agree, to commit a crime of violence as a formal condition of membership." We oppose the amendment.

We do not support enhancing a sentence based on someone's affiliation with an organization, particularly when there is no connection between the offense committed and the defendant's membership in the organization. Like amendment 27, the proposed enhancement has application problems as well. What would constitute a criminal organization? It is common knowledge that some college fraternities have hazing practices that amount to commission of a crime of violence. Does the Department of Justice want to increase the sentences of people solely because they belong to a fraternity?

Even without the application problems inherent in this type of enhancement, this amendment is unnecessary because we are not aware of a significant number of federal offenses involving organizations that have crime of violence initiation rites. In our view, the best way to deal with a violent offense that can be directly attributable to an initiation rite is through a departure.

Amendment 30
(§ 4A1.1 and chapter 5, part A)

Amendment 30, published at the request of the Department of Justice, invites comment on whether to expand the distinctions in

assigning points for criminal history. We do not believe that any substantial revision in calculating criminal history points or in the sentencing table would be justified at this time. The Justice Department has not identified any major problems with the rules of chapter 4, part A, or with the sentencing table, that call for major changes. In any event, changes of such a magnitude should be preceded by a working group study and report.

**Amendment 31
(\$ 1B1.10, p.s.)**

Amendment 31, published at the request of the Judicial Conference Committee on Criminal Law, invites comment upon whether § 1B1.10(b) would be modified to call for determination of the guideline range applicable to the defendant under § 1B1.10 "by using only those amendments that have been expressly designated for retroactive application." We support such a modification. This method ensures that all defendants affected by an ameliorative amendment will benefit from the change in policy.

**Amendment 33
(\$ 2D1.1)**

Amendment 33(A), published at the request of Families Against Mandatory Minimums, invites comment on whether to revise the 100 to 1 ratio between crack and powder cocaine in the drug quantity table. We support a one to one ratio.

The reality is that over ninety percent of the persons sentenced for crack offenses are African-Americans. The crack-powder cocaine ratio is not grounded in fact because there is no objective scientific data to show that crack is any more addictive,

dangerous, or crime-producing than powder cocaine.

We realize that the Commission based the quantity table ratio between crack and powder on the mandatory minimum statute adopted by Congress, but the legislative history indicates that Congress, responded to media reports of what was believed to be a new drug, without a careful study of crack. The legislative record reveals no rationale for the ratio other than assumptions unsupported by valid scientific evidence.⁴⁰

We believe that the disparate levels of punishment only cast doubt on the fairness of the federal criminal justice system and are clearly inconsistent with the goal of eliminating unwarranted sentencing disparity. The disproportionate impact of these increased sentences on African-Americans has raised serious Constitutional questions as well. Three district courts, recognizing the unfairness of the sentences, have imposed sentences using the drug quantity level for an equivalent amount of powder cocaine.⁴¹

We believe that the Commission should take the initiative and revise the ratio in the drug quantity table. Because there has

⁴⁰ For an analysis of the legislative history of the ratio and provocative discussion of the history of racial discrimination in the criminal justice system and "unconscious racism" see United States v. Clary, 1994 WL 68288 (E.D. Mo. Feb. 11, 1994).

⁴¹ See United States V. Walls, 841 F. Supp. 24, (D.D.C. 1994) (cruel and unusual punishment); United States v. Clary, 1994 WL 68288 (E.D. Mo. Feb. 11, 1994) (equal protection); United States v. Majied, 1993 WL 315987 (D.Neb. July 29, 1993) (downward departure under 18 U.S.C. § 3553(b) because "(t)his disparate impact was not contemplated by Congress nor was it considered by the Sentencing Commission in developing the guideline ranges for users of crack cocaine").

been no showing that the offense levels for powder cocaine are providing inadequate penalties, the offense levels for crack should be the same as for an equivalent quantity of powder cocaine. We are not contending that Congress or the Commission acted with a discriminatory intent when initially adopting the 100 to one ratio. In light of the evidence of disparate racial impact and lack of evidence that crack is more addictive, dangerous, or crime-producing than powder cocaine, failing to act to equalize the ratio becomes an endorsement of racial discrimination in sentencing.

Amendment 33(B), published at the request of Families Against Mandatory Minimums, invites comment on whether to revise the equivalency between marijuana plants and marijuana for purposes of the drug quantity table. This amendment also invites comment on other issues related to marijuana plants. We recommend that the Commission return to the equivalency in the drug trafficking guideline as originally promulgated, in which a marijuana plant was treated as the equivalent of 100 grams of marijuana.

Determining the offense severity for cases involving the cultivation of marijuana plants presents special problems. The yield of marijuana obtained by cultivating marijuana plants will vary with such factors as the gardening skill of the cultivator, the fertility of the soil and climatic conditions, the presence of animals or insects that might damage the plants, and the sex of the plants under cultivation (male plants yield little or no marketable marijuana).

Because the drug quantity guideline is quantity-driven, the

number of plants must be converted into weight of marijuana. The Commission's original approach was to treat a marijuana plant as equivalent of 100 grams of marijuana. As the synopsis of amendment 33(B) notes, that ratio "was developed after a review by the Commission of information relating to the actual yield of marijuana plants under a variety of conditions."

The Commission, effective November 1, 1989, changed the ratio to its present equivalency (one marijuana plant is equivalent to one kilogram of marijuana if there are 50 or more plants, and to 100 grams of marijuana if there are fewer than 50 plants). The Commission acted in response to the Anti-Drug Abuse Act of 1988,⁴² which amended 21 U.S.C. § 841(b) to establish a ratio of one plant to one kilogram of marijuana. The Congressional equivalency is unrealistically high. Only in the rarest instances, under ideal growing conditions, can a yield approaching one kilogram per plant be achieved. To use that formula artificially inflates offense levels and leads to unfairly disproportionate punishment. We favor returning to the equivalency originally adopted by the Commission.

**Amendment 34
(Multiple victims)**

This amendment, published at the request of the United States Postal Service, would add an upward adjustment if an offense "affected more than one victim." We oppose the amendment.

The Commission rejected this amendment last year. No evidence was presented then, and none has been made public since, showing a

⁴²Pub. L. No. 100-690, § 6479, 102 Stat. 4381.

need for such an enhancement. The enhancement assumes that the number of victims provides an appropriate measure of the severity of the offense. In property cases, stealing \$10 from ten people is not necessarily more serious than stealing \$20,000 from three people.

While the proposed enhancement at first glance 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 catalogs), or 201 victims (Sears plus the 200 "occupants") -- or some lesser number that accounts for those "occupants" who do not want the catalog, do not care if it is delivered, or would throw it away immediately upon receipt.

We believe that relevant conduct guideline and multiple count grouping rules provide the best method for taking into account crimes against more than one person.

**Amendment 35
(Organized scheme to steal mail)**

Amendment 35, published at the request of the Postal Service, would amend § 2B1.1 to provide for an offense level of at least 14 for an organized scheme to steal mail. We oppose this amendment.

The Commission rejected a similar amendment last year. The Postal Service has presented no evidence to suggest that the present penalties for theft of undelivered mail are inadequate. Further, assigning a minimum level of 14 would mean that an organized scheme to steal undelivered mail is equated with a loss

of over \$200,000. The Postal Service has given no rationale for treating any organized scheme to steal mail as equivalent to a loss of that amount.

064-94

COMMENTS OF

THE AMERICAN CIVIL LIBERTIES UNION

TO THE

UNITED STATES SENTENCING COMMISSION

REGARDING

DISPARITY IN PENALTY

BETWEEN CRACK AND POWDER COCAINE

submitted by

NKECHI TAIFA
LEGISLATIVE COUNSEL

March 18, 1994

The American Civil Liberties Union appreciates this opportunity to comment upon the disparity in penalty between cocaine base (crack cocaine) and cocaine hydrochloride (powder cocaine), and the appropriate equivalency between these two forms of cocaine. We feel that the 100-to-one disparity in sentencing is irrational and unwarranted; and strongly urge this Commission to request that Congress use a one-to-one correspondence.

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 equal protection of the law and freedom from disproportionate punishment are upheld wherever threatened.

With several modifications and additions, these comments essentially track comments submitted by the ACLU to this Commission on October 25, 1993.

Since the Controlled Substances Act of 1970,¹ Congress has drawn a clear distinction between the manufacture and distribution of a drug and its simple possession. Regardless of the drug, the penalty for simple possession was the same -- a misdemeanor with a maximum of one year imprisonment for a first time offender. However, in 1988, Congress enacted an amendment to the Anti-Drug Abuse Act of 1986 that created a distinction in

¹ Pub. L. No. 91-513, Tit. II, Sec. 404.

sentencing with respect to one substance, cocaine base or "crack."² This amendment set a mandatory minimum felony penalty of five years for a first time offender's simple possession of more than five grams of crack cocaine.³ The maximum one year penalty for a first offense remained the same for possession of any other form of cocaine, including cocaine hydrochloride (powder cocaine). The sentence for possession of crack cocaine, thus, is 100 times harsher than for powder cocaine. This 100-to-1 ratio of crack cocaine to powder cocaine is found not only in 21 U.S.C. 844(a) (possession), but also in the provisions of 21 U.S.C. 841 (b)(1)(A) & 841 (b)(1)(B) (trafficking); 21 U.S.C. 960(b)(1) & 960(b)(2) (importation) and the Sentencing Guidelines promulgated pursuant thereto.

Two classes of mandatory minimum sentences were established pursuant to the Anti-Drug Abuse Act of 1986. For the highest level traffickers, a minimum 10 year sentence, without parole, was provided for participating in the manufacture, distribution or conspiracy to manufacture or distribute 5 kilograms of cocaine (approximately 11 pounds, now worth approximately \$100,000 wholesale). For mid-level cocaine distributors, a 5 year minimum was set for 500 grams (a little more than one pound, about \$10,000 wholesale). However, because of the enormous media attention paid to crack cocaine -- cocaine which has been processed slightly so that it can be vaporized when heated and thus inhaled -- the 10 year minimum was set for only 50 grams of crack -- less than two ounces, and the 5 year minimum was set for 5 grams, about the weight of two pennies.

² Section 6371 of Public Law 100-690 amended 21 U.S.C. 844(a).

³ A mandatory minimum sentence of 5 years and a maximum of 20 years for possession of: 5 grams of crack for a first conviction; 3 grams for a second conviction; 1 gram for a third conviction. See 21 U.S.C. 844(a).

Most of those who deal in 5 or 50 gram quantities of crack are not the highest level traffickers that these mandatory minimum penalties were intended for. Typically, they are near the very bottom of the international cocaine distribution system. Crack is cocaine. Scientists such as Charles Shuster, M.D., the director of the National Institute on Drug Abuse under President Reagan, have pointed out that "cocaine is cocaine is cocaine, whether you take in intranasally, intravenously or smoked.⁴ Cocaine powder is usually absorbed through the nasal passages and sniffed, snorted or liquefied and injected; whereas crack cocaine is absorbed through the lungs and smoked.

Unfortunately, the difference in cocaine weights for triggering mandatory sentences has racially discriminatory consequences. Nationwide statistics compiled by this Commission reveal that the race of those prosecuted for crack offenses has predominately been African American. Those prosecuted for powder cocaine -- with its 100 times higher weights for triggering five and ten year sentences - have predominately been Caucasian. In 1992, 91.3% of those sentenced federally for crack offenses were Black, while only 3% were White.⁵ Caucasians, however, comprise a much higher proportion of crack users: 2.4 million Caucasians (64.4%), 990,000 African Americans (26.6%), and 348,000 Hispanics (9.2%).⁶

The ACLU has been closely monitoring issues involving race-based sentencing

⁴ See testimony of Charles Shuster, M.D., before the United States Sentencing Commission Hearing on Crack Cocaine, November 9, 1993, at 112. See Also interview with Dr. Charles Shuster, aired on CBS Eye to Eye with Connie Chung, September 16, 1993.

⁵ See United States Sentencing Commission, 1992 Data File, MONFY 92, Table 31, "Race of Defendant by Drug Type," October 1991 through September 30, 1992).

⁶ See National Institute for Drug Abuse National Household Survey on Drug Abuse, Population Estimates 1991, Revised, Nov. 20, 1992), Table 5-B, 5-C, 5-D.

disparities. We, along with other organizations, convened on August 26, 1993 the first national symposium exploring the disparity in sentencing between crack and powder cocaine, entitled "Racial Bias in Cocaine Laws."⁷ This Symposium featured "The Experts Speak" panel, "The Families Speak" panel, and a Roundtable Discussion with representatives of civil rights, criminal justice, and religious organizations. The overwhelming testimony of the expert's panel was that the mandatory minimum sentences for crack cocaine are not medically, scientifically or socially supportable, are highly inequitable against African Americans, and represent a national drug policy tinged with racism. This memorandum refers to commentary from "The Experts Speak" panel.

I. THE REASONS FOR THE DISTINCTION ARE UNJUSTIFIED

Three reasons are often cited for the gross distinction in penalty between powder and crack cocaine: addictiveness and dangerousness, violence, and accessibility due to low cost. All three reasons fail as a justification for the 100-to-1 ratio in punishment between two methods of ingesting the same drug.

Stiffer penalties for crack are not justified because of dangerousness.

Disparate treatment in sentencing between crack and powder cocaine users is not justified on the basis of the alleged greater dangerousness or addictiveness of crack. Cocaine hydrochloride (powder) can easily be transformed into crack by combining it with baking

⁷ The Racial Bias in Cocaine Laws Symposium was co-sponsored by the American Civil Liberties Union, the Congressional Black Caucus Foundation, the Committee Against the Discriminatory Crack Law, the Southern Christian Leadership Conference, and the Criminal Justice Policy Foundation. A complete copy of the Symposium can be ordered from C-SPAN Viewer Services, reference numbers 37649, 37650, 37651 & 37652.

soda and heat.⁸ Thus, to apply a stiffer penalty between cocaine which is directly sold as crack, and cocaine which is sold in powder form but which can be treated by the consumer and easily transformed into crack, is irrational. Cocaine can also be injected by dissolving the hydrochloride in water and administering it intravenously. The effect on the body of injecting liquefied cocaine is similar to the effect of smoking crack cocaine.⁹ During the "Racial Bias in Cocaine Laws" Symposium, Dr. George Schwartz¹⁰ also explained that cocaine powder and base have the same effect on the body and temperament, but only the means of ingestion are different: snorting powder, smoking crack, or injecting freebase.¹¹ Dr. Schwartz stated that no method of ingestion is more addictive than another: smoking crack is not more addictive than snorting powder. In fact, he believes that intravenously-injected cocaine, not smoking it, is the leading cocaine-related threat to both the user and society. He reports that three times as many deaths are reported from snorting cocaine than

⁸ See Bureau of Justice Statistics, Dec. 1992, supra at 181.

⁹ The onset of drug effects is slowest for swallowing and sniffing and fastest for smoking and injection. Intravenous injection deposits drugs directly into the blood that is carried to the brain. Drugs inhaled in smoke are absorbed by blood vessels in the lungs and carried to the brain. See Bureau of Justice Statistics, supra at 24. See Also Testimony of Charles Shuster, M.D. before the United States Sentencing Commission, November 9, 1994 at 113.

¹⁰ Dr. Schwartz is an expert in pharmacology and toxicology of drugs, visiting associate professor of emergency medicine at the Medical College of Pennsylvania, and editor of a 1986 text on emergency medicine.

¹¹ Dr. Schwartz explained that powder cocaine is water soluble, and thus can be absorbed by the sinus liquid. Crack is fat soluble, and when smoked, bonds with the fatty lipids of the lungs and is thusly transmitted to the brain. Freebase is injected directly into the veins, and goes straight to the brain.

from smoking it.¹² Also, heart and lung problems are much more common among intranasal users and, from a public health perspective, injecting cocaine increases the threat of infections, including HIV and hepatitis.¹³

Finally, the specter of a generation of "crack babies" has also been used as justification for the distinction in penalty. Studies, however, have indicated that the "crack baby" scare has been overblown; that many of these infants suffer as a result of other social factors such as community violence, malnutrition, other drug usage, and inadequate health care.¹⁴

Stiffer penalties for crack are not justified because of violence. It has been asserted that there is more violence associated with the use of crack than with the use of powder cocaine, and that justifies the 100-to-1-ratio in penalty. Professor Paul Goldstein¹⁵ asserts that there are no valid and reliable sources of data for policy makers, in either the criminal justice or health care systems, that adequately explain the relationship between violence and drugs. Media reports on violence, he contends, are unclear and misleading, with distinctions

¹² See Proffer of Dr. George Schwartz, attached to Defendant's Motion to Declare Provisions of 21 U.S.C. 844(a) Unconstitutional, United States v. Maske, Cr. No. 92-0132-01 (TFH) (D.D.C.).

¹³ See GAO/HRD-91-55FS "Health Consequences and Treatment for Crack Abuse."

¹⁴ See "The Problem of Prenatal Cocaine Exposure," by Linda Mayes, et al. Journal of the American Medical Association, V. 267, No. 3, 1992.

¹⁵ Professor Paul Goldstein teaches at the University of Illinois at Chicago, School of Public Health, and has authored studies probing the relationship between drugs and violence.

between drug use and drug trafficking often not made.¹⁶ Professor Goldstein also made a presentation on "The Experts Speak" portion of the August Symposium on "Racial Bias in Cocaine Laws". He stated that he has found no difference in violence between crack users and powder cocaine users; such violence that there is relates to the drug's marketplace dynamics.¹⁷

Professor Goldstein divides drug-related violence into three categories: pharmacological (the drug's actual effect upon the user); economic compulsive violence (where the user commits a crime to support his habit); and systemic (the violence related to the system of drug distribution). Based on his studies, Professor Goldstein asserts that he has found little pharmacological violence attributed to either powder or crack cocaine; most of this violence is attributed to alcohol.¹⁸ Similarly, Professor Goldstein has found very little "user-trying-to-support-his-habit" economic violence: only 2% to 8% of cocaine-related violence is of this type. He found that almost all cocaine related violence is found in the cocaine marketplace and system of distribution. "Examples of systemic violence," he explained, "include territorial disputes between rival dealers, assaults and homicides committed within particular drug dealing operations in order to enforce normative codes,

¹⁶ See "The Relationship Between Drugs and Urban Violence: Research and Prevention Issues," by Paul J. Goldstein, Ph.D, University of Illinois at Chicago, School of Public Health, June 1993, hereinafter, "Goldstein article".

¹⁷ Professor Goldstein has studied drug-related violence in New York State and New York City, funded by the National Institute on Drug Abuse and the National Institute of Justice.

¹⁸ Professor Goldstein believes that the figures often used in the media for drug-related violence include alcohol-related violence, which is not made clear when the figures are used. He is also suspicious of police-reported "drug-related violence," having found that police often target specific areas such that any crime therein committed is "drug-related."

punishment for selling adulterated or bogus drugs, assaults to collect drug related debts, and so on."¹⁹

Goldstein's findings provide evidence that certain common assumptions about drug-related violence are incorrect or exaggerated. For example, although it is commonly believed that violent, predatory acts by drug users to obtain money to purchase drugs is an important threat to public safety, Goldstein's data indicates otherwise. He found that violence is most likely to occur with respect to the drug marketplace, and to involve others similarly situated.

Goldstein theorized that police procedures substantially add to cocaine-related violence:

Intensified law enforcement efforts probably contributed to increased levels of violence. Street sweeps, neighborhood saturation, buy-bust operations, and the like lead to increased violence in a number of ways. For example, removing dealers from their established territory by arresting them creates a vacuum that other dealers fight to fill. By the time these hostilities have ended, convicted dealers may have returned from prison and attempted to reassert their authority, resulting in a new round of violence.²⁰

Finally, Professor Goldstein found no difference in the violence level between the powder cocaine and the crack cocaine market. During the Symposium, he used the example of Miami as the "murder capitol of America" during the late 1970's and early 1980's -- the crime there being driven by a distribution war over powder cocaine. He characterized New York City and Washington, D.C. as the current crime capitols, as a result of the crack distribution wars.

¹⁹ See Goldstein article at 4.

²⁰ See Goldstein article, at 11.

The Department of Justice has recognized that the connection of drug use with crime "oversimplifies their relationship," and that "a wide range of psychological, social, and economic incentives can combine" to produce violent crime.²¹ Indeed, extrinsic socioeconomic factors have commonly been the indicators of crime and violence, as opposed to any factors intrinsic to crack. A 1991 survey of state prisoners found that those who had used crack before their offense were less likely to be in prison for a violent offense than those who had used other drugs or no drug.²² In fact, the survey found that of the percentage of prisoners who used crack in the month before their offense, 33% were incarcerated for a violent offense, compared with 39% who used powder cocaine and 48% who used any other drug.²³

Stiffer penalties for crack are not justified by its cheapness and accessibility.

During debate on the Anti-Drug Abuse Acts of 1986 and 1988, various Members of Congress argued that crack cocaine must be eradicated because of its cheapness and availability.²⁴ To apply draconian penalties, however, for first time possession of crack on the basis of its low cost discriminates on the basis of class, especially in light of the fact that

²¹ See Bureau of Justice Statistics, Dec. 1992, supra at 2. See also State v. Russell, 477 N.W. 2d 886 (Minn. 1991), at 890, citing Minnesota Department of Public Safety Office of Drug Policy, Minnesota Drug Strategy 1991, at 14.

²² See Survey of State Prison Inmates, Department of Justice, Bureau of Justice Statistics, 1991, at 23.

²³ Id.

²⁴ See statement of Representative Traficant, 132 Cong. Rec. 6519 (daily ed. Sept. 10, 1986). See also statement of Representative Young of Florida, 132 Cong. Rec. H6679 (daily ed. Sept. 11, 1986); statement of Representative Dewine of Ohio, 134 Cong. Rec. H7074-02 (daily ed. Sept. 7, 1988).

powder cocaine, in spite of its higher expense, is a drug abused more in this country.²⁵ Furthermore, higher penalties for crack cocaine guarantee that small time street level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. This type of drug abuse policy which disproportionately impacts lower income people is neither logical nor effective.

The Sentencing Guidelines were promulgated by this Commission to provide certainty and fairness in sentencing and to eliminate unwarranted sentencing disparities.²⁶ The Commission was commanded to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."²⁷ Accordingly, the Sentencing Guidelines declare that race and socioeconomic status are not relevant in the determination of a sentence.²⁸ In 1991 this Commission noted the racially disparate impact of federal mandatory minimum sentences and recommended, in part on this basis, that Congress, in effect, eliminate them from the federal criminal law.

II. THE LEGISLATIVE HISTORY OF THE 100-TO-1 RATIO BETWEEN CRACK AND POWDER COCAINE REVEALS ITS WEAK FOUNDATION

Eric Sterling also testified during the Experts' Speak portion of the Symposium on "Racial Bias in Cocaine Laws." Mr. Sterling was counsel to the House Judiciary Subcommittee on Crime, and participated in the enactments of the 1984 and 1986 Anti-Drug

²⁵ See Bureau of Justice Statistics, Dec. 1992, *supra*, at 24.

²⁶ See 28 U.S.C. Sec. 991(b)(1)(B).

²⁷ See 28 U.S.C. 994(d).

²⁸ See U.S.S.G. 5H1.10.

Abuse Acts.²⁹

Mr. Sterling explained how the law was passed. Five weeks before the 1984 presidential election, with the Republicans accusing the Democrats of being "soft on crime," the Republicans attached a "tough" crime bill onto an emergency spending bill, which passed with 20 minutes of debate. In 1986, college basketball star Len Bias died from a drug overdose, focusing national attention on cocaine. Politicians became hysterical and non-rational. Mr. Sterling spoke of Representatives filling the Congressional Record with articles of "crazed black men killing innocent people while on cocaine." Sterling quoted Senator Chiles as stating, "I doubt America can survive crack." Senator Gramm, Sterling continued, added an amendment sentencing imprisoned cocaine possessors to twice the amount of time they would have received had they possessed a grenade instead.

Eric Sterling explained that the first laws criminalizing cocaine were blatantly racist. The 1914 Harrison Act was promoted by "spreading the image of a crazed, cocaine-using black man coming to rape white women." Thus, the Democratic leadership composed in thirty days, with no hearings and little debate, a "tougher" crime bill that included the mandatory minimum sentence for first time possessors of crack cocaine.

III. RECENT AMENDMENTS TO THE SENTENCING GUIDELINES ACCENTUATE RACIAL DISPARITY IN SENTENCING

Amendment 15 to United States Sentencing Guideline 2D1.1(c) (Drug Quantity

²⁹ Eric Sterling is currently president of the Criminal Justice Policy Foundation, and has testified as an expert witness in evidentiary hearings exploring legislative intent in the formulation of the distinction in penalty between crack and powder cocaine.

Table) presumes to resolve an inter-circuit conflict regarding the definition of cocaine base.

The amendment states:

"Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

Federal Register, May 6, 1993 (Vol. 58, No. 86, Part V).

This amendment narrowly defines cocaine base so that forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine. See Amendments to the Sentencing Guidelines, United States Sentencing Commission, May 4, 1993, p. 45.

Conspicuously excluded from the definition of cocaine base is "freebase," another smokable base form of cocaine. The "do-it-yourself" process for converting cocaine powder into anhydrous cocaine base (freebase) requires ether and a substantial quantity of cocaine powder.³⁰ Freebase preceded crack, but

[s]ometime in the early 1980's, cocaine dealers invented a different process for making smokable cocaine, one that did not involve the use of the ether which made freebasing so dangerous. (The resulting impurities cause the mixture to crackle when it is heated; folk etymology offers this as the derivation of "crack."³¹

Freebase users tend to be affluent Caucasians.³² Thus, the Amendment assures that affluent Caucasian freebase dealers are not subject to the same harsh penalties as African

³⁰ See Mark A.R. Kleiman, Against Excess: Drug Policy for Results 297 (1992).

³¹ Id.

³² Id.

American crack defendants. The Sentencing Commission has thus promulgated a definition of crack that is sociological in derivation, singling out the base form of cocaine, which African Americans are more likely to be convicted of, for harsher treatment. "Unlike every other controlled substance, cocaine base is now defined by its slang ("street") nomenclature ("crack") rather than its chemical composition."³³

By comparison, the inequities and public criticism surrounding sentences for LSD did attract much-needed reform from this Commission. In order to avoid the "undue influence of varied carrier weight on the applicable offense level," Amendment 14 to U.S.S.G. 2D1.1 requires that each dose of LSD on the carrier medium be treated as 0.4 mg of LSD for purposes of calculating the quantity of LSD on the Drug Quality Table.³⁴ This amendment will benefit primarily Caucasians since that race accounts for 94.3% of all LSD defendants.³⁵

Dr. Richard Seltzer³⁶ of Howard University accentuated the disparity as he spoke of the incarceration rates for Black drug users during the August Symposium on "Racial Bias in Cocaine Laws." For those sentenced for marijuana-related offenses, where no mandatory minimum sentences are imposed for first time offenders, 94.3% were White. Similarly, he

³³ See Brief for Appellant, U.S. v. James Darnell Wallace, U.S. Court of Appeals for the Fourth Circuit, No. 93-5415, filed by William B. Moffitt, Moffitt, Zwerling & Kemler, P.C. Note: preceding discussion regarding Sentencing Guideline Amendment 15 and subsequent discussion regarding Sentencing Guideline Amendment 14 are extracted from this brief.

³⁴ See Amendments to the Sentencing Guidelines, United States Sentencing Commission, May 4, 1993, p. 43.

³⁵ See U.S. Sentencing Commission, 1992 Data File, MONFY92.

³⁶ Dr. Seltzer is a professor in the Political Science Department of Howard University.

continued, powder cocaine offense incarceration, again with no mandatory minimum, was 62.3% White. But, again, with respect to crack cocaine incarceration, where there is a five year mandatory minimum sentence for first time offenders possessing over five grams, 91.3% of those imprisoned were Black.

IV. AMERICAN DRUG POLICY IN GENERAL IS NON-RATIONAL AND RACIST

Dr. Irene Jillson-Boostrom,³⁷ another presenter in "The Experts Speak" panel, argued that national drug policy is inherently racist. She cited the Congressional testimony of Dr. Benny Primm, former director of the Center for Substance Abuse Control, that racism is rampant in the very agency directed to reduce drug abuse. Dr. Jillson-Boostrom argues that money is not spent to improve the known factors that cause drug use. Federal funding for housing fell from \$31.5 billion in 1978 to \$7 billion in 1988. Veterans' job training funding fell from \$440 million in 1980 to \$119 million in 1987. Social security post-secondary student beneficiary program funding went from \$1.6 billion in 1980 to \$25 million in 1985.

Dr. Jillson-Boostrom continued by stating that federal money spent directly on the drug problem is mostly spent internationally and for domestic policing, not on treatment. She argues that money that is spent for drug treatment does not reach the community, but benefits power structure institutions, such as research universities, pharmaceutical companies, and hospitals. Although 6.4 million people used cocaine in a previous year, there are only

³⁷ Dr. Irene Jillson-Boostrom is the Executive Vice President for Americans for Democratic Action and the Co-Chair on Health for that organization. She is also the President of Policy Research, Inc.

750,000 total beds devoted to treating drug abusers, including alcoholics.

Dr. Marsha Lillie-Blanton³⁸ also presented during "The Experts Speak" panel. She argues that if not racist, the national drug policy is at least non-rational. The end of the policy is to protect the public from drug-related violence, she states, and the means is to break up low-level street drug trafficking. This focus affects the small money end of a billion-dollar industry. The policy results in jailing the smaller part of the drug-using population (the inner-city Blacks) while leaving the majority of drug users free.³⁹ Indeed, Dr. Lillie-Blanton has studied individual neighborhoods for socially-shared conditions, such as means of social status, drug availability, and common stress-relieving methods. Her research revealed that overall rates of drug use are not much different between Blacks and Whites.

V. EFFORTS TO REPEAL THE DISPARITY GROWS IN CONGRESS

Significantly, Congress has already taken a first step in eliminating this sentencing disparity. Congressman Charles Rangel (D-NY), on October 13, 1993 introduced the "Crack-Cocaine Equitable Sentencing Act of 1993" (H.R. 3277). This bill will amend the Controlled Substances Act and the Controlled Substances Import and Export Act to eliminate certain mandatory minimum penalties relating to crack cocaine offenses. For all

³⁸ Dr. Marsha Lillie-Blanton is Associate Professor of Health Policy and Planning at Johns Hopkins University, and a former senior analyst for the General Accounting Office in health policy.

³⁹ Dr. Lillie-Blanton cited these figures from the Household Survey of Drug Abuse, 1991. Of the 6.4 million people who used cocaine in 1990, 75% were White; two-thirds of the 700,000 heroin users were White; and half of the one million crack users were White.

cocaine offenses, if 500 or more grams are involved, the defendant will receive a minimum sentence of five years, and if 5 kilograms or more are involved, the defendant will get a sentence of at least ten years. This bill keeps mandatory minimums for powder cocaine offenses at the current level so that they can be applied to the major level traffickers they were designed for. It will eliminate the senseless low triggering points for crack that have been applied to hundreds of street-level dealers, who have been predominately African American.

Rep. Rangel's bill has also been incorporated into "The Crime Prevention and Criminal Justice Reform Act" (H.R. 3315), introduced by Congressman Craig Washington (D-TX) and endorsed by the Congressional Black Caucus.

On March 16, 1993 Congressman William Hughes (D-NJ) introduced an amendment to omnibus anti-crime legislation being considered in the House Judiciary Committee to also conform the penalties for crack to the current levels set for powder cocaine. Although there was no disagreement among the Judiciary Committee members that a sentencing disparity existed, Congressman Hughes withdrew his amendment in the wake of disagreement over whether the disparity should be abolished by raising the penalty levels for powder cocaine to the current levels set for crack. Congressman Hughes expressed that there has been no evidence proffered that the current penalty levels set for powder cocaine offenses are not sufficient.

Moreover, arbitrarily increasing the penalty levels for powder cocaine to the levels currently established for crack, or establishing any other increased ratio between powder and crack cocaine will simply flood the courts with mandatory federal sentences for nonviolent,

unarmed, first time drug addicts. According to the National Institute on Drug Abuse, about 7,000,000 people used powder cocaine in the past year -- five times the amount that used crack.

Also, should mandatory sentences be affixed to possessory powder cocaine offenses, no doubt conforming amendments will be introduced to add mandatory sentences for simple possession of all other drugs as well. Again, this will serve to inundate the prisons with low-level drug offenders serving lengthy mandatory sentences, resulting in the premature release of rapists and murderers not subject to such sentences.

VI. EFFORTS TO REPEAL THE DISPARITY GROWS IN THE COURTS

The most recent outcry against the disparity in sentencing between crack and powder cocaine came on March 9 from Supreme Court Justice Anthony M. Kennedy who, in assailing mandatory minimum sentencing before a House Appropriations Subcommittee hearing on the Supreme Court budget, stated, "I simply do not see how Congress can be satisfied with the results of mandatory minimums for possession of crack cocaine."⁴⁰

This statement comes on the heels of two federal court decisions which recently held crack sentences unconstitutional. Senior Judge Louis Oberdorfer of the United States District Court for the District of Columbia on January 26 declared that the mandatory sentences as applied to two defendants before him violated the Eighth Amendment's proscription against cruel and unusual punishment. On February 11, Judge Clyde S. Cahill

⁴⁰ See "Justice Kennedy Assails Mandatory Sentences," The Washington Post, March 10, 1994 at A15.

of the United States District Court for the Eastern District of Missouri used the 14th Amendment's guarantee of equal protection under the laws as grounds for holding the sentencing disparity unconstitutional.

Under current federal equal protection analysis, to apply strict scrutiny to a statute that has a racially discriminatory impact requires a showing that the legislature enacted the particular statute 'because of,' not merely 'in spite of,' an anticipated racially discriminatory effect.⁴¹ The Minnesota Supreme Court, the first court to invalidate the disproportionate penalties between crack and powder cocaine, adopted the reasoning of Professor Lawrence Tribe who minimized the distinction between "because of" and "in spite of," as follows:

[The distinction] overlooks the fact that minorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current acts will perpetuate it. *** If the government is barred from enacting laws with an eye to invidious discrimination against a particular group, it should not be free to visit the same wrong whenever it happens to be looking the other way. If a state may not club minorities with its fist, surely it may not indifferently inflict the same wound with the back of its hand.⁴²

The Minnesota Supreme Court rejected 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 crack. The Minnesota Supreme Court stated:

There comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race ... that in Minnesota, the

⁴¹ See McClesky v. Kemp, 481 U.S. 279, 298, 107 S. Ct. 1756, 1770, 95 L. Ed. 2d 262 (1987).

⁴² See L. Tribe, American Constitutional Law, Sec. 16-21, at 1518-19 (2nd ed. 1988), cited in State v. Russell, 477 N.W. 2nd 886 (Minn. 1991).

predominately black possessors of three grams of crack cocaine face a long term of imprisonment with presumptive execution of sentence while the predominately white possessors of three grams of powder cocaine face a lesser term of imprisonment with presumptive probation and stay of sentence."⁴³

In July 1993, a federal court in Omaha, Nebraska agreed with the defense that the provisions within the Sentencing Guidelines, which treat crack cocaine as 100 times worse than powder cocaine, are unfair to African Americans. U.S. District Judge Lyle Strom, in his written decision justifying his downward departure from the U.S. Sentencing Guidelines, stated,

The evidence now demonstrates that in excess of ninety percent (90%) of the persons prosecuted for distribution or possession with intent to distribute crack cocaine or cocaine base are African-American. At the same time, the evidence is clear that the cocaine molecule is the same whether the drug being used is powder or in crack form, and is not inherently more dangerous in crack form.

The 1:100 ratio between crack and powder reflected in the mandatory minimum sentences enacted by Congress have been a factor driving the sentencing commission in developing the guidelines. This has resulted in sentences for crack cocaine being inordinately more severe than sentences for similar amounts of powder cocaine, and this disparity has been aggravated by the guidelines adopted in November of 1989 and subsequently. A by-product of this inordinate disparity is that members of the African American race are being treated unfairly in receiving substantially longer sentences than Caucasian males who traditionally deal in powder cocaine, and this disparity simply is not justified by the evidence.

This disparate impact was not contemplated by Congress nor was it considered by the Sentencing Commission in developing the guideline ranges for users of crack cocaine. The effect of this has been that a segment of minority members of our society are simply not being treated appropriately for the criminal conduct of which they have been found guilty. The Court believes that these factors, which are now apparent from the anecdotal evidence presented to the Court, constitute a basis for the Court departing from the guideline range.⁴⁴ (emphasis added)

⁴³ See State v. Russell, 477 N.W.2d 886 (Minn. 1991).

⁴⁴ See "Statement of Reasons for Departure," United States v. Majied, CA No. 8:CR91-00038 (02), U.S. District Court for the District of Nebraska, Judge Lyle Strom

VII. CONCLUSION

The ACLU believes that the 100-to-1 disparity in sentencing between powder and crack cocaine is irrational and unwarranted, and that, by and large, the legislature and the courts have drawn a distinction where science and medicine have concluded none exists. As such, we strongly urge this Commission to request that Congress (1) eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100-to-one and (2) establish a one-to-one ratio. In face of the overwhelming statistics and the developing sentiment in Congress and the courts, this Commission must not continue to adhere to the unwarranted distinction in penalty between crack and powder cocaine.

065-9

THE CITY UNIVERSITY OF NEW YORK MEDICAL SCHOOL
THE SOPHIE DAVIS SCHOOL OF BIOMEDICAL EDUCATION

THE CITY COLLEGE OF NEW YORK
DEPARTMENT OF PHARMACOLOGY [RM J903]
138th STREET & CONVENT AVENUE
NEW YORK, NEW YORK 10031

(212) 650-8255
Fax (212) 650-7751

**REMARKS OF
John P. Morgan, M.D.
Professor of Pharmacology**

February 18, 1994

In 1980 (May 21), 1986 (September 25) and now, 1994 (February 6), a New York Times reporter has discovered the "new highly-potent marijuana." The narrative of the three reports is nearly identical: some group of previous marijuana consumers (Beats; Hippies; Baby-Boomers) recalling their days of inconsequential smoking misunderstand the current dangers of the new potent marijuana. Jane Brody, Peter Kerr, and now Melinda Henneberger, relying on "drug treatment experts and law enforcement officials," present as fact that today's marijuana is 10 or even 20 times more potent than the marijuana of the 60s and 70s.

This green miracle attributed to unspecified agronomic wisdom is never documented. The "potent" drug is then linked to a number of harms involving pulmonary, immune, and cognitive functions. This narrative is now so fixed that it appears immune to research, data, fact and truth.

Marijuana potency is expressed as the percentage weight of the sample contributed by delta-9-THC. This active chemical was not identified until 1966 and potency was rarely measured before 1970. Reports from street drug laboratories assessing anonymously submitted samples indicate that from 1970 to 1975, commercial marijuana averaged 2-4 percent THC.

In 1975, a federally-funded marijuana potency monitoring project was established at the University of Mississippi. Essentially all plant samples tested have been seized by the DEA or state criminal agencies. The summer 1993 quarterly report traces the project's entire experience.

Since 1974, approximately 20,000 samples of marijuana have been analyzed. The average THC content of all samples is 2.93 percent. Since the laboratory first received more than 250 seizures annually in 1981, there has been no discernible pattern of increased potency. The highest average potency was 3.96 percent in 1984. The lowest was 1.9 percent recorded in the last complete year tallied, 1992. These 1992 figures came from the assessment of approximately 3500 seized samples with total weight exceeding 1.5 million pounds.

The new potent marijuana is a myth.

THE "NONETHELESS" RIDER IN THE 1994 FSGM

AND A PLEA TO REMOVE IT

The 1994 FSGM contains an amendment that introduces a method for estimating the weight of a sample of LSD on a carrier vehicle. The purpose of the amendment is to reduce the injustice that attends LSD sentencing. This it accomplishes -- or would do if it operated unimpeded. But a rider at the end of the Commentary to the amendment, referred to here as the "nonetheless" rider, warns that the amendment has only limited application and even misinterprets the amendment. The rider is seen to be unnecessary as well as subversive to the intention of the Commission, and a plea is made for its removal.

1. The Commission's first approach to the relief of inequity and disproportionality in LSD sentencing: That such injustice exists has been acknowledged by the Commission in Application Note 18 in Section 2D1.1. The mandate of the Commission is to remedy faulty justice where it is discovered, and this in the person of its Chairman has long set out to do.

The first approach aimed at the elimination of carrier weight as a factor in determining the base offense level where an offense involved LSD on carrier material. Carrier weight exceeds the weight of the LSD it carries by so wide a margin that its inclusion in the determination of a sentence inevitably distorts the administration of justice. The aim of the Commission was to exempt certain LSD offenses from the authority of the mixture-or-substance rule. This proved to be unworkable, but the reason for its lack of success is worth recounting.

The mixture-or-substance rule, one of the two pillars of the Anti-Drug Abuse Act of 1986, requires that the weight of both or all of the ingredients of a mixture or substance containing a detectable amount of certain proscribed drugs, including LSD, decides whether a mandatory minimum sentence is to be imposed. The mixture-or-substance rule left unstated what a mixture is or what a substance is. The meaning of "substance" never figured prominently in court actions subsequent to 1986, but the meaning of "mixture" did. The question was settled in the 1991 Chapman decision, which found that the combination of LSD and blotter paper constitutes a mixture, with the result that the weight of blotter paper carrier material becomes critical to the question of whether a mandatory minimum sentence is triggered.

The Commission's earlier approach foundered on this rock.

Opposition in Congress to the Commission's aim of exempting LSD offenses from the authority of the mixture-or-substance^{rule} resorted to an argument derived from Chapman. A letter from Representative Henry Hyde and other members of the House protested that an exemption in the case of LSD would invite offenders responsible for offenses involving drugs other than LSD to claim the same privilege. Then heroin and cocaine offenders would argue that they too should see their liability to mandatory minimum sentences determined by a weight of pure heroin and pure cocaine. One of the pillars of the 1986 Act would have crumbled, perhaps irreparably.

The letter was dated April 7, 1993. Evidently, by this time the Committee realized it faced an impasse. Unjust sentencing could not be remedied by an appeal to Congress for a resolution of the carrier weight problem directly. Yet the Commission could not fulfill its mandate to alleviate injustice if present sentencing arrangements continued. An alternative approach was needed.

2. The Commission's second approach: The solution the Commission adopted and which Congress allowed to be entered in the 1994 FSGM, consists in an alternative method of estimating the weight of a sample of LSD on carrier material. The Commission's method, which will be referred to here as the 0.4 milligram method, permits a judge to treat each unit of a mixture of LSD and blotter paper as equal to 0.4 milligram for the purposes of the Drug Quantity Table. In practice, the number of units in a sample is counted and the total number is multiplied by the standard figure of 0.4 milligram. The result is entered in the Drug Quantity Table and a base offense level read off. From there a sentence range is determined from the Sentencing Table.

The 0.4 milligram method accords with Chapman. It concedes that an LSD-blotter paper combination is a mixture. Both measures require that the weight of an LSD-blotter paper mixture be recorded as the weight of the entire mixture, not just the weight of one ingredient. Both measures, as a matter of fact, address themselves to LSD-blotter paper mixtures only, Chapman because only the constitution of an LSD-blotter paper combination was examined and declared to fit the definition of a mixture, while the constitution of combinations of LSD and some carrier material other than blotter paper was left unexamined and so not declared to fit the definition of a mixture; the amendment because only blotter paper carrier has been defined in terms of units, and the 0.4 milligram method of estimating weight is useless if a unit of an LSD-carrier vehicle mixture has not been defined. Throughout, there is no point of disagreement between Chapman and the amendment.

Chapman ruled that "the entire mixture or substance is to be weighed," and that "it is the weight of the blotter paper containing LSD, and not the weight of the pure LSD [alone], which determines eligibility for the minimum sentences." Chapman

nowhere uses the expression "entire weight," which is ambiguous, and makes it clear that the court's notion of entirety is that no sector of a mixture consisting of LSD and blotter paper shall be omitted from the count, neither the blotter paper nor the LSD. Chapman nowhere shows an interest in the manner in which the operation of weighing the entire mixture is conducted, however. That the entire mixture is to be weighed is certain. How it is to be weighed is left unstated.

Richard Chapman and his co-petitioners in their case before the Supreme Court did not raise the question of the method of estimating the weight of Chapman's LSD-blotter paper mixture either. The question was simply not germane to the case. The Sentencing Commission, in adopting an alternative method of estimating the weight of such a mixture, therefore, did nothing to contravene the rule of Chapman. So long as the weights of both ingredients of an LSD-blotter paper mixture are taken into account and not the weight of one ingredient only, the 0.4 milligram method is in perfect accord with Chapman.

The method of attributing a standard weight to a unit of a mixture containing LSD is not original and, further, lies within the Commission's sphere of competence. The attribution of a standard weight for administrative purposes is done all the time in the field of drug law. The example which springs to mind is the attribution, by the Commission, of a weight of 100 grams to a marijuana plant when the number of plants in a grow is less than 50. The weight assigned to a single plant is to an extent arbitrary, although the guideline gives a plausible account of it. The assigning of a weight of 0.4 milligram to a unit of a mixture of LSD and blotter paper follows the same principle. It too is arbitrary to an extent, though well defended.

3. The link to mandatory minimum sentencing: The two pillars of the Anti-Drug Abuse Act of 1986 are the mixture-or-substance rule and the provision for mandatory sentences of a minimum of five years and a minimum of ten years. Necessarily, they are linked. The weight obtained in consequence of the calculation performed on the mixture or substance -- mixture only in the case of LSD and blotter paper -- is the weight that either does or does not generate a five or ten year mandatory minimum term. To suggest a metaphor, the mixture-or-substance rule is the fuel that lights the fire of mandatory minimum sentencing. The one supplies the power that drives the other. The question that concerns critics of the Commission is whether its 0.4 milligram method weakens the link between the mixture-or-substance rule and the provision for mandatory minimum sentencing. The contention here is that it does not.

In a strong sense, all drug sentencing is mandatory and minimal. The Drug Quantity Table that translates a given weight of a mixture or substance into an offense level, and the corresponding Sentencing Table that completes the calculation by translating the offense level into a range of months of

imprisonment, together mirror the requirements of the statute. In the statute, two weights, an upper and a lower, the amount stipulated for each drug listed in the Act, are related to the five and ten year mandatory minimum sentences the Act provides for. Together, the Drug Quantity Table and the Sentencing Table mirror this arrangement faithfully, copying the parameters set by Congress on a scale that extends above, below, and between the linkages set by the statute. Each calculation that starts with the weight of a mixture or substance containing a drug such as LSD ends in a range of months from which a sentence is selected. Barring downward departures, each range has a lower edge below which a sentence may not fall. Effectively, every sentence has a mandatory minimum floor.

The Drug Quantity Table and its companion Sentencing Table make up a system that projects and embraces the connections defined in the statute. It may be argued as a consequence that if the principle of assigning weight is acceptable for one part of the system, it is acceptable for every part.

Inasmuch as Chapman ^{is} ~~was~~ silent on the question of the method by which the weight of a mixture or substance is estimated, so also is the statute. There is not an explicit or implicit prohibition of the use of the Commission's instrument for any part of the system of mandatory drug sentencing. Congress, in permitting ~~permitting~~ passage of the 0.4 milligram amendment into law, tacitly recognized this.

Congress is mindful of the need for mandatory sentencing in drug cases. But the Commission's second approach to the relief of injustice in LSD cases does not occasion the same caution as the first. No one has suggested a standardized weighing method for heroin or cocaine mixtures. With the 0.4 milligram method in place for LSD-blitter paper cases generally, it is unreasonable to suggest that the statutory link between mixture-or-substance weight and mandatory minimum sentencing is weakened. Given sufficient weight, a mandatory minimum sentence is triggered with the 0.4 milligram method in place no less effectively than formerly. The mechanism remains intact. A weight that reaches the level stipulated for LSD mixtures triggers the sentence. A weight that does not reach the level does not.

4. The objection: Critics resort to an argument that relies on Section 5G1.1(b) of the guidelines. A statutorily required minimum sentence that exceeds the maximum sentence allowable in a guideline range becomes the guideline sentence, according to this section. In practice, the argument yields a two-stage procedure that determines an offender's sentence. In stage one, the weight of a sample of a mixture LSD and blitter paper is estimated according to the traditional method of gauging weight, namely by checking a pointer-reading on a scale. The weight is examined for its ability to trigger a mandatory five or ten year sentence. Should such a sentence be excited, its place in the ultimate sentence is assured. Next, in stage two of the procedure, the

weight of the sample is re-estimated according to the 0.4 milligram method. This second weight is read into the Drug Quantity Table, and a sentencing range is taken from the Sentencing Table. This is compared with the statutory minimum sentence obtained in stage one, and a determination is made of which is greater: the stage one statutory minimum or the top edge of the guideline range.

Since, invariably, the outcome of the comparison is ~~not~~⁹ that the top of the guideline range in an LSD-blatter paper case is lower than the statutorily required minimum sentence, the statutory sentence, in keeping with Section 5G1.1 is retained. Hence the catch-phrase "statute trumps guideline."

The argument ignores the points outline above: the competence of the Commission to prescribe a method of estimating weight such as the 0.4 milligram method; the silence of Chapman and the statute alike on the question of weight estimation; and the unitary system that joins statutory mandatory minimum sentencing and what is in effect the mandatory minimum sentencing that characterizes all drug sentencing.

The problem with the argument is that it uncritically assumes an equivalence between a method of estimating weight and a category of legal authority. It relegates the 0.4 milligram method to a guideline sentence and reserves the traditional "pointer-reading" method for a statutory sentence. That this assumption lacks a critical foundation seems evident.

The erection of a double standard for estimating the weight of one and the same sample of a mixture containing LSD opposes common sense and rationality. A sense of the rational is restored when the sample is submitted to a single method of estimating weight. As to which method, only the 0.4 milligram method alleviates the injustice commonly attached to LSD sentencing.

If to this it is countered that Section 5G1.1 is an amendment that expressly recognizes instances of a double standard of this sort, it ought not to be forgotten that Section 5 G1.1 is itself an amendment to the guidelines, exerting no greater force than the amendment in Section 2D1.1 that introduced the 0.4 milligram amendment. Section 5G1.1 does not exert the force of statutory law.

5. Consequences of the two-stage procedure: After the March, 1993 hearing of the Commission, a measure was voted in that allowed for retroactive modification of sentences imposed for LSD-blatter paper offenses. (The reader may be reminded that the 0.4 milligram method applies in practice only to LSD cases that involve blatter paper carrier. Retroactive sentence modification therefore applies only to cases of this type.)

The problem that has been raised at hearings of applications

for sentence modification is that a mandatory sentence determined by statute cannot be "trumped" by a sentence in the guideline range, calculated from the 0.4 milligram method.

Not all judges have been persuaded by this argument. The following types of outcome have been reported in cases applying for resentencing:

(A) A sentence is reduced from a position above a statutorily imposed mandatory floor to below that floor. Example: 11.5 years reduced to 56 months. Argument: The sentence is recalculated de novo. A sample of LSD-blitter paper mixture is weighed in the light of the 0.4 milligram method and found not to trigger a mandatory minimum five or ten year sentence.

(B) Sentence reduced to a mandatory ten year floor but not below. Example: 12.7 years reduced to 10 years. Argument: The sentence is recalculated according to the two-stage procedure.

(C) Sentence reduced from above to below a mandatory ten or five year floor due to substantial assistance. This type of outcome requires no further comment.

(D) Sentence not reduced even to a mandatory floor. Example: 78 months retained at 78 months. Argument: The USSC did not intend sentence modifications even to a statutorily imposed mandatory floor. (See below, 6B.)

(E) Sentence reduced where no mandatory element exists. Example: 97 months reduced to 44 months. Argument: Defendant was charged under Section 841(b)(1)(C). (The circumstances, as explained by the defendant, were that the indictment was fortuitous, his case being the first to occur in Delaware, and the prosecutor not being fully informed of the possibilities.)

These cases show the varied outcomes of applications for sentence modification, due to the employment of different arguments. Cases of types (A), (B), and (D) are the subject of appeals. Reports have it that type (B) cases are very common, and that appeals are in progress in at least four, probably more circuits, lodged by the defense in types (B) and (D) and by the prosecution in type (A).

The pattern of current sentencing in new cases, not involving resentencing, is not known to the writer.

6. Effect of the "nonetheless" rider: The rider occupies a peculiar place in the Commentary. It comes at the end of a lucid exposition of the rationale of the 0.4 milligram amendment and appears to have been added as an afterthought. Its purpose remains obscure. The comments it has elicited are:

(A) The "nonetheless" rider is superfluous: Its caution that the Commission's second approach to the difficulty of correcting injustice does not override or trump the "applicability of the concept of 'mixture or substance' for the purpose of applying any mandatory minimum sentence" does not serve a necessary end. The motive behind the Commission's second approach was precisely not to contest the meaning of "mixture or substance" as this was clarified by Chapman, and not to render the mixture-or-substance rule any the less applicable than it was before. Why is this reminder needed?

Besides, nowhere else in the FSGM, as far as can be seen, is a similar caution inserted into an application note to an amendment. Why has this amendment been singled out for such attention?

(B) The rider is subversive of the intention of the Commission: If, as is clear from the commentary, the Commission intended to relieve inequity and disproportionality, the inclusion of a "nonetheless" rider that questions the amendment's effectiveness appears self-defeating. The rider injects doubt as to the amendment's worth. Then opposition to the Commission's intention of a possibly emotional kind that has been contained in the background prior to the reading of this passage is invited to appear in force.

Two anecdotes from the writer's limited experience are relevant, one that concerns a negative outcome for a defendant. Case (D) above was heard by a judge who declined to give a reason for a refusal to modify a 78 month sentence, revealing only that it was the judge's view that the USSC did not seriously intend that LSD sentences should be reduced, even to a mandatory floor. The origin of that impression, it may be assumed, lies at least in part in the "nonetheless" rider and the negative light it casts.

In another case, attended by the writer, the judge conducting a sentencing hearing was inclined to follow the 0.4 milligram method de novo. In the course of questioning, the judge asked why, considering the obvious intention of the Commission, the "nonetheless" disclaimer had been inserted in the manual. No one among those present in court could answer, and for a moment it looked as though the judge's view might waver. It did not, and the defendant was sentenced on the basis of the 0.4 milligram method, but the failure of counsel to respond to the judge's question was awkward.

(C) The "nonetheless" rider is misleading: The reference to Chapman in the rider appears to hinge on the significance in that opinion of the word "entire." The interpretation of the term has been mentioned already. Chapman is clear on the meaning of "entire." Its insistence is that both ingredients of an LSD-blotter paper mixture be weighed, not

one. The Chapman text uses the expression "entire-mixture," not "entire weight." (The expression "entire weight" occurs in the FSGM's asterisked entry at the conclusion of the Drug Quantity Table in 2D1.1, where a more felicitous reading would be "weight of entire mixture") If, as it appears to be, it is insinuating that Chapman calls for an actual or literal weight and not an assigned weight as the quantity that triggers a five or ten year mandatory minimum sentence, the rider does its readers a disservice.

7. Recommendations: There are two:

(A) The "nonetheless" rider should be deleted. It is unnecessary, vague, probably misleading, and inimical to the Commission's intention. Without it, the Commission's intention would be read in a more positive light than it is apt to be at present. Judges would be reassured of the Commission's intention to fulfill its mandate. A healthy impetus to sentencing reform would be felt.

(B) With or without agreement to (A), an amendment should be added to the text of Section 5G1.1. Confusion over the merits of the "trumping" argument would be laid to rest by an amendment that exempted LSD-blotter paper cases from the 5G1.1(b) provision. The effect would be to facilitate modification of an LSD offender's sentence to beneath a mandatory floor. A block to modification of this kind, as in the type of outcome mentioned in 5(B) above, is the principal reason for the frustration of the Commission's aim to promote equity and proportionality in LSD sentencing.

There is no cause to fear that this amendment would threaten the authority of the statute with regard to other kinds of drug sentencing. The effectiveness of the amendment is conditional on the use of a method of estimating weight that assigns a standard weight to a unit of a mixture or substance, and no one has suggested a change in the method of estimating weight in cases involving drugs such as heroin or cocaine.

067-94

NATIONAL
RAINBOW
COALITION

REVEREND JESSE L. JACKSON
TESTIMONY BEFORE THE U.S. SENTENCING COMMISSION
MARCH 24, 1994

INTRODUCTION

Mr. Chairman, Members of the Commission, ladies and gentleman, let me express my appreciation for the opportunity to testify today. I would like to share with you my grave concern about the discriminatory impact of mandatory minimum sentences and the disparity in sentencing between powder and crack cocaine. The impact of these laws and policies is so discriminatory that crime and criminal justice have become the preeminent civil rights issue of our time. As either victims or defendants, people of color are treated unjustly and inequitably in the American criminal justice system.

The current penalty for possession of crack cocaine in the federal system is one of the most blatant examples of this discrimination. I strongly believe in both preventing and punishing illegal drug distribution. However, I believe that the punishment should fit the crime and that those guilty of the same crime should be punished equitably. None of these tenets apply to the penalties for crack and powder cocaine.

Current federal narcotics law provides that first offenders convicted of possession of 5 grams of crack cocaine (the weight of two pennies) must serve a mandatory 5 years in prison. First offenders convicted of possessing the same amount of powder cocaine are eligible for probation. Those who possess powder cocaine serve a mandatory 5 year sentence only when they possess 100 times as much powder cocaine (500 grams). The discriminatory impact of this law becomes painfully clear when one considers that African-Americans comprise 91.3% of those sentenced for federal crack offenses and Whites comprise only 3%. These statistics become even more significant considering the fact that Whites comprise 64.4% of all crack users.

These statistics lead to some disturbing conclusions:

- 1) Although most crack users are White, most of the people in federal prisons for crack use are African American.

Reverend Jesse L. Jackson, President and Founder
Dennis Rivera, Chairman, Board of Directors

Francisco L. Borges, Treasurer
The Honorable Salima Siler Marriott, Secretary

2) - The penalty for crack cocaine possession is 100 times greater than the penalty for powder cocaine, and the vast majority of powder cocaine users are White.

There may be an amendment offered by Congressman William Hughes (D-NJ) to the crime bill being considered this week before the House of Representatives to equalize the sentences between crack and powder cocaine. The proposed legislation will equalize the penalties between crack and powder cocaine at the current sentencing levels set for powder cocaine offenses.

However, as you review the guidelines for crack versus powder cocaine sentencing disparity, I urge you to consider the racism inherent within them. There is absolutely no justification for this stark disparity in punishment for two different forms of the same drug. Crack is relatively inexpensive, readily available in poor communities, and used more openly. Powder cocaine is expensive, primarily used in white, affluent communities, and used more privately.

Both forms of the drug are dangerous and addictive, and there is no evidence that crack cocaine is more dangerous or addictive than powder cocaine. In fact, scientific studies show that there is no molecular difference in the two forms of the drug, and that powder may in fact be more addictive than crack.

Defenders of the disparity attempt to blame crack for the violence associated with the drug trade in poor communities of color. However, according to a 1991 Justice Department survey of state prison inmates, prisoners who had used crack before their offense were less likely to be in prison for a violent offense than those who had used other drugs or no drugs. In fact, the survey found that of the percentage of prisoners who used crack in the month before their offense, 33% were incarcerated for a violent offense, compared with 39% who used powder cocaine and 48% who used any other drug. The violence would exist whether the drug were crack, powder cocaine, heroin, or some other drug. The violence is associated with the nature of the drug trade, not the drug itself.

The black, the brown, the poor, tend to go for the cheap high from five grams of crack, and because of sentencing disparity, are punished overly severely. The rich, the slick, and those who can maneuver, get probation.

On March 9, Supreme Court Justice Anthony M. Kennedy assailed mandatory minimum sentencing before a House Appropriations Subcommittee on the Supreme Court budget and stated: " I simply do not see how Congress can be satisfied with the results of mandatory minimums for the possession of crack cocaine."

This statement follows two federal court decisions which recently held crack sentences unconstitutional. Senior Judge Louis Oberdorfer of the United States District Court for the District of Columbia declared on January 26 that the mandatory sentences applied to two defendants before him violated the Eighth Amendment's proscription against cruel and unusual punishment.

On February 11, Judge Clyde S. Cahill of the United States District Court in St. Louis, Missouri used the 14th Amendment's guarantee of equal protection under the law as grounds for holding the sentencing disparity unconstitutional.

The prisons are filled with young African-American men and women who are serving mandatory minimums for crack cocaine. Last month, the Washington Post reported that Derrick Curry, a twenty year old African-American male with a promising future, will spend as much time in prison as he has been alive for a non-violent first offense. The FBI admitted that Derrick was a "flunky" in the operation that was run by his friend. If the crack cocaine guideline ratio changes, Derrick will be eligible for a reduction in sentence to 78 months. However, because the mandatory minimum sentence trumps the guideline sentence, Derrick's sentence cannot go below 10 years.

Steven Cook is serving a 19 1/2 year sentence for a crack cocaine conspiracy involving 32 kilos. If the sentencing guidelines change for crack cocaine, Steven will be eligible for a reduction in sentence to 78 months. However, the 10 year mandatory minimum sentence for 50 grams or more of crack cocaine will prevent Steven's sentence from dropping below 10 years. The change would effectively reduce his sentence by 9 1/2 years. Steven is 25 years old, a first offender, and was in college prior to his arrest.

Terrol Spruell, a senior at Virginia State University, was caught with 5 ounces of crack in a shopping mall parking lot in October 1989. He had never been arrested before. The sentencing report said that Spruell had sold 8 kilograms of crack in his drug-dealing career. He was sentenced to 30 years without parole. He is scheduled to be released at age 54 in the year 2015. If he'd had powder cocaine, he would have gotten a 10-year sentence and been released in 1997.

Murderers, kidnappers, and rapists routinely spend between 4 and 10 times less time than do people who possess or distribute small quantities of crack. People who possess the same amount of powder cocaine get much less time. The disproportionate impact of mandatory minimums on the African-American and Latino communities and the issue of crack versus powder cocaine sentencing disparity are central to the crime debate.

Judges are required to mete out these harsh sentences as a result of the laws passed by Congress in the eighties requiring

mandatory minimum federal sentences for the possession of crack cocaine. Judges do not like these laws because there is no room for judicial discretion, and the sentences are arbitrary. U.S. District Court Judge Clyde Cahill of St. Louis last month refused to impose a minimum mandatory sentence on a small-time drug dealer, stating the following;

"This one provision, the crack statute, has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods...it has created a situation that reeks with inhumanity and injustice. The scales of justice have been turned topsy-turvy so that those masterminds, the kingpins of drug trafficking, escape detection while those whose role is minimal, even trivial, are hoisted on the spears of an enraged electorate and at the pinnacle of their youth are imprisoned for years while those most responsible for the evil of the day remain free."

Laws requiring mandatory minimums were passed during a wave of public outcry about crime in the eighties; drive-by shootings and an increase in inner-city crime. There is currently a similar public outcry around crime, with the attendant media and political posturing, resulting in the discussion of similar unreasoned responses, and pressure for immediate answers. We must be more rational and thoughtful in our approach this time. We must learn the lessons of our history.

We must move towards proactive, rather than reactive approaches to violence. We can no longer allow our communities to be unsafe, our children filled with fear, and our solutions to be ineffective. More jails are not the answer. Mandatory minimum sentences for non-violent offenders are not the answer.

Mandatory minimum sentences use cell space that would be better used to house violent criminals. Criminals with nothing to lose will resist arrest, demand trials, process appeals. Prison will become a greater jungle overrun with those who can never leave. And as we know, these laws will disproportionately affect African Americans and Latinos.

We, who are agents for political and social change must lead the way. The victims of neglect, oppression, and abandonment have the moral and practical imperative to go forward. We must use all of the resources that we have in our power. While political and economic resources are important, it is our moral authority that is our secret weapon.

Leadership must bring fairness and justice to a clearly unjust situation. Crack versus powder cocaine sentencing disparity is a racist response to the climate of fear which affects all of our communities. Sentencing disparity punishes people for their socio-economic status; the poor, the black and the brown use crack, and the wealthy and the white use powder.

We must support community leaders, parents, teachers, and judges with laws and policies that are just, and which address the scope of the problem with rational and fair solutions. We cannot allow another generation of talented young men and women to fall victim to unjust policies which do nothing to rehabilitate them, and which stand in the way of affecting the truly violent. The Sentencing Commission must use its power and authority to right this egregious wrong and correct this fundamental injustice.

We will not surrender to fear, we must move forward with hope. We will keep hope alive.

068-9^c

TESTIMONY OF K. M. HEARST
DEPUTY CHIEF INSPECTOR
UNITED STATES POSTAL INSPECTION SERVICE
BEFORE THE
UNITED STATES SENTENCING COMMISSION
MARCH 24, 1994

I am Mike Hearst, Deputy Chief Inspector for Criminal Investigations, United States Postal Inspection Service.

I want to thank the Commission for the opportunity to testify again this year on two issues of interest to the Postal Service. We have proposed two amendments for your consideration regarding multiple victim crimes and volume mail theft. These two proposals are separate and distinct and are discussed more fully in our written comments. We believe the concepts in our amendments have a great impact on the public, commerce, and the Postal Service, but are not adequately addressed by the Sentencing Guidelines.

As I have stated, our two proposed sentencing guideline amendments are found as Amendment 34 (multiple victim) and Amendment 35 (volume theft of mail). I will address Proposed Amendment 35 first.

Research was conducted by members of my staff on this proposal. To support this proposed amendment, they visited eight federal judicial districts, federal judges, Assistant United States Attorneys, federal probation personnel, victim witness personnel, postal inspectors, postal managers, and victim postal customers were interviewed. They provided input on the effectiveness of the current sentencing guidelines in deterring volume mail theft, as well as the impact the theft has on the Postal Service and on

victim postal customers. In addition, we studied statistical information provided by the Commission relating to the sentencing of individuals for violations of postal laws which relate to mail theft.

Our written comments submitted to the Commission include statistical data and news accounts, both written and on video, of mail theft. Included in the video segments are an actual volume mail theft as it is occurring, filmed with a hidden camera, video taped interviews of victims who give accounts of the effect the mail theft has had on their lives, and television accounts of volume mail thefts given during news broadcasts.

Also submitted, and sorted by federal judicial district, are case summaries which describe the types of volume mail theft cases our field inspectors routinely investigate.

In the typical volume mail theft crime, the offenders target postal vehicles, letter carrier carts and satchels, collection and relay boxes, and apartment and residential mail boxes. A significant amount of mail is stolen by those who organize these schemes, in order to obtain relatively few pieces of mail with monetary value such as checks, credit cards or other personal financial information. As an example, the average amount of mail taken during a vehicle attack is between 500 and 1000 pieces, impacting on hundreds of customers. During a collection box or

relay box attack, 4000 to 5000 pieces of mail may be taken. The items with value are kept and used while the remaining mail, with no monetary value for the thieves, is discarded or destroyed. The guidelines do not take into consideration this nonmonetary value of the items which are stolen.

The current sentencing guideline, 2B1.1(b)(4), recognizes the importance of the U.S. Mail by providing for a two-level increase in the offense level for the theft of mail. This two-level increase is adequate for mail theft as a crime of opportunity. However, the volume mail theft crimes are not crimes of opportunity, but rather are crimes committed by organized rings established for the sole purpose of stealing mail and negotiating items with monetary value. Although they include other crimes such as forgery or fraud, the basis of the crime is the theft of large volumes of mail. These rings are comprised of individuals with specified roles in the overall scheme. They include thieves, forgers, false identification providers, fences, and the individuals who use or negotiate the checks or credit cards. A majority of these crimes are committed primarily to support drug habits. Recent intelligence also shows an involvement of organized gangs that use the proceeds from mail theft to finance other criminal activities, such as drug trafficking.

Last year I advised the Commission of the continuing increase in the volume thefts of mail. That continues to be true today.

During this past year, overall mail thefts have decreased 35 percent over the prior year. However, volume mail thefts have increased by over 9 percent. The increase in this category represents the most serious type of mail theft and is primarily attributable to the criminal activities of mail theft rings.

In the volume theft crimes, numerous pieces of mail are taken in one criminal act. When this theft of mail occurs, not only are the citizens who send or receive mail victimized, but also the Postal Service, because such a crime is an attack on an essential governmental service provided to the American people. It erodes the public's confidence in the Postal Service. This has the potential for making our customers seek alternative means of delivery. Our proposed amendment addresses the serious nature of these organized schemes by increasing the offense level to a 14 for these specific offenses.

The volume mail theft problem is not unique to any one locality, but is a problem we face nationally. Because of the impact this crime has on our customers and operations, our field offices have aggressively sought methods to prevent these thefts. Modifications have been made to postal vehicles, collection and relay box locking mechanisms have been reinforced, and postal customers have been alerted via the news media regarding the precautions they should take in order to avoid being victimized.

The cost to the Postal Service to implement these preventative efforts has been substantial. As an example, in Queens, New York, the Postal Service experienced a period where one collection or relay box attack was committed each day. Each attack affected 100 to 1000 families. To remedy the box break-in problem, a modification was made to each collection and relay box in Queens. This cost the Postal Service approximately \$400,000.

When the thieves could no longer break into the boxes in Queens, they migrated to Brooklyn, and then Jamaica, New York. The Postal Service then modified the boxes in those boroughs, at an approximate cost of \$250,000. In addition, the Postal Service was required to expend an average of 16 workhours to process the customer complaints which resulted from each break-in.

Given time, most security systems can be compromised by the criminal. Our investigations in Los Angeles typify the value mail has to the criminal, and the extremes they will go to in order to acquire the mail. After experiencing a rash of vehicle break-ins, modifications were made to the postal vehicles in Los Angeles, with a number of the more vulnerable vehicles being replaced with ones which were more secure. Because of these preventative efforts, the criminals sought another course of action to acquire the mail, robbery. During Fiscal Year 1993, the Los Angeles Division of the Postal Inspection Service

suffered 91 robberies. In FY 1992, the number was 41. From October 1, 1993, to January 31, 1994, the Los Angeles Division had 57 robberies. Of these, 39 were postal carriers who were robbed, and mail or arrow keys, which provide access to collection and relay boxes, were taken.

The sentencing information which was provided to us by the Commission indicates 60 percent of all criminals that are sentenced for a mail theft related crime receive no sentence of incarceration, 25 percent receive incarceration of 1 to 12 months, and only 15 percent of all criminals sentenced for a mail theft related offense receive incarceration of more than 12 months.

Because of the low sentencing guidelines for mail theft, many federal districts defer prosecution of mail theft to local jurisdictions where the sentencing is more representative of the severity of the crime. Others have charged the defendants in mail theft cases with a federal violation in which the sentencing enhancements are greater than the mail theft enhancement.

In one instance, a federal judge wanted the mail theft defendant sentenced under 2B1.1(b)(6), because the base level for the offense was 14, and the crime involved an "organized scheme." As you are aware, this guideline refers to vehicle thefts.

This same concept that caught the judge's eye, the "organized scheme," is the key to our proposed amendment. These offenses satisfy the requirement of more than "minimal planning." The planning and repeated acts show both the intention and potential to do considerable harm. In addition, they constitute a jointly undertaken criminal activity. These organized schemes follow a pattern with each participant engaging in a similar course of conduct in the series of mail thefts committed for criminal gain.

Proposed Amendment 35 is patterned after the organized scheme to steal vehicles as found in 2B1.1(b)(6). A reading of the commentary to this guideline describes offense characteristics analogous to the organized scheme to steal mail. As previously described, these mail theft cases, like the organized thefts of vehicles, represent substantial criminal activity. Furthermore, the value of the mail stolen is difficult to ascertain, due to the intrinsic value of the majority of the mail stolen, and its quick destruction in the course of the offense.

From the sentencing data reviewed, the vehicle theft offense characteristic has only been used in 95 cases over the past five years. We believe this is due in a large part to the extrinsic value of vehicles and the corresponding high dollar loss which results from the theft of a relatively few vehicles. For example, once the dollar loss of the vehicles reaches \$70,000, the dollar loss for the specific offense characteristic as a

floor offense level is met. In comparison, a similar guideline which creates a floor level of 14 for an organized scheme would apply in the majority of our volume mail theft offenses. Under the current guidelines, a significant dollar loss is involved in these crimes if all relevant conduct in the scheme can be considered. However, the total loss attributed to relevant conduct can only be proven at a substantial cost to the government, and even if the total dollar loss is proven, it still would not take into consideration the nonmonetary harm attributed to the crime.

Sentencing enhancements, driven by dollar loss, do not address the full impact mail theft has on its victims. Mail theft involves an invasion of one's privacy. It is a crime that steals some of the victim's dignity by prying into their personal affairs. It also places the victim in fear that the theft may occur again.

What dollar value can be placed on a box of blank checks stolen from the mail? How does one replace the greeting card sent by a grandmother, which is stolen along with hundreds of other pieces of mail, and then disposed of in the trash?

Even for items that have a monetary value, the actual "loss" is dependent on the victim's socioeconomic status. For example, one victim in Los Angeles who was interviewed by my staff detailed

the long, drawn out process of replacing her welfare check which had been stolen during a postal vehicle attack. She and her children experienced great hardship during the replacement period. They were forced to borrow money from friends, forced to buy groceries on credit, and the store where she bought clothes for her children closed her charge account since she could not make the monthly payment. The most difficult experience for this victim was not being able to buy even the smallest of gifts for her children at Christmas, as the theft occurred December 15.

Prosecutors have advised that mail theft, for the criminal, is an "easy money" operation, with minimal risk. One suspect, when arrested in his home by postal inspectors for mail theft, had a sign hung above one of the doorways. The sign read, "The pen is mightier than the sword," referring to forgery versus robbery.

In another case, a foreign national convicted of mail theft said, "I was told the streets of America were paved with gold. I now know it's the mail boxes, not the streets, that have the gold."

As these examples show, the suspects are well aware of the profit to be made from volume mail theft. They are also well aware of the minimal risk and punishment for mail theft, as compared to that for a violent crime.

The impact on the postal customer, however, is one of dire consequences. One victim, who was interviewed in Dallas, Texas, advised that due to the theft of her and her husband's blank personal checks, and the subsequent cashing of the checks by the suspect, an arrest warrant was issued for her husband.

By adding a guideline with a base level of 14 for the organized scheme to steal mail, the Commission would be addressing the fact that this type of theft offense is a more serious crime than general mail theft, with an impact that cannot be properly measured by a dollar loss value.

Personnel from my staff have also conducted background research on proposed Amendment 34. We have found, based on interviews of our field inspectors, prosecutors, probation officers, and judges in the federal judicial system, there is no proportionality in the sentencing of criminals who prey on multiple victims.

From a layman's perspective, which crime would the average person view as a more serious offense, one that involves a \$100,000 aggregate loss to 100 victims, or one that involves a \$100,000 aggregate loss to 1,000 victims? Most people would agree the crime that affects the 1,000 victims has a greater societal harm. However, the current sentencing guidelines treat both crimes equally.

The Postal 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 sentence computation. As our amendment proposes, a table based on the number of victims would be used during the sentencing computation.

In our testimony last year, we asked the Commission to study the multiple victim issue. When the Commission asked for topical issues for study this year, we again submitted the issue of multiple victims. As an alternative to our proposed victim table, we again would urge the study of what we deem to be an important aspect of a crime's total harm--that being multiple victims.

Our written testimony also contains comments on other amendments published by the Commission, as well as comments on the determination of loss in cases involving credit card theft. One amendment I would like to comment on before the Commission is Amendment 12(B) which provides for an increase in the base offense level for the loss table in 2B1.1.

We agree with the increase in the base offense level for 2B1.1 to the extent it brings the loss table in conformance with that of 2F1.1. We strongly disagree, however, with the elimination of the mail theft offense characteristic (b)(4). The basis for the current two-level increase for mail theft is attributed to the unique character of mail as the stolen property referred to in the commentary background. For a consistent application of this statutory distinction, a corresponding two-level increase above the base offense level should be provided for in theft of mail offenses, regardless of the dollar loss amount. Thus, if the base offense level is increased for 2B1.1 to a 6, the specific offense characteristic for mail theft should provide a floor guideline of 8, regardless of the dollar loss involved. This will establish a floor offense level for the general mail theft offenses committed as crimes of opportunity as distinguished from the "organized schemes" to steal mail covered in proposed Amendment 35.

I want to thank you for this opportunity to summarize our written presentation, and will now entertain any questions concerning our comments.



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

MARY LOU SOLLER, 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 18, 1994

My name is Mary Lou Soller, and I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States' Sentencing Guidelines. The members of this committee include professionals involved in all aspects of the criminal justice system, including the judiciary, prosecutors, public and private defense practitioners, academics, and criminal justice planning professionals.

I appear before you today at the request of ABA President R. William Ide, III, to convey the ABA's views on the proposed amendments to the Sentencing Guidelines. Our comments are made in the context of the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures that were finalized last year.

The Amendment Process

As in prior years, we remain interested and concerned about the process employed by the Commission in the amendment of the Guidelines.

First, we are aware of a concern that has been expressed by some practitioners that the Guidelines should not be amended when the Commission does not have a full complement of members. Last year several commissioners expressed concern about taking action with a bare quorum of members. This year, that problem is potentially compounded by the fact that there are even more positions waiting for appointment. We urge the Commission to postpone its consideration of all proposed amendments until it is at full strength.

On a related point, we note that the Commission has sought comment in a number of areas in which we believe the experience of those who see examples of these cases in practice could be useful. Thus, we urge the Commission to consider holding hearings in the field after its current

vacancies have been filled. Specifically, we believe that this would be appropriate for discussions of the Commission's proposals and concerns set forth in Issues 16 (aging prisoners), 29 (criminal organizations), and 30 (criminal history).

Administrative Procedures

We would like to take this opportunity to provide comment on the procedures employed by the Commission in conducting its business.

In previous years we have recommended that the Commission adopt rules of procedure and work toward a more accountable process. We renew those recommendations. We believe the Commission's effort to systematize its process is an important part of any effort to improve federal sentencing.

As we have noted before, the Sentencing Reform Act envisioned an expert sentencing commission acting as an informed and responsive administrative agency. Although located in the Judicial Branch, the Commission has important substantive rulemaking responsibility. Because that responsibility is being exercised by unelected individuals, it is critical that those officials actually be -- and appear to be -- both open to input and accountable to the public.

We applaud the steps already taken by the Commission. However, even with the changes that have been made, the Commission remains significantly less accountable than other federal rulemaking agencies. This difference contributes unnecessarily to the controversial nature of Commission decisions. While many of the policy decisions of the Commission will of necessity be unpopular with some, Commission policy decisions become even harder to accept

when the decision makers have not provided adequate access to information, sufficient opportunity to comment, or an adequate explanation of the decisions reached.

We believe that, as a general matter, the Commission should use those procedures followed by other administrative agencies that issue substantive rules as a model for procedural regularity. While these procedures are by no means perfect, they do represent an accommodation that has been reached over time between the need for agency efficiency and the need for public accountability. The ABA Criminal Justice Section (through our Committee) and the Administrative Law and Regulatory Practice Section are currently involved in a study of Commission procedures that may ultimately lead to recommendations by the ABA House of Delegates for Congressional action to change certain aspects of the Commission's mandate.

What follows are recommendations consistent with our previous suggestions to the Commission which could be implemented without any changes in its statutory mandate. In making these suggestions, we do not intend that they would alter or expand any rights of review that may currently exist.

1. The Commission Should Promulgate Rules of Procedure.

We note that 28 U.S.C. § 994 (a) envisions that the Commission will promulgate and amend its Guidelines pursuant to "its rules and regulations." However, the Commission has not, as yet, brought together those procedures it now follows into a unified and published set of standards. We urge the Commission to publish a set of the rules and procedures to govern all aspects of its rulemaking process and to make those procedures available to the interested public.

2. The Commission Should Provide a More Detailed Statement of Basis and Purpose When Adopting Rules.

Section 553(c) of the Administrative Procedures Act ("APA") requires that an agency incorporate "a concise statement of basis and purpose" in the rules adopted. For most agencies, that requirement poses a more elaborate burden than the term "concise statement" implies. As the Supreme Court has explained, "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"¹

In the past, the Commission's explanations have not met this standard. For example, the Commission has often failed to account for factors Congress required to be considered, such as the impact of Guideline changes on prison overcrowding. It has also rarely responded to public requests to explain why a comment was being accepted or rejected. For some issues, such as the decision to make Commission changes retroactive, the Commission has supplied no explanation at all.

We urge the Commission to provide a more thorough explanation of its amendments to the Guidelines and policy statements, to explain why it chooses one option over others considered, and to explain why it rejects public comment opposed to its suggestion. If the requirement of producing this statement of basis and purpose is difficult to accomplish under the Commission's current timetable, we believe that the Commission should seriously consider moving to a two-year amendment cycle.

¹ Bowen v. American Hospital Ass'n, 476 U.S. 610, 626 (1986).

3. The Commission Should Publish a More Detailed Regulatory Agenda.

The Commission now publishes a notice in the Federal Register identifying the issues on which it seeks comment and those on which it may adopt amendments, and we commend you for doing so. However, that notice is generally far less detailed than the notice published in the United Agenda of Federal Regulations and required of other agencies. We recommend that, to the extent feasible, the Commission should model its agenda on the United Agenda. The more information the Commission can provide to the public, the better the feedback it can expect.

4. The Commission Should Adopt Procedures for Petitions.

At present, the Commission has no written procedures concerning the solicitation and disposition of petitions. It also does not maintain a public petition file. The Commission should consider adopting procedures regarding petitions.

5. The Commission Should Comply Voluntarily With FACA and FOIA.

Conventional rulemaking agencies are subject to the requirements of the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA"). The Commission's failure to operate under these open-government provisions, or to construct acceptable analogies, frustrates legitimate public efforts to influence and learn from the Commission.

FACA requires open advisory committees. Most other, more traditional, agencies have learned to operate with open meetings. An open meeting rule would permit the public

better access to the Commission's committee action and would improve the quality of its deliberations by permitting public input. Compliance with FOIA, or a Commission analogue, would permit the public easier access to Commission documents with relevance to sentencing questions.

6. The Commission Should Comply With the Sunshine Act.

Although the Commission's meetings are open to the public, the lack of notice and lack of formality concerning the meetings limits the usefulness of any open meeting policy. The Commission's current policy does not require a week's prior notice of the meeting or publication of the notice in the Federal Register, nor does the policy define what meetings are to open or limit the circumstances under which a meeting may be closed. In addition, the Commission does not make tape recordings of prior meetings available to the public. We urge the Commission to amend its meetings policy to provide greater notice of the time of its meetings, access to a record, and standards for those rare circumstances when decisions will not be made in public.

Specific Amendments

In addition to our general comments, we also have comments on several of the proposed amendments and have set forth our positions below.

I. Public Corruption

Proposed Amendment 2(A):

This proposal would result in the consolidation of § 2C1.3 (Conflict of Interest) and § 2C1.4 (Payment or Receipt of Unauthorized Compensation). For the reasons stated in the synopsis of the proposal, the ABA does not object to this proposed consolidation. However, it should be noted that for many of the statutes covered by the Guidelines, the proposal does not distinguish between non-intentional violations (which are classified as misdemeanors) and willful violations (which are classified as felonies). We recommend that the Commission add an application note to alert the court that a downward departure may be appropriate if the offense does not involve willful conduct.

Proposed Amendment 2(B):

For the reasons stated in the synopsis of the proposal, the ABA does not object to the proposed consolidation of § 2C1.2 and § 2C1.6. However, for the reasons set forth in more detail in response to Proposed Amendment 4(A) below, the ABA seeks the elimination of the specific offense characteristic that increases the offense level under § 2C1.2 "if the offense involved more than one gratuity." Additionally, the ABA is opposed to increasing the offense levels for gratuity offenses by eight (8) levels if the gratuity was given to an elected or high level decision-making official. We discuss the reason for our opposition to this specific offense characteristic in our response to Proposed Amendment 5(A).

Issue for Comment 2(C):

The ABA opposes the consolidation of the bribery (§ 2C1.1) and gratuity (§ 2C1.2) Guidelines. Any consolidation would serve only to blur the distinction between the offenses for sentencing purposes. Consolidation will neither simplify the determination of the appropriate Guideline nor ensure similar punishment for similar conduct. The definitions of the separate offenses covered by these separate Guidelines are already contained in the statutes and interpretive case law.

Issue for Comment 3:

The empirical evidence developed by the Commission's Working Group Report does not justify increasing offense levels for public corruption offenses. As reported by the Working Group, bribery defendants already have a median total offense level of 14 and thus -- absent departures -- are not normally eligible for a non-imprisonment sentence. Furthermore, an increase in offense levels that does not allow for a distinction between sentences to be imposed in public corruption cases and sentences to be imposed in non-public corruption cases is not justified. Indeed, even within public corruption cases, we suggest that a distinction be made between the sentences to be imposed on public officials and those imposed on non-public officials. Regardless, we suggest that the matter be subjected to further study. While the

Working Group report is an excellent start, a more careful review of the sentencing data is necessary before the enactment of amendments that restructure base or adjusted offense levels.

With regard to harmonizing the existing public corruption Guidelines, we generally favor equalizing base offense levels for bribery, regardless of the context, and gratuities, regardless of the context. However, we suggest that this matter be submitted to the Working Group for further evaluation.

Proposed Amendment 4(A):

The ABA favors option 2 if the proposals that address the issue of the adjustments in § 2C1.1 and § 2C1.2 for more than one incident, for the reasons stated in the Commission's synopsis. The adjustment based on "value of benefit" adequately measures the relative culpability. There is no good reason to sentence an individual whose financial condition results in his paying bribes in multiple installments more harshly than the individual whose financial condition allows him to pay the same amount in a single payment.

Proposed Amendment 4(B):

Consistent with the adoption of option 2, as noted above, the commentary discussion of the adjustments for multiple payments should be eliminated.

Proposed Amendment 5(A):

We oppose making the adjustment for value of the payment cumulative to the adjustment for high level or elected officials. Our position is influenced by the fact that the current increase for conduct involving an elected or high level government officials is eight (8) levels.

We have several objections to this provision. First, in the case of a gratuity, the eight (8) level increase results in abnormally harsh sentences, even in cases involving very minor gratuities. The payment of a meal for a high level official would presumptively be sentenced at between 18 and 24 months. Second, for any offense involving any amount of money over \$2,001, the presumptive sentence would be above the statutory maximum. Thus, non-similarly situated offenders (those paying or receiving gratuities of \$1,000,000 or more and those paying or receiving gratuities of between \$2,001 and \$5,000) are treated similarly -- *i.e.*, they are sentenced to the statutory maximum. Finally, the adjustment for elected officials does not make any distinction between a locally elected sheriff serving a small town and a United States Senator. Not all elected officials are alike simply by virtue of the fact that they are elected; not all elected officials are "high level."

Issue for Comment 5(B):

The ABA favors modification of the eight (8) level adjustment for high level officials. Without commenting on the appropriateness of any specific range of levels, we favor a sliding-scale approach that would allow the court to distinguish between different types of truly "high level" officials. In connection with the sliding-scale approach, the maximum adjustment should be less than eight (8) levels, with truly extraordinary cases, such as those involving presidential appointees, handled by way of departure. While the Commission should set forth certain objective standards that might be added to facilitate application of this adjustment, we suggest that this be adopted as commentary and not as part of the Guideline.

Proposed Amendment 6(A):

The proposed clarifications are consistent with the definitions contained in the relevant statutes. The ABA supports the three definitional clarifications proposed.

Issue for Comment 6(B):

Regardless of which rule is the better rule of law, we question whether the Commission must act whenever a conflict of interpretation develops among the circuits. This task has generally been the duty of the United States Supreme Court. While Congress amends statutes to "overrule" Supreme Court rulings interpreting Congressional enactments, Congress generally does not so act until the Supreme Court rules. Taking guidance from this, the ABA believes the Commission should await further judicial action before amending its "legislation" to overrule decisions with which it disagrees.

Proposed Amendment 6(C):

Consistent with its standards, the ABA opposes the proposed application note authorizing an upward departure for ongoing harm. First, the phrase "risk of ongoing harm" is ambiguous. Second, there is generally little need to direct departures -- the court has authority to depart upward for any factor not adequately considered, pursuant to § 5K. Finally, in this case, a court already has departure authority under § 5K2.7 (Disruption of Governmental Function).

II. Drugs

Proposed Amendment 8(A):

This proposed amendment would revise the Drug Quantity Table to provide for offense levels that encompass the statutory mandatory minimums at the top, rather than the bottom, of the guideline range. This amendment was before the Commission last year, and the ABA continues to urge its adoption.

There are several reasons for our support. First, we have long believed that the current Guidelines overemphasize the quantity of drugs in determining an offender's culpability. Second, consistent with ABA policy, we oppose the mandatory minimum provisions themselves. This amendment would reduce the extent to which the Guidelines are distorted by the ill-considered statutes.

Finally, we adhere to the principle stated both in our Standards and in 18 U.S.C. § 3553 that punishment should be sufficient -- but not greater than necessary -- to fulfill the statutory purposes of sentencing. A recently released study from the Department of Justice documented the shocking extent to which federal prisons are populated with low-level, non-violent drug offenders. This result is caused largely by mandatory sentencing statutes and their interaction with Guideline § 2D1.1. Adoption of this proposed amendment would be a small but necessary step toward rationalizing the use of scarce prison space.

Proposed Amendment 8(B):

This amendment adds a specific offense characteristic in § 2D1.1 to address the use or possession of a weapon in drug offenses. We believe this amendment is unnecessary, because such conduct generally will be separately charged in federal drug prosecutions. If the purpose of the amendment is to relieve the prosecution of the need to prove weapons use beyond a reasonable doubt, we oppose the amendment. This burden-shifting is contrary to the ABA Standards. It also constitutes an unjustified shift from a charge-based to a real offense approach to this conduct. If there is some other purpose of the amendment, the Commission has not adequately expressed or explained it.

Proposed Amendment 8(C):

This amendment caps the offense level for defendants with a mitigating role in the offense. Consistent with the reasons of support for Proposed Amendment 8(A), we support this amendment.

The ABA does not take a position on any specific offense levels, so we will not comment on whether the cap should be set at 30 or 32.

Issue for Comment 8(D):

As noted, the ABA believes that the current Guidelines overemphasize the role of drug quantity in determining a defendant's culpability. We believe that adoption of Proposed Amendments 8(A) and 8(C) would begin to redress this flaw in the Guidelines.

Proposed Amendment 9:

This amendment sensibly clarifies the operation of the aggravating role Guideline, and we urge its adoption. We note, however, the phrase "or was otherwise extensive" in the current Guideline may no longer be necessary now that the commentary defines the meaning of the term "participant" with greater specificity. While we support judicial discretion, we believe the Commission should not employ or retain Guideline terms that are so vague they provide no guidance to judges, and thus may cause unwarranted disparity.

Proposed Amendment 10:

This amendment clarifies the operation of the mitigation role Guideline. In the past, we have urged its adoption, and we continue to support it. We believe the examples inserted in the introductory commentary to Chapter Three, Part B of the Guidelines seem to provide useful guidance to courts.

Proposed Amendment 24:

The purpose of this amendment is to address the situation in which an individual involved in a drug transaction inflates the amount of drugs he intends to buy or is capable of buying or selling in the transaction. Since the Guidelines are so driven by drug quantity, this "puffing" has led to bizarre and unjust results producing unwarranted disparity, and thus should be corrected.

Consistent with our view on the role of quantity in determining a defendant's culpability and our interest in minimizing unwarranted disparity, the ABA supports adoption of the amendment.

Issue for Comment 33(A):

The Commission seeks comment on whether it should modify the Guidelines that provide for a 100 to 1 ratio distinguishing crack cocaine from powder cocaine cases.

First, we understand that the Commission staff has completed a comprehensive review of this subject. We strongly urge prompt publication of this report. If, as we suspect,

the report suggests that the current ratio is unjustified -- or at least overstated -- we would support amendments to rectify this error.

The fact that the current ratio is based on a statutory mandatory sentence should not be a bar to improvement of the Guidelines. In a related situation last year, the ABA supported an amendment to rationalize the definition of "mixture or substance" in LSD cases. The Commission commendably adopted that amendment because it recognized its independent obligation to ensure just sentences in cases not covered by the mandatory minimum sentencing laws.

III. Money Laundering

Proposed Amendment 11:

We strongly support the adoption of this amendment to § 2S1.1 and § 2S1.2, with several modifications.

We agree with the Commission's Money Laundering Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

Many of our members have reported to us their experience that the current Guidelines encourage prosecutors to seek money laundering convictions in cases not related to narcotics money laundering, because the resulting sentences are significantly higher than for the underlying offenses. We have also become aware of instances in which the government can influence plea bargaining negotiations merely by threatening to include a "money laundering" count in the indictment.

The proposed Amendment seems to recognize that 18 U.S.C. §§ 1956 and 1957 are so broad that they encompass cases which are not normally thought to be "money laundering" -- and indeed, in some cases, in which the underlying offense is virtually indistinguishable from the underlying crime. Adoption of the amendment would go a long way towards addressing the problems this overreaching creates.

Although this Amendment would go a long way toward correcting the current problems, we suggest that the ultimate goal of achieving fairness in sentencing would be more clearly advanced by modifying the proposal so that the base offense level for an underlying offense would be applied in all cases, not just in cases where that level would exceed the base offense level in § 2S1.1(a)(2) or (3). Further, if the Commission is intent on achieving uniformity among Guidelines by conforming § 2B1.1 and § 2T1.1 with § 2F1.1, we suggest that § 2S1.1(a)(3) should also be assigned the same base offense level as § 2F1.1.

IV. Fraud

Proposed Amendments 12 and 20:

We support the change proposed in Amendment 12(A) that would eliminate "more than minimal planning" as a guideline specific offense characteristic. By changing the definition of the specific offense characteristic to "sophisticated planning," we believe the structure of the Guidelines will be improved in two respects.

First, the continued recognition of planning (independent of actual harm), as an important factor for judging relative culpability, is consistent with the empirical analysis of pre-Guidelines sentencing practices. (See § 2F1.1 comment (background).) By refining the definition, however, the Commission has made an attempt to capture this factor more precisely. Because courts have found that "more than minimal planning" applies in virtually all cases, the concept of the heartland case -- as one in which the base offense level applies without the application of specific offense characteristics -- has been lost in the past. Adoption of proposed amendment 12(A) would advance the original concept of the Guidelines and promote fairness by allowing courts to rationally distinguish between offenders.

Proposed Amendment 12(B) seeks to raise the base offense level in § 2B1.1 to that found in § 2F1.1. We oppose this change. The ABA Standards seek to foster uniformity of sentences for similarly situated individuals charged with the same crimes. As we testified last year, the decision to sentence larceny and theft cases exactly the same as fraud and deceit cases is contrary to prior practice and appears to increase disparity by treating dissimilar offenders in a similar manner.

If the Commission believes that there is an unrecognized need to conform the base offense levels of these two Guidelines, we support the formation of a working group to study this issue. Without a thorough examination of the circumstances of the cases that has arisen under these two Guidelines, it is impossible to determine whether a change would be made solely for the sake of facial consistency, whether such a change would result in unwarranted disparity by imposing the same sentence for truly disparate conduct, or whether such a change would be justified. If a need for harmonizing these two Guidelines is found, we would support the reduction of the base offense level for § 2F1.1 rather than increasing that for § 2B1.1.

Similarly, the Commission has sought comments on changing the increments in the loss tables for § 2B1.1, § 2F1.1, and § 2T1.1. The purported reason for such a change is that "[s]ome commentators have noted that the slope of the current loss tables is not uniform throughout the range of loss in the tables." This reason does not provide compelling justification for changing the current structure of the Guidelines. Again, we believe that before any action is taken on these proposals, the Commission should establish a working group to determine whether there is, in fact, a need or justification for the proposed changes.

Finally, we support Proposed Amendment 20A, which revises the Commentary to § 2F1.1 to provide greater consistency § 2B1.1. This revision would cure an anomaly that currently exists and, consist with the ABA Standards, would promote more fairness in sentencing.

V. Acquitted Conduct

Proposed Amendment 18:

Consistent with our position on a similar amendment last year, we support this proposed amendment because it is conforms with the ABA Standards. As set forth in Standard 18-3.6, we believe that sentences imposed should be based on the offense of conviction. We disapprove of the practice of "real offense" sentencing. We would prohibit the enhancement of sentences based on a finding by a court that -- despite the acquittal of the defendant -- he or she committed the additional offense.

We believe that any argument for basing a sentence on acquitted conduct is outweighed by the need to promote both perceived and actual fairness in the sentencing process of the criminal justice system. In our view, it is inappropriate for an individual to be punished for a criminal offense despite having been acquitted of it.

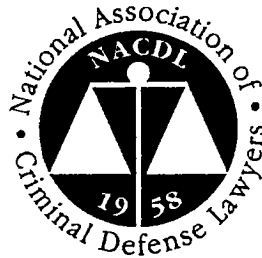
In addition, the fact that the uneven consideration of acquitted conduct at sentencing promotes disparity is also a compelling justification for enactment of this amendment. The preclusion of its consideration may actually promote uniformity.

V. Imposition of Sentence for Defendant Serving Undischarged Term of Imprisonment

Proposed Amendment 23:

The Committee opposes this proposal to revise § 5G1.3. This amendment was proposed for the stated purpose of facilitating the job of the probation department. The ABA does not believe that the mere difficulty in obtaining information is a valid justification for increasing the severity of sentences. Moreover, the better approach is found in the present state of the Guideline -- as opposed to the proposed revision -- which does not allow for differences in sentences based merely on the time of the imposition of the sentence.

070-94



**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, D.C.
March 24, 1994**

Chairman Wilkins and Members of the Commission:

My name is Alan J. Chaset and I am appearing on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization whose membership is comprised of more than 8,000 lawyers and 25,000 affiliate members who practice in every state and federal district. NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to insure 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. NACDL's ongoing efforts to achieve those goals brings me here today to share our views about your set of proposed changes to the Sentencing Guidelines.

For the past six years, I have served as the Chair or Vice-Chair of the NACDL's Sentencing and Post-Conviction Committees and, in that capacity, have had the opportunity and pleasure of working with members of the commission and its staff on several related matters including the drafting of proposed amendments, the training of various actors in the federal criminal justice system, and the preparation of numerous articles on the guidelines. In that latter regard, this year saw the introduction of a bimonthly column in the Association's periodical *The Champion* devoted almost exclusively to Sentencing Guidelines issues; copies of the first three installments of "Grid and Bear It" are being made available under separate cover.

Before presenting our specific responses to the various proposals and requests for comments, I would like to address a number of more general issues regarding the commission and its guidelines. While much of what follows has been said before and while many of these same points will be raised anew by others, I believe that it remains both necessary and appropriate to rearticulate these matters. And, while the commission has so far not seen fit to adopt these basic suggestions, NACDL appreciates the fact that, at least in this forum, we are being given more than "three-strikes" at the system.

First, NACDL continues to believe that the commission should have crafted and should now reformulate the system to focus initial attention on whether or not the individual defendant warrants incarceration for his/her offense: the "in-out" decision. Only after it is determined that some period of incarceration is required would the guidelines come into play to assist in the calculation of the length of that period of imprisonment. As a closely related corollary, we support the fundamental principle of parsimony articulated in 18 U.S.C. § 3553(a): sentences ought to be no more severe than necessary to achieve the various purposes of sentencing.

Second, we continue to 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 pled guilty. Thus, we are supportive of amendments that move away from the "real offense" concept and towards sanctioning based upon the offense of conviction. Next, while we find laudable the move toward assuring that similar offenders who commit similar offenses are treated similarly, we still do not feel that the current system affords sufficient opportunity to highlight and weigh legitimate differences and dissimilarities, especially as concerns offender characteristics. Too much emphasis remains on factors such as drug quantities and dollar amounts; too little attention is afforded to who the offender is and what function he/she may have played in the offense.

Fourth, NACDL continues to believe that trial judges should generally be 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. And we believe that the commission should formulate provisions to eliminate some of the other restrictions/limitations on the implementation and application of § 5K1.1 that have been adopted in several districts. The resulting disparity here clearly merits remedial attention.

Additionally, we believe that there have been too many and too many inappropriate changes to the guidelines over the several years of their existence. While we remain advocates for some basic changes and while we will be voicing our support for some of the proposals provided in this round of amendments, 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. Even as our representatives several blocks away debate the potential for assigning billions of dollars for new prison construction, it remains crucial for the commission to 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.

Moreover, we believe that the commission's amendment task this year is complicated by the fact that there still is less than the full complement of commissioners and some significant questions exists as to whether some of the "holdovers" can appropriately vote to amend the system. In the face of those questions and in order to avoid unnecessary litigation, NACDL urges the commission to postpone its consideration

of all proposed amendments until it is at full strength.

In regard to those vacancies, NACDL would like to use this occasion to implore the administration to act swiftly on the appointment process. As we have stated in the past, there remains a distinct need to insure that representatives of the defense bar serve in some capacity on the commission. Whether more appropriately as a commissioner or in an *ex officio* capacity similar to the designee of the Attorney General and the Chair of the Parole Commission, it is time for such an individual to take his or her place at the table. We urge the commission to lend its full support to the effort to secure such a position.

Finally, we are acquainted with the efforts of our colleagues at the American Bar Association to craft a set of proposals concerning certain administrative rules and procedures to guide the commission in the conduct of its business. Without repeating those suggestions here, please permit me to both applaud that significant effort and to note NACDL's support for the general thrust of and the specific details contained therein. We urge the commission to fully explore those matters through the creation of a working group and we ask that a package of recommendations in this regard be included in the next round of amendments. While several of our members already participate within the responsible ABA committees, we pledge our continuing assistance in this endeavor.

Turning now to the amendments and requests for comments as proposed, NACDL offers the following responses:

AMENDMENT 1

NACDL opposes the amendments being proposed here for computer-related crimes as unnecessary and, in certain instances, overly broad. We share the views of (and adopt the comments provided by) the Practitioners' Advisory Group in this regard believing that there exists too little experience with these offenses to as yet craft appropriate guidelines.

AMENDMENT 2

As to 2(A), while favoring the elimination of the Specific Offense Characteristic in § 2C1.3, NACDL believes that the further consideration of the consolidation of this guideline and § 2C1.4 should be deferred pending review of the modification to 18 U.S.C. § 216. As to 2(B), while we have no specific objection to the consolidation of §§ 2C1.2 and 2C1.6, we continue to oppose level increases for more than one gratuity and remain concerned with the eight level increase for an official holding a "high-level decision-making or sensitive position; we believe that the value table and/or departure provisions can better address such matters. And, as to 2(C), NACDL opposes the consolidation of §§ 2C1.1 and 2C1.2. The dif-

ferences between these two offenses are sufficiently substantial as to warrant separate guidelines.

AMENDMENT 3

NACDL would favor the modification of the base offense levels for Blackmail, Bribery Affecting Employee Benefit Plans, and Gratuities Affecting Employee Benefit Plans so that the sanctions for non-public corruption offenses are lower than those for public corruption cases and would oppose any other modification that would tend to equate the levels for those clearly different offenses. We oppose the proposed base offense level increases for §§ 2C1.1, 2C1.2 and 2C1.7 as we believe that non-incarcerative sentences should still be at least available as a potential for some of these offenses; and we favor lowering the offense level for corruption gratuity from seven to five.

AMENDMENT 4

In regard to the proposed changes to §§ 2C1.1 and 2C1.2, NACDL favors Option two which would eliminate the Specific Offense Characteristic addressing more than one incident of bribery/gratuity. With commission data reflecting the fact that the majority of cases receive this level increase, we believe that the continued use of this characteristic serves only to inappropriately increase the sentence for a factor that is already adequately addressed in the value table. Value or benefit of the payment is the better measure of offense severity. Because we favor Option 2, we see no need to comment on 4(B).

AMENDMENT 5

NACDL opposes the proposal in 5(A) to make cumulative the adjustments for the value of the payment and for high-level official in §§ 2C1.1, 2C1.2 and 2C1.7. The results that such a change would produce are clearly more severe than warranted. If, however, the commission were to adopt this proposal, we recommend that the adjustment for high-level official be reduced to two levels, permitting judges to depart in atypical, unusual cases. As to 5(B), while we favor the total elimination of any enhancement that depends upon the position of the bribee, we recommend that such an enhancement, if retained, should not exceed two levels. And, if the commission desires some sliding scale here, then we believe that the range should be from two to six levels with objective criteria developed (and clear examples provided) to guide in their application.

AMENDMENT 6

As to 6(A), NACDL does not object to the proposed clarifications in §§ 2C1.1 and 2C1.7 that the "payment" involved

in the offense need not be monetary. And, while opposing the size of the level increase, we favor the change to § 2C1.7 to clarify that private officials are not considered high-level officials for purposes of this enhancement. As to 6(B), while favoring the definition of "benefit received" as discussed in *United States v. Narvaez*, we remain uncomfortable with the commission's attempts to resolve potentially conflicting circuit interpretations and approaches to guideline issues and would allow the courts more time to address such matters. Finally, as to 6(C), NACDL opposes the proposal to add the potential for an upward departure under § 2C1.1 where the offense involves ongoing harm or a risk of ongoing harm to a government entity or program. Given the fact that the base offense level here (10) is already quite significant, any need to account for such risk can be addressed by the court's movement to a sanction in the higher part of the associated range.

AMENDMENT 7

NACDL does not share the conclusion that the holdings in the three cited cases and the requirements within 28 U.S.C. § 994(d) provide an example of a critical policy matter that warrants immediate commission attention. We believe that issues such as this should typically be allowed to additionally percolate throughout the federal court system before the commission attempts to resolve or bring cloture to them. For the present, we believe that the trial and appellate courts should be permitted to read both 28 U.S.C. § 994(d) and 18 U.S.C. § 3553(b) and then decide for themselves whatever tensions might exist between the two provisions and how to resolve same in the context of the facts and circumstances of the specific case. With the arguable exception of the "Crack" provisions, the commission has significantly and successfully performed its § 994(d) obligation and there exists no present need to revisit that effort for cultural matters in general or for public corruption cases in particular.

AMENDMENT 8

NACDL supports the proposed revisions in the Drug Quantity Table in § 2D1.1 as a step in the right direction. For many of the reasons that are discussed in our introductory remarks herein, we believe that 8(A)'s establishment of level 38 as the upper end of the scale and its keying of the mandatory minimums to the upper end of the guideline range will bring more fairness and rationality into the system as regards these offenses. Having said that, however, we remain convinced that more changes need to be made in order to address the consequences of these sanctions for these offenses as portrayed in the Department of Justice's recently released study of low-level,

non-violent drug offenders. For similar reasons, we would support capping the offense level at 30 for defendants who qualify for a mitigating role adjustment as proposed in 8(C).

As to 8(B), while recognizing that an increased enhancement for weapons and firearms might be used as a "trade-off" for the quantity decreases elsewhere being proposed, NACDL continues to oppose such a change.

AMENDMENT 9

Since the principal impact of this proposal would be to count undercover law enforcement officers as participants in jointly undertaken activity for aggravating role/§ 3B1.1 purposes, NACDL opposes this amendment. We believe that the main flaw in this guideline remains the words "or otherwise extensive," a phrase whose vagueness continues to foster disparate application.

AMENDMENT 10

NACDL welcomes and strongly supports the proposed revisions to the introductory commentary accompanying the Role in the Offense adjustment in Part B of Chapter Three. The clarifying language and examples provided should assist in securing a more consistent application of these adjustments.

As regards the proposed changes to the Application Notes accompanying § 3B1.2 *Mitigating Role*, we are generally supportive of just about all of these useful clarifications. We recommend the deletion of paragraph 4 as too inflexible; the decision as regards the role decrease for "mules" should be made in the context of the specific fact pattern involved. We also recommend against the adoption of either option in paragraph 5 because it inappropriately introduces a factor (use/possession of firearms) unrelated to the concept at hand and because it can be more adequately addressed in other sections of the guidelines (specific offense characteristic). We would also recommend the deletion of the phrase "i.e., value of \$1000.00 or less, generally in the form of a flat fee" in paragraph 2(C); the concept to be addressed here should be "small in relationship to the size of the conspiracy" without any additional specificity.

AMENDMENT 11

In regard to money laundering, NACDL continues to believe that the sanctioning here needs to be revisited and the guideline consequences revised. We continue to agree with the commission's study group that the sentences provided for money laundering conduct should be the same as for the underlying offense where that conduct is essentially the same; we continue to be troubled by the government's attempts to ratchet up sanctions and to inappropriately influence plea bargaining through the use and/or threatened use of the money

laundering provisions. Also, while the proposal here represents the commission's recognition of these problems and a first step to remediate same, it does not go far enough.

AMENDMENTS 12 & 20

NACDL strongly supports the changes proposed in Amendment 12(A) that would result in the elimination of the term "more than minimal planning" as a specific offense characteristic in several guidelines and that would substitute in its stead the term "sophisticated planning." We believe that this change will improve the structure of the guidelines in two significant respects.

First, the continued recognition of planning and preparation as an important factor in assessing relative culpability is consistent with the analysis that the commission conducted on pre-guideline practices. However, it appears that the courts, in interpreting the existing language, have found "more than minimal planning" in virtually all the facts and circumstances that they face. As a result, the basic guideline heartland-type concept of differentiating base offense level cases from others through the use of specific offense characteristic adjustments has seemingly been lost: if all defendants receive the associated level increase for clearly dissimilar quantities/qualities of planning, then the specific offense characteristic serves no function other than to indirectly increase the base offense level. Therefore, adopting the proposed new definition and substituting it within the various guidelines would advance the original intent of the commission in this regard and would promote fairness by providing the courts with a better mechanism to rationally distinguish between offenders and their offenses.

As regards the proposal in 12(B) that seeks to raise the base offense level in § 2B1.1 to the same as that in § 2F1.1, NACDL opposes this change. We maintain that there exists sufficient differences between and amongst larceny and theft cases and fraud and deceit cases (particularly at the low end) as to warrant the current base level differential. We believe that prior practice correctly reflected those differences and that the change proposed would tend to increase disparity by treating dissimilar cases similarly. If, however, the commission were to continue to view the need for seeming consistency as an imperative, then we suggest the formation of a working group to further study the issue. If the results of such a study were to uncover both a real need to harmonize these two provisions and a limited potential for disparate results, then NACDL would support a reduction to the base offense level in § 2F1.1 rather than an increase in that level under § 2B1.1.

Finally, as to 12(C), the commission has sought comment on changing the increments in the loss tables of §§ 2B1.1, 2F1.1 and 2T4.1, offering two options in that regard. The stat-

ed reason for such a change relates to the non-uniform slope of the existing tables. NACDL strongly opposes any such change in the tables. While we do not view the rationale offered as a sufficient reason to undertake such a change, we also remain concerned about the guideline application confusion that such a change would engender. If the commission remains convinced that this type of tinkering is important, we recommend the formation of a working group to establish and demonstrate how the new amount thresholds better differentiate between offenses.

And as to the three items proposed in Amendment 20, we likewise suggest the formation of a working group to study the entire "loss" definition issue. While consistency between §§ 2B1.1 and 2F1.1 might be a legitimate goal, NACDL is not yet convinced that the need exists for the changes being recommended.

AMENDMENT 13

In regard to the various proposals to amend some of the career offender provisions in Chapter Four, NACDL opposes 13(A) with its recommended addition to the Commentary for § 4B1.1. We believe that an offender should not be placed in the career offender category based upon a conviction for a conspiracy to commit a substantive offense or for an attempt to commit a substantive offense.

NACDL does support, however, the remaining proposals: 13(B) would appropriately avoid unwarranted double-counting by defining the term "offense statutory maximum" as the statutory maximum prior to any enhancement based on prior criminal record; 13(C), Option 1 is the more favorable method of ensuring that this provision impacts the "true recidivist" by providing that the offenses that resulted in the two qualifying prior convictions must be separated by an intervening arrest for one of the offenses; 13(D) would correctly eliminate non-residential burglaries from consideration as crimes of violence for § 4B1.2 purposes; and 13(E) serves to appropriately narrow the definition of crimes of violence that "otherwise involve conduct that presents a serious risk of physical injury" to offenses that are similar to the offenses expressly listed.

AMENDMENT 14

NACDL strongly supports this proposal in general and the bracketed language "or combination of characteristics or circumstances" in particular as providing most useful and workable guidance and clarification for the application of the departure provisions of § 5K2.0.

AMENDMENT 15

While NACDL supports all efforts to simplify the opera-

tion of the guidelines, we remain uncomfortable with the long list of changes being proposed herein because we have seen no evidence/data that these particular guideline sections have been the source of confusion and misapplication nor have we been provided with information that these changes will adequately address those problems.

AMENDMENT 16

While believing that it is most appropriate to provide more flexibility throughout the entire system as regards older and infirmed and older, infirmed defendants, NACDL recognizes that this issue does not lend itself to simple, discrete suggestions. It is recommended, therefore, that the commission form a working group (made up of commission and Bureau of Prisons staff and others) to explore this topic and its guideline and statutory ramifications. The goal of such an effort would be, amongst other things, to develop a uniform set of criteria and definitions to inform the initial sentencing decision, to develop similar criteria and definitions for changes in circumstances during the period of confinement and supervision and to develop a mechanism for addressing those changed circumstances in a uniform, expeditious manner. Given the fact that the overall federal prison population is rapidly aging and considering the fact that current legislative initiatives may result in more individuals serving longer periods of time, the need to address this issue in a more systemic manner appears imperative.

AMENDMENT 17

As to the various miscellaneous substantive, clarifying and conforming amendments contained in this item, NACDL supports 17(A) as appropriately clarifying § 1B1.3 through the addition of helpful language in the Application Notes, 17(D) as adding useful definitions for hashish/hashish oil cases, 17(M) as simplifying the application of § 3D1.2, and 17(O) as appropriately clarifying § 5G1.1. As to 17(Q), we support Option 1, providing that a false statement made to a probation officer during supervision is to be treated as a Grade C violation. As to 17(I), since NACDL favors the position taken in *United States v. Concepcion*, we oppose the clarification of the application of subsection (c) of § 2K2.1. As to the remaining proposals herein, NACDL takes no position.

AMENDMENT 18

NACDL continues to strongly support proposals that would limit the use of acquitted conduct for guideline purposes. While we believe that such conduct should also not be used for departure purposes, we credit the proposal offered by the PAG as at least providing more fairness and flexibility than currently exists within the system.

AMENDMENTS 19 & 31

While remaining concerned with some of the *ex post facto* implications of this guideline in general, NACDL supports the proposed changes to § 1B1.10. The minor clarifying revisions and the deletion of subsection (c) should assist the courts and the parties in more easily applying the provisions of this guideline. Additionally, as regards the issue for comment raised within Amendment 31, we would support a further amendment to this section that would provide that, when considering a sentence reduction where the applicable range has been lowered, the amended guideline range is to be determined by using only those amendments that have been expressly designated for retroactive application in conjunction with the manual used at the defendant's original sentencing. The existing provisions here require the use of the current manual in its entirety, effectively (and inappropriately) granting retroactive status to all of the amendments issued subsequent to the original sentencing, both those that might help and those that might harm the defendant.

AMENDMENT 21

NACDL supports this proposal that would treat all attempted conduct similarly, regardless of the language in the title of the applicable statute.

AMENDMENT 22

NACDL strongly supports Option 1 in this proposal crafted to address the limited application of § 5K2.13 *Diminished Capacity* to non-violent offenses. We believe that the favored option provides a more rationale and reasoned approach to the issue and would argue that the second paragraph in the synopsis well captures and explicates our position.

AMENDMENT 23

NACDL opposes the proposed change to § 5G1.3. While the amendment is designed to resolve the difficulty in obtaining information about prior unexpired state and local offenses and the problems in accurately applying such information to the guidelines process, we believe that that difficulty and those problems are overstated and that, in any event, this amendment affords no clear solution. While recognizing that the commission has long struggled with this issue, we see no present need to make an additional change. Moreover, we remain concerned that, while the language appears to afford more flexibility for the imposition of concurrent or consecutive sentences, the other changes contained within will actually require defendants to serve unnecessarily longer and often more disparate periods of incarceration.

AMENDMENT 24

NACDL strongly endorses the proposed change to Note 12 of § 2D1.1 that currently advises that the amount of drugs that was the subject of negotiations determines the offense level save where the defendant establishes that he did not intend *and* was not capable of delivering the negotiated amount. The amendment would change the word "and" to "or" so that either capacity *or* intent can reduce the amount negotiated. Not only would such an amendment speak to the general need to reduce the emphasis on drug amounts, but also such a change would more adequately address the fact that an offender who wants to deliver/buy more, but cannot and/or one who has the means, but does not want to be involved with more is less culpable. Additionally, it would lessen the opportunity for guideline manipulation by case agents and law enforcement officers.

AMENDMENT 25

NACDL supports the revision in Option 1 that would amend § 2P1.1 to conform the definition of non-secure custody in subsection (b)(3) to that used in subsection (b)(2).

AMENDMENT 26

While NACDL does not oppose the distinction being proposed between the base offense level in § 2H2.1 where the defendant corrupts the registration or votes of others and where the defendant corrupts only his own registration or ballot, we remain concerned with that base level remaining at 12 for obstruction of the right to vote by forgery, fraud, theft, bribery or deceit because it exceeds the base offense level of 10 for bribery (§ 2C1.1), a more serious offense.

AMENDMENT 27

NACDL continues to oppose any and all proposals that would attempt to add adjustments or other base offense level increases as a function of membership in or association with a gang, criminal or otherwise. For the present, we believe that the role adjustment in § 3B1.1 is sufficient to address this issue.

AMENDMENTS 28, 29 & 30

While offering no specific comments, NACDL sees no need to amend the guidelines to provide the enhancements or increases being proposed nor does it see the present need to add any additional distinctions or categories within Chapter Four or the Sentencing Table in Chapter Five. Although we have in the past supported the development of a Criminal History Category for those with totally clean records (no arrests and no convictions), we understand and appreciate the commission's position in this regard and do not ask that that decision be revisited.

AMENDMENT 32

While welcoming opportunities to expand the coverage of and the rewards to be received under the provisions of § 2E1.1 even for those defendants who proceed to trial, NACDL opposes this otherwise well intended proposal. The language as proposed is too vague and ambiguous and appears to suggest that those defendants who go to trial and vigorously contest the government's proof by objections, motions, etc., should be placed in a worse situation than those who do otherwise.

AMENDMENT 33

This amendment seeks comment as to the need to explore and then modify the provisions within § 2D1.1 as regards both the ratio between powder cocaine and crack cocaine and the equivalency between marijuana and marijuana plants. NACDL believes strongly that each of these issues merit commission attention and remedial action to eliminate what we perceive as amongst the most grossly unfair, illogical and racially biased provisions of the guidelines. While we recognize that the commission has already commenced a study of the crack cocaine issue, we believe that a similar effort should be undertaken as to marijuana. Additionally, we believe that the commission should likewise urge Congress to revisit these matters and, in the meanwhile, it should on its own at least reduce the sanctions here as regards those drug amounts above the mandatory minimum levels.

AMENDMENT 34

NACDL opposes the creation of a new adjustment within Chapter Three to address harm caused when there is more than one victim. There is no empirical basis available that demonstrates either the need for such an adjustment or the fact that existing provisions (including departures) are inadequate to address this factor. Similarly, we see no need for the creation of a generalized victim table. If data are developed that demonstrate such a need for particular offense categories, the proper way to address such would be the development of a specific offense characteristic for those offenses.

AMENDMENT 35

NACDL opposes the proposal to provide a minimum offense level of 14 for an organized scheme to steal mail. Aside from the ambiguity/vagueness in the proposed language and absent more data in this regard, current base offense levels, increases for the amounts of gain/loss and role adjustments appear sufficient to address this offense conduct. ■

071-94

**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

March 25, 1994

**The Drug Policy Foundation
4455 Connecticut Ave., NW
Suite B-500
Washington, D.C. 20005
202-537-5005**

Testimony of the Drug Policy Foundation
Kevin B. Zeese
Vice President and Counsel
On Amendments to the Sentencing Guidelines for 1994

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.

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.

072-90

NEW YORK COUNCIL OF DEFENSE LAWYERS

565 FIFTH AVENUE, 9TH FLOOR

NEW YORK, NEW YORK 10017

(212) 856-9600

FAX (212) 856-9494

ROBERT C. MORVILLO

PRESIDENT

ANDREW M. LAWLER

VICE-PRESIDENT

ROBERT HILL SCHWARTZ

SECRETARY-TREASURER

March 23, 1994

BOARD OF DIRECTORS:

CHARLES E. CLAYMAN

FREDERICK P. HAFETZ

LEONARD JOY

ALAN R. KAUFMAN

GERALD B. LEFCOURT

ALLISON MANNING

MARJORIE J. PIERCE

HENRY PUTZEL III

JED S. RAKOFF

RONALD G. RUSSO

LAWRENCE J. ZWEIFACH

VIA TELECOPIER

Mr. Michael Courlander
Public Information Specialist
U.S. Sentencing Commission
One Columbus Circle, N.E. - Suite 2500
Washington, D.C. 20002-8002

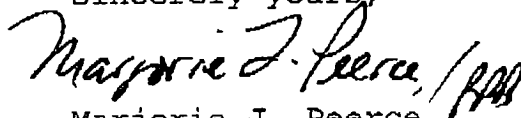
Re: 1994 Guidelines Amendment Cycle

Dear Mr. Courlander:

We are writing to withdraw the New York Council of Defense Lawyers' endorsement of Proposed Amendment No. 32. Upon reconsideration of the proposed amendment and upon reviewing the positions taken by the Practitioner's Advisory Group and the National Association of Criminal Defense Lawyers, we believe the proposed amendment, while well intentioned, can be harmful to other, more important interests. In particular, it inappropriately bases a sentence upon the conduct of a defendant's lawyer in conducting a trial as opposed to the client's conduct and would potentially subject lawyers to criticism by their clients in their trial strategy. The NYCDL therefore opposes this amendment.

Please provide a copy of this letter to all of the Commissioners, and we apologize for any inconvenience this may have caused.

Sincerely yours,



Marjorie J. Pearce



Paul B. Bergman
Co-Chair, NYCDL Sentencing
Guidelines Committee

PBB:hb

072
9

**COMMENTS OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
REGARDING PROPOSED 1994 AMENDMENTS TO
THE SENTENCING GUIDELINES**

Respectfully submitted,

**NEW YORK COUNCIL OF
DEFENSE LAWYERS**

**565 Fifth Avenue
New York, New York 10017
(212) 880-9400**

**Robert G. Morvillo, President
Marjorie J. Peerce and Paul B. Bergman
Co-Chair, Sentencing Guidelines Committee**

March 17, 1994

TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
PROPOSED AMENDMENT NO. 1	
Larceny and other forms of theft (§ 2B1.1; new Application Note 15); possible upward departure for certain computer-related misconduct	2
PROPOSED AMENDMENT NO. 2 (A)	
Consolidation of §§ 2C1.3 (conflict of interest) and 2C1.4 (payment or receipt of unauthorized compensation); the proposed cross reference to § 2C1.3	3
PROPOSED AMENDMENT NO. 2 (B)	
Consolidation of §§ 2C1.2 and 2C1.6 (loan or gratuity to bank examiner, and offering, giving, soliciting or receiving a gratuity)	4
PROPOSED AMENDMENT NO. 2 (C)	
ISSUE FOR COMMENT	
Consolidation of §§ 2C1.1 and 2C1.2	5
PROPOSED AMENDMENT NO. 3	
ISSUE FOR COMMENT	
Whether violators of the bribery and gratuity statutes should be more severely punished	5
PROPOSED AMENDMENT NO. 4 (A)	
Adjustments to §§ 2C1.1 and 2C1.2 (bribery, extortion under color of right; gratuity)	9
PROPOSED AMENDMENT NO. 5 (A)	
§§ 2C1.1, 2C1.2 and 2C1.7; cumulation of the value of the payment and the high-level character of the public official's office	10

**PROPOSED AMENDMENT NO. 5(B)
ISSUE FOR COMMENT**

Redefinition of high-level official in §§ 2C1.1,
2C1.2 and 2C1.7 11

PROPOSED AMENDMENT NO. 6(A)

Clarification of the terms "payment" in §§ 2C1.1
and 2C1.7 and the phrases, "the benefit received
or to be received" and "high-level official" 14

**PROPOSED AMENDMENT NO. 7
ISSUE FOR COMMENT**

Departures (Chapter Five, Part K); issue for
comment regarding departures for reasons such
as cultural characteristics of defendant and
collateral consequences 16

PROPOSED AMENDMENT NOS. 8(A) THROUGH (D)

Drug Trafficking (lower base offense levels
in Drug Quantity Table); role in the offense
(weapon use and injury) 18

PROPOSED AMENDMENT NO. 9

Role in the offense; redefinition of participant
and clarification of the interreaction between
§§ 3B1.1 and 3B1.2 25

PROPOSED AMENDMENT NO. 11

Money Laundering Guidelines, §§ 2S1.1 and 2S1.2 30

**PROPOSED AMENDMENTS NOS. 12(A) AND (B);
ISSUE FOR COMMENT 12(C)**

"More than Minimal Planning"; revision of the
definition; conforming the offense levels under
§ 2B1.1 with those in § 2F1.1 32

PROPOSED AMENDMENT NO. 15(G)

Offense guideline consolidation; §§ 2T1.1 and 2T2.2	40
--	----

**PROPOSED AMENDMENT NO. 16
ISSUE FOR COMMENT**

Aging prisoners	40
---------------------------	----

PROPOSED AMENDMENT NO. 17(A)

Clarification of § 1B1.3 (relevant conduct) with respect to the non-liability of a defendant for actions of conspirators prior to the defendant joining the conspiracy	41
---	----

PROPOSED AMENDMENT NO. 18

Relevant conduct (§ 1B1.3); prohibits use of acquitted conduct in determining guideline offense level; possible basis for departure in exceptional cases	41
---	----

PROPOSED AMENDMENT NO. 22

Diminished Capacity (§ 5K2.13)	43
--	----

**PROPOSED AMENDMENT NO. 31
ISSUE FOR COMMENT**

Retroactivity of amended lower guideline range	44
--	----

PROPOSED AMENDMENT NO. 32

§ 3E1.2 assisting in the fair and expeditious administration of justice (one level decrease)	45
---	----

NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 1994 AMENDMENTS TO THE SENTENCING GUIDELINES

Introduction

Once again, 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 and twenty-five 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 membership also includes attorneys from the Federal Defender offices in the Eastern and Southern 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.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Marjorie J. Pearce and Paul B. Bergman, Co-Chair, and Barry A. Bohrer, Paul Corcoran, Michael S. Feldberg, Linda Imes, Peter Kirchheimer, Martin L. Perschetz, Mark F. Pomerantz, Edward M. Shaw, Minna Schrag, Vivian Shevitz and John J. Tigue, Jr.

PROPOSED AMENDMENT NO. 1

Larceny and other forms of theft (§ 2B1.1; new Application Note 15); possible upward departure for certain computer-related misconduct

A proposed amendment to the commentary to § 2B1.1 (New Application Note 15) would provide for a possible upward departure for obtaining intentional, unauthorized access to financial or credit card information, where a "substantial invasion of a privacy interest" is involved. The commentary goes on to conclude that accessing the records of an individual for non-pecuniary motives may justify an upward departure, while the applicable guideline range would suffice for such intrusions done for pecuniary gain.

We disagree. Indeed, we believe a defendant whose motivation is merely to explore, test the computer's limits or satisfy simple curiosity deserves less severe punishment than the defendant who acts for money. These defendants are, in our experience, generally young, bright individuals exploring the extent of their knowledge. Many of today's "hackers" are yesterdays's youthful pranksters who, because the medium has changed, are now subject to federal prosecution. While there is no doubt that their conduct is wrong, deferred prosecution should be considered and, even if rejected, prosecution is a sufficient deterrent; incarceration is simply not warranted.

In the absence of financial benefit or malicious conduct causing the substantial destruction of property, we

believe no upward departure is warranted no matter how serious the "invasion of a privacy interest."

For the same reasons, the NYCDL opposes the proposed addition of Application Note 10(g) to § 2F1.1 ("Fraud and Deceit"; etc.), which suggests that an upward departure may be warranted if "the offense involved a substantial invasion of a privacy interest."

PROPOSED AMENDMENT NO. 2(A)

Consolidation of §§ 2C1.3 (conflict of interest) and 2C1.4 (payment or receipt of unauthorized compensation); the proposed cross reference to § 2C1.3

The NYCDL opposes the consolidation aspect of the proposed amendment. We agree, however, with the elimination of § 2C1.3(b)(1), the specific offense characteristic which requires a four level increase if the offense involved actual or planned harm to the government. We agree that the factor of actual or planned harm, if it is to be retained at all, is best treated as a possible basis for upward departure, although a cap of four levels should be placed on the extent of the upward departure.

The stated rationale for the consolidation, that all of the statutory provisions have, as their gravamen, the unauthorized receipt of payment for an official act, does not stand up to close analysis. Title 18 U.S.C. § 1909, one of the two statutory references in current § 2C1.4, creates a misdemeanor for a "national bank examiner[]" (and other similarly situated persons), who "performs any other service ..." (emphasis added), for the individuals or entities for whom they regularly

work. By its very terms, therefore, § 1909 is outside the expressed underlying rationale for the consolidation. Moreover, given the misdemeanor level of § 1909 -- which reflects the relative low severity of the conduct -- the consolidation would defeat the statutory purpose of distinguishing between felonies and misdemeanors. The proposed consolidation tends to obliterate that distinction by incorporating § 1909 and, as well, § 209 with the felonies covered by existing Guideline § 2C1.3.

The NYCDL further believes that the proposed addition of cross reference (b) to § 2C1.3 should be rejected. It serves to equate a conviction for the enumerated lesser offenses of the Guideline; i.e., 18 U.S.C., §§ 203, 205, 207 and 208, which do not involve a corrupt element, with those enumerated offenses in §§ 2C1.1 and 2C1.2, which do. As such, the cross-reference seriously dilutes the distinction between vastly different statutory crimes. If the offense involved a bribery or unlawful gratuity then, presumably, the defendant would have been charged with the appropriate crime in the first instance.

PROPOSED AMENDMENT NO. 2 (B)

Consolidation of §§ 2C1.2 and 2C1.6 (loan or gratuity to bank examiner, and offering, giving, soliciting or receiving a gratuity)

The NYCDL opposes this consolidation because it insinuates a series of unwarranted potential sentencing increases for the defendants who run afoul of 18 U.S.C. §§ 212-214 and 217, all misdemeanors. That is in contrast to defendants who have been convicted of 18 U.S.C. § 201(c)(1), a felony level crime

that involves a gratuity given for an official act. The Commission should retain the clear distinction between the two types of criminal conduct, a distinction which Congress has recognized and one which the Commission itself recognized from the inception of the Guidelines.

PROPOSED AMENDMENT NO. 2 (C)
ISSUE FOR COMMENT

Consolidation of §§ 2C1.1 and 2C1.2

The NYCDL opposes any consolidation of the bribery and gratuity crimes under the guidelines. It would, in our view, obfuscate the clear distinctions between those crimes, distinctions which involve the elements of the offenses, the purposes served by distinguishing between the types of conduct, and the statutory penalties; i.e., fifteen years as opposed to two years.

PROPOSED AMENDMENT NO. 3
ISSUE FOR COMMENT

Whether violators of the bribery and gratuity
statutes should be more severely punished

The Commission next invites comment on whether the offense levels for the public corruption guidelines and other guidelines concerning bribes and gratuities appropriately account for the seriousness of the offenses. With the exceptions noted herein, we believe they do. Section 2C1.1 (Offering, Giving, Soliciting or Receiving a Bribe) and § 2C1.7 (Fraud Involving Deprivation of the Intangible Right to Honest Services of Public Officials) currently have a base offense level of 10, while § 2C1.2 (Offering, Giving, Receiving or Soliciting a Gratuity)

and § 2C1.6 (Loan or Gratuity to a Bank Examiner) currently have a base offense level of 7. The current base offense levels are higher than those applicable to other offenses involving fraud and deceit (see § 2F1.1 which applies a base offense level of 6) or commercial bribery (see § 2B4.1 which applies a base offense level of 8). Moreover, the public corruption guidelines utilize the "loss" table of § 2F1.1 to correspondingly increase the offense level as the dollar value of the bribe, gratuity or loss to the government, increases.

In our view, the sentence ranges under the current guidelines already reflect the seriousness of such offenses, subjecting first time, non-violent offenders to significant incarceration. For example, under § 2C1.1, a base offense level of 10 subjects both bribe givers and bribe receivers to 6-12 months incarceration for all offenses involving less than \$2,000. For offenses involving more than \$2,000, the guidelines ranges are amply enhanced through incorporation of the § 2F1.1 loss table. Indeed, as the Introductory Commentary of Part C of the Sentencing Guidelines Manual notes, the current guidelines already provide for sentences which are "considerably higher than average pre-guidelines" sentences for offenses involving public officials. (Federal Sentencing Guidelines Manual, Part C, at p. 86).

Moreover, we believe the current § 2C1.1(b)(2)(B) to be unfair and inappropriately harsh in its application. It provides

for an increase of "8 levels" when the offense involves payment "for purpose of influencing an elected official of any official holding a high-level decision-making or sensitive position." However, under the terms of § 2C1.1(b)(2), application of such 8-level increase occurs only where the resulting sentence would be "greater" than that produced under § 2C1.1(b)(2)(A), which incorporates the loss tables of § 2F1.1 to increase the public corruption offense level based upon the dollar value of either the corrupt payment or the loss to the government. As a result, under the current "alternative" structure of § 2C1.1(b)(2), the 8-level increase of Subdivision B does not apply where the dollar value of the payment or loss is sufficiently high that Subdivision A provides for more than an 8-level increase. Since under Subdivision A the loss tables of § 2F1.1 would increase the offense level by more than 8 levels for all offenses involving more than \$350,000, the provisions of Subdivision B would apply only to a bribe or gratuity of less than \$350,000. Where Subdivision B does apply, there are no gradations of sentences for bribes or gratuities of differing amounts. All such offenses would receive the same 8 level increase. The result is patently inappropriate.

By imposing the same 8-level increase to all "high-level official" offense involving up to \$350,000, § 2C1.1(b)(2)(B) inappropriately lumps together a broad spectrum of conduct without regard to variations in the "seriousness" of the offense. Focusing on the title or job description of the

bribe receiver, the subdivision would apply the same 8-level increase to a \$500 bribe made to effect an insignificant advantage, as it would to a \$200,000 bribe made to obtain a significant government contract. The section thus harshly penalizes a minor offender in comparison to the punishment of one who offers a more significant bribe to a high-level decision maker. To remedy this inequity, we recommend that the Commission delete the provisions of Subdivision B, and apply the § 2F1.1 fraud table to all bribes and gratuities made to governmental officials.

Finally, we oppose both the general recommendation of the Department of Justice that the base offense levels for § 2C1.1, § 2C1.1 and § 2C1.7 be increased, and the specific recommendation that the base offense level of § 2C1.1 be increased from 10 to 14 in order "to prevent any defendant to whom such guideline applies from being eligible for a non-imprisonment sentence". As noted above, we believe the penalties imposed by the current guidelines are more than sufficiently geared to the seriousness of the offense, utilizing the loss table of § 2F1.1 to increase the sentence as the dollar value of the payment or loss to the government increases. The Department's specific recommendation that the guidelines for § 2C1.1 be increased to a base of 14 in order to prevent sentences of non-imprisonment is particularly inappropriate. We believe the Department's proposal would contravene the congressional mandate set forth at 28 U.S.C. § 994(j), which

directs the Commission to insure that the guidelines reflect the appropriateness of a sentence other than imprisonment for a non-violent first offender. Moreover, a base offense level of 14 for § 2C1.1 offenses would have draconian results. Bribes involving only a few hundred dollars to low-level government employees would result in a guideline range of 15-21 months, while payment of the same few hundred dollars to a high-level official would result in a guidelines range of 41-51 months. Offenses involving \$2,000 or more would increase upward from the base offense level of 14 in accordance with the § 2F1.1 table. We believe the resulting sentences would be inappropriately high. And we are aware of no sentencing abuses which would justify depriving the district courts of the discretion to impose appropriate probationary sentences for small-dollar offenses by first-time offenders.

PROPOSED AMENDMENT NO. 4(A)

Adjustments to §§ 2C1.1 and 2C1.2 (bribery, extortion under color of right; gratuity)

We support the adoption of Option 2 of the Proposed Amendment 4(A), which would eliminate the two-level increase under §§2C1.1 and 2C1.2 for offenses involving more than one bribe or gratuity. According to the Commission, multiple bribes or gratuities are typically associated with larger volume or larger benefit offenses. Those offenses are already the subject of enhanced sentencing based upon dollar value. As the two level increase of § 2C1.1(b)(1) and 2C1.2(b)(1) are "substantially duplicative" of the dollar value enhancement, they should be

eliminated in accordance with Option 2 to Proposed Amendment 4 (A) .

Consistent with the NYCDL's view that Option 2 is appropriate, we believe that the discussion of adjustments for multiple payments in §§ 2C1.1(b)(1) and 2C1.2(b)(1) should be the subject of a proposed amendment during the next cycle, one which would eliminate mere multiplicity as a sentencing factor.

PROPOSED AMENDMENT NO. 5(A)

§§ 2C1.1, 2C1.2 and 2C1.7; cumulation of the value of the payment and the high level character of the public official's office

As noted in our comment to Proposed Amendment 3, supra, at p.5, the "alternative" application of the "value of payment" and "high level official" adjustments under §§ 2C1.1, 2C1.2 and 2C1.7, creates an inappropriately harsh result with regard to lower value, lower payment offenses. Under the current § 2C1.1(b)(2)(B), an offense involving a high-level official receives an 8 level increase only where such increase would be "greater" than the value of payment or benefit increase applicable under § 2C1.1(b)(2)(A). Subdivisions A and B of § 2C1.1(b)(2) are applied alternatively to effect the "greater" sentence. Since Subdivision A would result in more than an 8-level increase only where the value of the payment or benefit exceeded \$350,000 (see "loss table" under § 2F1.1), Subdivision B would be "greater", and would therefore apply, only where the value of the payment or benefit was less than \$350,000. Thus, under the "alternative" approach of the current guidelines,

value-graded sentencing would occur only with regard to offenses involving \$350,000 or more. For offenses involving less than \$350,000, all high-level official cases would receive the same 8-level increase. An 8-level increase would apply to a \$500 bribe as well as to a \$250,000 bribe. Moreover, it would make no difference whether the bribe-affected official acts were significant or insignificant, material or immaterial. If the value of the payment or benefit were less than \$350,000, the same 8 level increase would apply.

We believe value-graded sentences are more appropriate in all public corruption cases. Subdivision A of § 2C1.1(b) (2) accomplishes that end by incorporating, for offense level determination, the loss tables of § 2F1.1. Subdivision B makes no such value-graded distinctions. By applying both Subdivisions A and B to every high-level offense, the proposed "cumulative" approach would effectively adjust all sentences to reflect the value of the payment or benefit. If, however, the cumulative approach is adopted, we believe the high-level adjustment should be no more than 2 levels, since the value of payment or benefit adjustments will already reflect, with enhanced sentencing, the seriousness of the offense.

PROPOSED AMENDMENT NO. 5(B)
ISSUE FOR COMMENT

Redefinition of high-level official in §§
2C1.1, 2C1.2 and 2C1.7

The Commission has invited comment on whether the definition of high-level official in §§ 2C1.1, 2C1.2 and 2C1.7

should be modified to facilitate a more consistent application of the high-level official adjustment. Noting that the 8-level adjustment is "relatively large in comparison with most guideline adjustments", the Commission also invites comment on (1) whether the adjustment should be reduced by 2-6 levels to limit the frequency with which the adjustment results in sentences of the statutory maximum; (2) whether the adjustment should be modified to provide different adjustment levels [2-12] depending upon the "level of authority, responsibility, salary or other characteristics of the public official involved"; and (3) whether instead of, or in addition to, modifying the current 8-level adjustment, the Commission should amend the commentary to authorize or recommend either upward or downward departure in specific cases.

We reiterate the recommendation made above, supra, at pp.7-8, that the Commission should consider deleting the high-level official adjustment from the public corruption guidelines. We believe the high-level official adjustment to be vague, difficult to apply, and unnecessary. As the Commission's invitation to comment indicates, the application of the high-level official adjustment would require extensive modification of the current guideline to provide graded adjustments based upon such things as the "authority, responsibility, salary [and] other characteristics of the public officials involved."

Moreover, even if a comprehensive modification could be

effectively drafted, the "high-level official" adjustment would still be inherently unfair. Focusing on the title or authority of the official involved does not solve the problem. The seriousness of the offense turns more directly on the nature of the official act being affected. Most high-level officials have a multitude of duties and responsibilities. Some duties are more significant than others. Thus, a bribe relating to a ministerial function of a high-level government official would appear to be less serious than a bribe affecting the principal decision-making function of the office. For example, a \$5,000 bribe to expedite a valid immigration matter would appear less serious an offense than a \$25,000 payment to drop a prosecution or fix a sentence. Yet, both payments may be made to officials who, by definition, are high-level officials.

In the view of the NYCDL, the title or job description of the official has less to do with the seriousness of the offense than the nature of the decision or function affected. The latter is more likely to be reflected in the dollar amount of the corrupt payment -- a factor readily made part of the sentence through use of the § 2F1.1 loss table, as per § 2C1.1(b)(2)(A). Accordingly, we urge the Commission to focus on the value of the payment or benefit adjustment, to the exclusion of the high-level official adjustment. As the seriousness of the offense is adequately reflected in the value of the payment or benefit adjustment, grappling with the definitional difficulties inherent in the high-level official adjustment would seem wholly

unwarranted.

PROPOSED AMENDMENT NO. 6 (A)

Clarification of the terms "payment" in §§ 2C1.1 and 2C1.7 and the phrases, "the benefit received or to be received" and "high-level official"

The NYCDL believes that it is unnecessary and confusing to define "payment" to mean "anything of value" in Application Note 2 of Guideline § 2C1.1. Section 2C1.1(b)(2)(a) already states: "If the value of the payment," If the definitional phrase is added, the foregoing phrase will necessarily mean, "If the value of anything of value ...", a result which would be essentially meaningless because of its redundancy. Perhaps the best way to solve the perceived problem is to change the guideline expression, "If the value of the payment," to "If the thing of value," a phrase which roughly coincides with the statutory language "anything of value" found in 18 U.S.C. § 201(b).

We also oppose the expanded definition of the phrase "the benefit received or to be received," to include, "...the loss that would have been caused[] to the victim had the victim not made the extorted payment." We question the wisdom and need of expanding the definition of the phrase, "the benefit received or to be received" (emphasis added) to include the concept of "loss." In the Guideline itself, the word "loss" is used only with respect to the "loss to the government." Thus, the Guideline reflects the primary notion that, insofar as "loss" is a measurement of harm, it is the harm to the government which is

considered. The suggested change in the proposed language in the Application Note introduces an entirely new element of harm which is absent from the Guideline itself. Worse, from a strictly definitional standpoint, it serves to convert the word "benefit" into the functional equivalent of "loss;" we believe that such an "expanded" definition will cause too much confusion. No logical system of definition can withstand definitional ingredients which are so inconsistent.

Apart from these objections, we also oppose the substantive idea of including the "loss that would have been caused ... had the victim not made the extorted payment," because, more than anything else, it seems just another way of rummaging for a higher loss calculation and, we add, one which is uncertain in the extreme. Because of the inherent uncertainty in such a calculation, it allows the most fanciful of claims, including the assertion that the victim would have lost his or her entire business had a particular contract not been awarded. What would be the consequential loss in that circumstance? Moreover, such a consequent "loss" would be unforeseeable and introduce elements of punishment which are not part of the criminal transaction itself. In other respects, the Commission has rejected including relatively remote, unforeseeable factors from the "loss" calculation; in fact, only last year, § 2B1.1, Application Note 2, was amended to provide that "loss does not include the interest that would have been earned had the funds not been stolen."

PROPOSED AMENDMENT NO. 7
ISSUE FOR COMMENT

Departures (Chapter Five, Part K); issue for
comment regarding departures for reasons such
as cultural characteristics of defendant and
collateral consequences

In United States v. Aguilar, 994 F.2d 609 (9th Cir.
1993, opinion withdrawn, rehearing granted en banc September 2,
1993), the court held that a sentencing court may depart downward
in cases in which "additional punishment" is likely to result
from conviction of a kind or to a degree the Commission did not
adequately take into account when formulating the guidelines.

The NYCDL believes that such departures should be
permitted in cases which are not "inconsistent with the
guidelines' policy that disparity in sentencing would not be
occasioned by socio-economic factors", i.e., not based on wealth,
privilege or status in society (U.S.S.G. § 5H1.10). Where
substantial additional punishment is likely to result from
conviction for the crime for which the defendant is sentenced
(i.e., beyond imprisonment, fine and forfeiture), sentencing
courts should be permitted to grant downward departures.

In Aguilar, the defendant was likely to be impeached,
to forfeit his pension which was worth over \$1 million and to be
disqualified from holding any future government appointive
position.

Various state laws frequently impose substantial
additional punishment on convicted felons. Defendants who hold
or wish to hold state issued licenses are often prevented from

doing so by a felony conviction. Additional punishment in the form of a suspension, revocation or disqualification of license is regularly meted out to certified public accountants, dentists, medical doctors, lawyers, stock brokers, investment advisors, hair dressers, taxi drivers, architects, holders of liquor licenses, gambling casino operators, real estate brokers, morticians and many other licensed persons.

Convicted felons are often precluded from bidding on government contracts, prohibited from holding public office, being fiduciaries, holding government jobs and, can be deported, under certain circumstances. These punishments are in addition to the laws of some states which take away the convicted felon's right to vote or to serve on juries.

Convicted lawyers and certified public accountants are subject to discipline by the office of director of practice of the Internal Revenue Service. Defendants convicted of tax evasion are collaterally estopped from litigating issues relating to underlying tax liability, interest and various penalties. Felony convictions are often admissible in subsequent related legal proceedings such as law suits and disciplinary proceedings.

Indeed, corporations (especially publicly held corporations) successfully argue that the prospective collateral consequences are so severe that they avoid prosecution altogether. These additional punishments are in many cases far more severe than a prison sentence and a fine.

Defendants who demonstrate fact-specific substantial

additional punishment should be able to present these factors to the sentencing court to arrive at a "just punishment for the offense" 18 U.S.C. § 3553(a)(2)(A), including a downward departure.

PROPOSED AMENDMENT NOS. 8(A) THROUGH (D)

Drug Trafficking (lower base offense levels
in Drug Quantity Table); role in the offense
(weapon use and injury)

This proposed amendment contains a number of different parts. When combined, the amendments would generally reduce the offense level for all drug crimes if quantity alone determines the level, "caps" the level for any defendant who qualifies for a mitigating role adjustment, and adds enhancements, either by way of a special offense characteristic or a "special instruction", for use of a weapon or injury in connection with the offense. We endorse the concept of keying a sentence more to offense characteristics than to the quantity of drugs "involved" in an offense. Such adjustments more appropriately deal with gradations of seriousness in offenses than increases due solely to the quantity of drugs involved. However, we have some problems with specific proposals, which we discuss separately.

AMENDMENT 8(A)

Proposed Amendment 8(A) reduces the Drug Quantity Table generally, keying the statutory mandatory minimums to a lower Guideline offense level, which would permit lower sentences where there is no enhancement for role or for a weapon. Thus, the Drug Quantity Table, as initially developed, keyed the offense level

for an offense involving one kilogram of heroin, which carries a statutory 10-year mandatory minimum, at a level 32 (121-151 months), and for 100 grams of heroin, which carries a 5-year statutory minimum, at a level 26 (63-78 months). These levels were selected, according to the Commission, because the Guideline ranges include the 5- and 10-year required sentences.

Proposed Amendment 8(A) reduces the offense level to a lower Guideline range that also includes the 5- and 10-year required sentences. One kilogram of heroin (and corresponding amounts of other drugs) would now be reduced from a level 32 to a 30 (97-121 months), and 110 grams of heroin would be reduced from a level 26 to a 24 (51-63 months). In addition, the proposed amendment "caps" the Drug Quantity Table at level 38, instead of level 42.¹

We agree fully with the purpose of the change, which contemplates that in drug cases it is more appropriate to increase a sentence based on characteristics other than quantity. This would include the possibility of a 4-level increase for an

¹ Actually, it completely omits the "top" category -- which now includes 300 kilograms or more of heroin or 1500 kilograms or more of cocaine. The present table placed those quantities at a level 42. For quantities including 100 - 300 kilograms of heroin and 500 - 1500 kilograms of cocaine, the present level is 40.

The largest quantities contained in the proposed amendment's Table is the current second level, including 100 - 300 kilograms of heroin and 500 - 1500 kilograms of cocaine. Instead of a level 40, the proposed level would be 38.

Quantities are otherwise changed slightly, as well. We do not comment on the specific changes, except to register our belief that quantity is generally a poor measure of culpability.

organizer or a leader of a large operation, and a 2-level weapon enhancement. We agree that such characteristics provide a far more sensible measure of culpability than quantity, since the amount of drugs distributed by any organization does not necessarily speak to the culpability of all of the participants in the venture.

AMENDMENT 8(B)

Proposed Amendment 8(B) pertains to a proposed enhancement where weapons are used in a drug offense or where someone is hurt. The proposal sets forth two different options for an enhancement. While it is rational to punish an offender more severely when a weapon is used or when harm results than when there is no such injury or threat of injury, we oppose both of the proposed options as they stand now, because of potential enhancements they could so vastly increase a sentence based on conduct that constitutes a separate substantive offense. Where conduct that forms a separate offense potentially increases a sentence manifold, we believe that an enhancement should not be applied without a conviction by proof beyond a reasonable doubt.

Option one would thus provide that, in addition to the current 2-level increase under § 2D1.1 for possession of a dangerous weapon (including a firearm), there would be, by way of a "specific offense characteristic", a 4-level increase where a "firearm was discharged or a dangerous weapon (including a firearm) was otherwise used. The proposal also provides for a 2-level increase where "the offense resulted in serious bodily

injury."

While we do not oppose a 2-level increase where "the offense resulted in serious bodily injury" -- a circumstance which we think is straightforward enough so that it will not be stretched beyond the apparent intendment of direct harm -- we do oppose expansion of a weapon adjustment beyond the current two points presently allowed. A four-level adjustment could potentially alter a defendant's sentence by some 50% or perhaps more. We think such an adjustment is inappropriate where the adjustment is based on conduct that can be charged as a separate violation of law.

Use of a firearm during a drug transaction could thus be charged as a violation of 18 U.S.C. § 924(c). Discharge could be charged as attempted murder or assault, if warranted. 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 firearm adjustments that carry significant additional penalties, 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.

We further believe that any adjustment should be limited so that it does not reach those who are not truly firearm offenders. Thus, an adjustment should be applied, if at all, only when the defendant himself "actually possessed" or discharged a gun, or where he "induced or directed another

participant" to do so. Given the statements of many courts that "guns are tools of the narcotics trade", any adjustment that is not so limited is potentially abusive in its overinclusiveness. For these reasons, we oppose that portion of option one of Proposed Amendment 8(B) that would add a 4-level enhancement for discharge or "use" of a weapon.

Worse, however, is Option Two of Proposed Amendment 8(B), which we oppose categorically. That proposed option would add as subsection (e) a "special instruction", which requires the computation of an offense level for conduct "involved" in a drug offense which amounts to "an attempted murder or aggravated assault", as if it were a separate "count." The amendment would prohibit the grouping of this "count" with the underlying drug offense (as per section (e)(1) Note (B), quoted below).²

² Specifically, the proposal states:

(e) Special Instruction

- (1) If the offense involved an attempted murder or aggravated assault, apply § 2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) or § 2A2.2 (Aggravated Assault) as if the defendant had been convicted of a separate count charging such conduct.

Notes:

- (A) This instruction is in addition to, and not in lieu of, the application of subsection (b)(1) [which provides for a 2-level increase for possession of a dangerous weapon].
- (B) The "count" established under this instruction is not to be grouped with the count for the underlying controlled substance offense under § 3D1.2
- (C) For the purposes of this instruction, the

Where a small amount of drugs is involved, this proposed "instruction" would allow the tail to wag the dog, so to speak, by allowing an increased period of incarceration based on evidence of a serious assault crime not proven beyond a reasonable doubt, and which allows (potentially) an offense level much greater than the drug offense out of which the "assault" grew. This we think should be impermissible, especially when treated as a "count." It is one thing to add points; it is another thing to possibly overshadow a conviction by making conduct proven only by a preponderance of evidence into the "prevailing" "count." (We address a comparable issue of concern in our discussion of Proposed Amendment No. 18, dealing with the use of acquitted conduct to increase sentences) infra, at p. __.

We all agree that people who assault or attempt murder during the commission of a drug offense, or for that matter any time, deserve to be punished more severely than those who do not. Because Option Two of Proposed Amendment 8(B) dispenses with this notion by allowing punishment as if a "count" had been proven, while at the same time, allowing for vastly increased punishment because of higher offense levels under the referenced Guidelines than for an underlying drug offense involving relatively small quantities, we oppose Option Two entirely.

discharge of a firearm under circumstances that create a substantial risk of serious bodily injury, even without the specific intent to cause such injury, is to be treated as an aggravated assault.

AMENDMENT 8 (C)

Part (C) of Proposed Amendment 8 places a ceiling (of either 32 or 30) on drug offense levels where a defendant receives a mitigating role adjustment. While we believe that the "cap" may not be low enough, we agree completely with the principle that there should be a limitation on the offense level for minimally culpable individuals. As stated by the Court of Appeals in United States v. Restrepo, 936 F.2d 661 (2d Cir. 1991), an offense level may be "extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense." That is certainly the case where a minimally involved defendant gets "caught up" in a drug organization that may be responsible for mega-kilos of drugs.

Moreover, it serves no useful purpose to "over-punish" the typical drug offender who merits a mitigating role adjustment. Many of the offenders who have been the beneficiaries of these minimal role adjustments are foreigners who have no knowledge or understanding of the laws of this country or of the risk that they take in performing the task of carrying drugs. In a very real sense, therefore, the punishment of these individuals with long sentences would not be a general deterrent at all. Moreover, there are few "repeat offenders" within this category. Hence, individual deterrence is not served by increasing a sentence beyond some minimal term of certain incarceration. We thus fully support a "cap" on the offense level for an individual with a mitigating role adjustment.

AMENDMENT 8 (D)

Finally, subsection (D) invites comment on whether the Commission "should deemphasize the impact of drug quantity on offense level by using a broader range of quantity at each level in the offense table, and instead provide greater enhancements for weapons or violence." Once again, we strongly endorse "deemphasizing the impact of drug quantity"; but we cannot endorse "greater enhancements" for conduct that constitutes an offense, where that offense is not proven beyond a reasonable doubt. The answer, of course, is not to keep the emphasis on drug quantity; rather, it is to encourage prosecutors to charge and prove offense conduct beyond a reasonable doubt where such conduct, including use of weapons and violence, justifies a heavy sentence.

PROPOSED AMENDMENT NO. 9

Role in the offense; redefinition of
participant and clarification of the
interreaction between §§ 3B1.1 and 3B1.2

§ 3B1.1 Aggravating Role

The NYCDL opposes the proposed amendment to aggravating role. Generally the amendment would lower the number of participants in an offense required to trigger the four level organizer/leader enhancement or the three level manager/supervisor enhancement from five participants to four participants.

This change has no rational basis. It is simply a reflection of "guidelines creep," every year slightly increasing

the severity of sentences. There is no rational basis to choose four participants in a crime as trigger for organizer or manager rather than the present five. The trigger could as easily be three or six.

The current structure of the aggravating role provides for enhancement of organizers, leaders, managers or supervisors for those involved in groups smaller than five. It is a two point enhancement. Thus these lesser leaders of smaller groups made up of four, three or two participants are enhanced. However they are enhanced two points. The only reason to change the triggering number for the larger number is to generally increase severity.

We also oppose Proposed Application Note (1)(B) which would include participants in the number triggering role enhancement regardless of whether those participants are criminally responsible. This dilutes the concept of higher moral culpability because of higher degree of responsibility. There is a qualitative distinction between supervising fellow criminals and supervising innocents. It is not the supervision of more numbers which increases the moral culpability. Essential to the concept of increased culpability for supervision is the fact that the actor takes responsibility for other criminals. Dilution of the requirement that supervisors be criminally responsible is a dilution of the culpability.

We endorse Application Note 4 which clarifies that the supervisor enhancement should not apply to those otherwise worthy

of mitigating role reductions. If a person's responsibility is so low as to merit reduction, limited supervisory authority does not signify enhanced culpability.

§ 3B1.2 Mitigating Role

The NYCDL opposes eliminating the compromise language permitting a three level decrease if the conduct falls between minor and minimal role. There is no reason to limit flexibility and discretion eliminating the possibility of compromise where the mitigating conduct is truly equivocal. The only explanation of the removal of the compromise language is a desire to further limit judicial discretion.

We oppose the removal of prior Application Notes 1 through 3. A body of caselaw and practice exists applying these definitions. Change will merely re-introduce disparity and uncertainty by invalidating prior court applications of those definitions. The proposal stems from dissatisfaction with the result of comparative definitions of role. To us it seems to work.

Proposed Application Notes (2)(A) and (2)(B) defining mitigating role as unskilled and without decision making authority make sense although it is not clear why the addition is necessary. Proposed Note (2)(C), limiting reduced role to cases where compensation is under \$1,000 is pointless. The concept of mitigating role is comparative. Setting an absolute ceiling rather than a relative one would destroy this structure. The

dollar number makes no sense. In a multi-million dollar case of money laundering by a bank the number is too low. In a small stolen check case the number is so high as to be irrelevant. Proposed Note (D), absolutely barring role reduction for those who did any supervision directly contradicts proposed note four to 3B1.1. For the reasons set forth within that note we feel (D) is wrong.

We note our strongest opposition to Proposed Application Note 4 which bars minimal role adjustment for anyone who transports narcotics. This regularly aired proposal appears aimed in part at the hundreds of intestinal smuggler cases at JFK Airport in the E.D.N.Y. These cases are the arch typical minimal role. These defendants swallow cocaine and heroin wrapped in condoms to import it into the U.S. Subsequently they retrieve the drug filled condoms from their bowel movements. The entire process from start to finish is disgusting and degrading to the defendants. Moreover it is highly dangerous to the courier. Blocked intestines and burst balloons which spill large amounts of drugs into their bodies occur regularly. This requires emergency surgery. Numbers of these couriers die. The manner of apprehension of these mules frequently demonstrates their minimal involvement. They are often apprehended after the customs inspector notices these novice criminal's extreme nervousness. Alternatively they arrive knowing no English, without funds, not knowing where they are going. The owners of the drugs do not trust them with this knowledge.

The couriers are usually paid small amounts of money. They are usually met upon arrival. They are rarely aware of the extent of the conspiracy beyond the recruiter. They are frequently from rural parts of Latin America or Africa with no awareness of the nature of this country's drug problems or of the significance and impact of their acts. Most are deported after serving their sentence and permanently barred from re-entry into the U.S.

These mules almost always meet all minimal role definitions. It appears that the purpose of application note six is directly aimed at increasing the sentences of the minimally involved intestinal carriers. Yet these first offenders are non-violent people who frequently will never be permitted to return to the U.S. and therefore bear little threat of future danger to the public. There is common agreement among prosecutors, the defense bar and judges in the E.D.N.Y. that these mules are the definition of what constitutes minimal involvement.

The NYCDL opposes Application Note 5 which would bar role reduction for anyone with a gun. Firearms are punished by severe firearms enhancements throughout the guidelines as well as in the code itself. Presumably, role reductions for weapons carriers are rare because the act of carrying a weapon usually betokens a significant role. In the rare case where such a person has a mitigating role, the mitigation should apply. The weapon enhancement will also apply. A less culpable weapons carrier should be punished less severely than a more culpable

weapons carrier.

Proposed Application Notes 6 and 7 are unnecessary if original notes one through three are maintained. This significant definitional change will add uncertainty and invalidate caselaw based on the comparative prior definition.

Proposed Application Note 8 is redundant. It is a first principal of Federal sentences that the court should consider all available facts. It would make a mockery of the right to allocution if the court could not consider a defendant's assertions. It is inconceivable that a court would feel bound to credit a defendant's assertion which it felt lacked credibility.

PROPOSED AMENDMENT NO. 11

Money Laundering Guidelines, §§ 2S1.1 and 2S1.2

The NYCDL is in basic agreement with the Commission's Proposed Amendments of the money laundering guidelines. According to the Commission's synopsis of Proposed Amendment 11, it "revises and consolidates" §§ 2S1.1 and 2S1.2, the guidelines associated with 18 U.S.C. §§ 1956 and 1957, and "relat[es] the offense levels more closely to the offense level of the underlying offense from which the funds were derived."

Both §§ 1956 and 1957 violations would be sentenced under the consolidated guideline, "new 2S1.1." New § 2S1.1 has a base offense level of the greater of (1) 8 plus the number of levels that would be added for a fraud of the same amount of money as the laundered funds; (2) if the defendant knew or believed that the funds were drug money, 12 plus the number of

levels that would be added for a fraud of the same amount of money as the laundered funds; or (3) the offense level of the underlying offense. If the defendant knew or believed that the transactions were designed to conceal criminal proceeds or promote criminal activities, the guideline adds 2 levels. If the defendant knew or believed that the transactions were designed to conceal criminal proceeds and used sophisticated means such as offshore banks, the guideline adds 2 more levels.

The Commission appears to be engaged in a long term project of guidelines simplification, of which Amendment 11 is an example. The difficulty with the project is that it transforms elements of the offense into sentencing factors. Section 1957, with a statutory maximum of ten years, is effectively a lesser included offense of § 1956, which carries a statutory maximum of 20 years. Under the new guideline, the government could convict a person on two counts of depositing criminal proceeds in the bank, then establish the elements of "actual" money laundering as guidelines enhancements by a lesser standard of proof, resulting in the same sentence as if it had proven one or more counts of "actual" money laundering. We question the advisability of trading the government's burden of proof for the advantage of fewer guidelines.

We strongly support the Commission's proposal to lower the base offense levels. Under new § 2S1.1, base offense levels are computed starting at 8, 12, or the offense level of the underlying offense; under the current guidelines base offense

levels are computed starting at 17, 20 or 23. However, it is unclear how the Commission arrived at its determination that money laundering is more serious than other financial crimes. For proceeds over \$100,000, new § 2S1.1 uses the same enhancement as the fraud table, but starts with a base offense level of no less than 8, as opposed to a base offense level of 6 for fraud. Thus, the Commission implies, without explanation, that a person who launders \$100,000 is two offense levels worse than a person who defrauds another of \$100,000. That two offense level difference could be critical in the case of two defendants who are otherwise equally culpable for their criminal conduct; both should have the equal opportunity for a non-incarcerative sentence if they are first time offenders.

**PROPOSED AMENDMENTS NOS. 12(A) AND (B);
ISSUE FOR COMMENT 12(C)**

"More than Minimal Planning"; revision of the definition; conforming the offense levels
under § 2B1.1 with those in § 2F1.1

(1)

The abandonment of "more than minimal planning" as a specific offense characteristic resulting in an enhancement of the offense level is welcome. Under the current Guidelines, merely engaging in "planning" that was "more than minimal" results in an enhancement. This presents too low a standard for increasing the offense level and too high a likelihood of enhancement for "planning" that is typical for the offense under consideration. The examples contained in the Notes to the current Guidelines also manifest too heavy an emphasis on repeat

conduct, such as multiple instances of individual takings of money or property pursuant to a single scheme, as a basis for enhancement for "more than minimal planning."

Particularly in the context of economic crimes, planning is virtually always more than "minimal," and therefore has already been taken into account by the Guidelines in arriving at the base offense level. The proposed amendment seems to recognize that a higher level of planning that creates a materially greater danger to the public or a significantly greater obstacle to detection by law enforcement should be present if an enhancement is to be applied on the basis "planning."

The semantic device utilized in the proposed amendment to accomplish this purpose is the term "sophisticated planning," which would replace "more than minimal planning" as the basis for the two-level enhancement. We endorse that change. More significant than the change in terminology, however, are the definition and examples of "sophisticated planning" set forth in the proposed amendment. "Sophisticated planning" is described as "planning that is complex, extensive, or meticulous," as opposed to merely "more planning than is typical for commission of the offense in a simple form," the definition under the current Guidelines for "more than minimal planning." This is an appropriate change, reflecting the notion that an enhancement will no longer result merely from planning that goes beyond that which would be expected in connection with the simplest, most

basic "form" of the committed crime.

On the other hand, as made clear by the Application Notes in the Commentary to the version of § 2F1.1 contained in the proposed amendments, the purpose underlying any enhancement at all on the basis of an increased level of planning is that "[t]he extent to which an offense involved sophisticated planning is related to the culpability of the offender and often to an increased difficulty of detection and proof." In light of this purpose for imposing the enhancement, it would seem preferable to be more specific about this goal in the definition of "sophisticated planning." There may be instances in which planning is "complex, extensive, or meticulous" but poses no materially greater danger or threat to the public or victims, no materially more significant obstacle to detection and proof, and reflects no materially greater culpability on the part of the defendant, than planning that is less "sophisticated." Thus, the Guidelines should provide that enhancement shall take place only where the increased level of planning is intended to and does pose a materially greater threat or danger to the public or specific victims, or a materially more significant obstacle to detection or proof, or does reflect a materially higher level of culpability under the circumstances. In the absence of such factors, there seems little reason for an offense level enhancement.

The examples of "sophisticated planning" contained in the Application Notes attendant to the proposed amendment appear

to reflect an intention to require a significantly higher level of planning that poses a materially greater danger or threat, or obstacle to detection or proof, or reflects a higher level of culpability, as the trigger for the enhancement.³ The notes indicate, for example, that merely making a false entry in books and records would not constitute "sophisticated planning." Rather, maintaining two sets of books, engaging in transactions through corporate shells, and similar types of conduct -- by their nature involving greater effort over a longer period of time for the specific purpose of avoiding detection -- would constitute sophisticated planning warranting an enhancement. This is an improvement over the existing Guidelines, which trigger an enhancement under the "more than minimal planning" standard.

(2)

The NYCDL opposes any increase in the base offense level for larceny, embezzlement and other forms of theft from 4 to 6. § 2B1.1(a). The stated purpose of Amendment 12(B) is to conform the offense levels of those crimes covered by § 2B1.1 with the crimes encompassed by the fraud and deceit guideline, § 2F1.1. In order to carry forward that goal of conformity, the amendment would also revise the theft loss table to parallel the monetary and offense level equivalents in the fraud table.

³ The first such note, in connection with an assault, appears to refer mistakenly to an example of "more than minimal planning." Presumably, this phrase should be changed to "sophisticated planning."

Succinctly stated, the NYCDL believes that the fraud and theft tables can be brought into conformity without, at the same time, raising the base offense level for crimes covered by § 2B1.1. That could be accomplished by lowering the base offense level for fraud crimes from 6 to 4 and, at the same time, conforming the fraud and theft tables.

The NYCDL believes that a raise of the § 2B1.1(a) offense level to 6, if ultimately coupled with a conforming table change, as set forth in the issue for comment, i.e., 12(C), will 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 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.⁴

If the proposed changes in the theft and fraud tables are enacted, as suggested in the issue for comment, too many first-offenders will wind up in federal prisons. According to the tables suggested in the issue for comment, any offender who is involved with a loss of more than \$4,500 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 \$15,000 generates a minimum offense level of "11", requiring a prison sentence unless some other deduction is applicable.

Increasing offense levels 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

⁴ The present 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 month. 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.

typical defendant in such cases -- 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 tables suggested in 12(C) which reduce further the loss threshold at the door of the federal prison cell, would be unwise and contrary to congressional intent. Those 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. To the extent this phenomenon reflects the imprisonment of first-time

offenders who steal relatively minor amounts of money, it is deplorable, and the proposed tables in 12(C) would only make matters worse because offense levels would be increased by one level, across the board.

An additional problem with the proposed loss tables for theft and fraud cases is that they perpetuate 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 \$50,000 would be slotted into one of eight pigeon holes. 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. 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 Guidelines ought to draw distinctions that turn on whether the defendant steals \$1,500 as opposed to \$2,500 or \$4,500, 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 order 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.

PROPOSED AMENDMENT NO. 15(G)

Offense guideline consolidation; §§ 2T1.1 and
2T2.2

Proposed Amendment 15(G) is opposed in so far as it proposes to increase the base offense level for § 2T2.2 from 4 to 6. The existing base offense levels are sufficient to achieve the goals of the Commission and "guideline simplification" does not justify the proposed increase. None of the other 7 proposed consolidation amendments increase base offense levels and generally make no substantial changes regarding proposed Amendment 15. The two cases sampled three years ago constitute a statistically insignificant basis upon which to justify a change in the base offense level.

PROPOSED AMENDMENT NO. 16
ISSUE FOR COMMENT

Aging prisoners

The NYCDL believes that, at a minimum, district courts should have the authority to request a motion by the Director of

the Bureau of Prisons to modify a term of imprisonment for extraordinary and compelling reasons. In addition, the district judges should have the authority to request the Probation Office to conduct an independent investigation of facts relating to whether an older or infirm prisoner should be released, including whether he or she poses a risk to public safety. While arguably a district court has the power under current statutes to take both of these actions, it is unlikely that a court would do so or that the Bureau of Prisons would respond favorably without a change in the applicable statute explicitly giving the district court this or greater authority.

PROPOSED AMENDMENT NO. 17(A)

Clarification of § 1B1.3 (relevant conduct) with respect to the non-liability of a defendant for actions of conspirators prior to the defendant joining the conspiracy

The NYCDL supports this amendment which reflects the approach of the courts and judges in the Second Circuit.

PROPOSED AMENDMENT NO. 18

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. The NYCDL believes that acquitted conduct should not be 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, as a matter of fundamental equity, 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 NO. 22

Diminished Capacity (§ 5K2.13)

We strongly support option one of this amendment, which enables defendants with significant psychological conditions to receive a downward departure due to diminished capacity, irrespective of the nature of the crime for which they have been convicted. This would be a welcome amendment, enabling the sentencing court, in the appropriate case, to fashion a sentence that truly fits the defendant and the offense, taking into consideration the psychological factors that may have contributed significantly to their conduct. We are aware of at least one case where the defendant, who had a significant and documentable mental condition, was denied, because of the prevailing law, any opportunity to seek a downward departure based on his diminished capacity because of the arguably violent nature of his charged offense, even though the government conceded that he never had the intention of carrying out any violence.

It is NYCDL's position that the nature of the crime should not preclude a defendant with a psychological condition from receiving a reduced or non-incarcerative sentence if there

are no compelling reasons why the public safety would be protected by his incarceration. For this reason we urge the adoption of option one, and in particular the elimination of the requirement that the offense be a non-violent one to obtain this departure.

We would prefer that option 2 not be adopted, since we do not believe that there is any valid sentencing interest in distinguishing between crimes of violence versus non-violent offenses when considering the effects of a significant mental condition. If, however, the choice is option 2 or retaining the current language of the departure section, we would support option 2.

PROPOSED AMENDMENT NO. 31
ISSUE FOR COMMENT

Retroactivity of amended lower guideline range

Section 1B1.10 allows reduction in terms of imprisonment for an incarcerated defendant whose guideline range has been lowered by certain enumerated amendments. At present, the new guideline range for reconsideration of length of sentence in such situations is to be determined by applying the new guidelines manual in its entirety. The Commission asks comment on the question whether § 1B1.10(b) should be modified so that the amended guideline range would be determined on the basis of the guidelines manual used at the time of the defendant's original sentencing, together with whatever subsequent amendments have been given retroactive effect.

We support this modification. There appears to be no

reason for not employing those guidelines provisions which governed at the original sentencing, except to the extent retroactively amended.

PROPOSED AMENDMENT NO. 32

§ 3E1.2; assisting in the fair and expeditious administration of justice (one level decrease)

This proposed amendment would provide a one level decrease for defendants who go to trial but who avoid actions that unreasonably delay or burden the court or the government. The proposed application notes describe refraining from making clearly frivolous motions and agreeing to reasonable stipulations as the kind of conduct that would qualify for earning this decrease.

With the exception of certain phraseology, we strongly support this amendment. Defendants who believe they have meritorious defenses to present at trial should be encouraged to behave cooperatively and responsibly in the conduct of the proceedings. Those defendants should be rewarded. Moreover, the Guidelines otherwise tend to discourage defendants from going to trial, and this amendment would be a step towards protecting those who in good faith proceed to trial.

Interpretation of the phrase in the proposed amendment, "undue burden on the Government," and the related phrase, "assist...the government," may cause confusion and lead defense counsel to be less than vigorous in insisting that the Government carry its burden of proof. We also think that it should be made

clear that this reduction should be applied independent of any other reduction the defendant may have earned.

Dated: New York, New York
March 17, 1994

Respectfully submitted,

New York Council of Defense Lawyers

NEW YORK COUNCIL OF DEFENSE
LAWYERS

565 Fifth Avenue
New York, New York 10017
(212) 880-9400

Robert G. Morvillo, President
Marjorie J. Pearce and Paul B. Bergman
Co-Chair, Sentencing Guidelines Committee

074-92

I would like to thank the United States Sentencing Commission for giving me the opportunity to testify in regard to proposed Amendment #18, which provides that acquitted conduct be used only as a basis for upward departure, after a preponderance of evidence hearing. As I understand this amendment, it would preclude the use of acquitted conduct to increase a defendant's sentence as was done in the case of my husband, Gerald Winters.

My husband was convicted of Rico conspiracy in December of 1990. All of his accused co-conspirators were acquitted; yet at his sentencing in March of 1991, the sentencing court used the acquitted conduct to find that the conspiracy continued beyond November 1, 1987, the effective date of the guidelines. The Rico substantive offenses were sentenced under the Old Law; they were all found to occur before November of 1987.

The court sentenced my husband as follows: a guidelines sentence of 235 months for the Rico conspiracy and an Old Law sentence of 15 years for the Rico substantive offenses, to run

consecutively to the guidelines sentence.

If acquitted conduct had not been considered at his sentencing, my husband would have been sentenced exclusively under the Old Law. Receiving the harshest Old Law sentence possible, he would have been eligible for parole in 10 years. He must now serve 17 years under his guidelines sentence and an additional 5 years for his Old Law sentence, for a total of 22 years. I can't see this any differently than the imposition of a 10 year sentence on convictions and an additional 12 years he must serve for acquittals.

I'm not a lawyer and I don't pretend to understand all the intricacies of the guidelines sentencing system. But I have always held the belief that our system of justice was based on a democratic system of government for the people, by the people. I own my own business and I come into contact with many people from all walks of life. Without exception, these people are shocked

and disbelieving that our federal criminal justice system permits a court to sentence on acquitted conduct.

My husband does not serve this sentence alone. My two daughters and I suffer this injustice along with him. Other family members and friends also suffer the pain of this separation.

And we all want to believe in our system of law and a fair system of justice. I ask you to please recommend to Congress in May of this year that proposed Amendment #18 be passed. I also ask that this amendment be made retroactive to alleviate the injustice that a few federal defendants received when sentencing courts sentenced them using acquitted conduct.

Thank you for your time and consideration in permitting me to speak at this hearing.

Maureen Winters

Ed Rosenthal
1635 East 22nd Street
Oakland, CA 94606

Tel: (510) 533-0605
Fax: (510) 535-0437

March 7, 1994

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500 South Lobby
Washington, D.C. 20001

Dear Sirs/Mesdames,

For the past six 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.

I will discuss several aspects of the sentencing laws. First I will address botanical aspects of marijuana and its cultivation. Secondly, I will briefly cover some of the effects of present policies. Third, I will propose a reasonable set of sentencing policy alternatives. The fourth section covers long-term prospects for the marijuana laws.

BOTANICAL ASPECTS OF MARIJUANA CULTIVATION AS THEY RELATE TO SENTENCING

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

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

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.

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

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

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.

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

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.

E.) Insects such as aphids, whiteflies, mites and thrips attack marijuana gardens indoors and out. These insects suck away the plant's vigor, resulting in less growth and yield and even death of the plant.

F.) Animals such as field mice, rats, rabbits, deer and raccoons regularly attack marijuana grown outdoors. They can destroy an entire plant in a few minutes and can attack any time during the season.

All of these factors make it clear that plant counts are an unreasonable method of determining sentencing of people convicted of marijuana offenses. A plant normally yields from 10 grams to about 100 grams.

Dr. Elsohly, at the University of Mississippi in Oxford conducted experiments on weight and spacing. Originally the Drug Enforcement Administration tried to keep the results confidential because they were so damaging to testimony given by DEA officers who testified in state trials that the plants produce between one and two pounds of buds. Dr. Elsohly's report clearly shows that spacing affects yield tremendously.

As enlightening as his experiment was, Dr Elsohely tested only one variety, growing for a single length of time and he has not tested for other environmental factors such as shading, water stress, weather, improper irrigation and nutrient problems. That is, the problems faced by all gardeners. The plants he grew were given ideal nutrients, plenty of sun and a uniform planting date. The goal of the experiment was to produce the largest plant possible.

EFFECTS OF PRESENT POLICIES

The effects of the present policies which result in severe penalties and high risk have been a disruptive source on cultivation and domestic supply. Over the years growers have become aware of the harsh penalties and have either stopped cultivating or downsized their operations so that they face lower sentences if caught. This has led to a shortage of domestic marijuana and the price has climbed. As a result many people who would prefer to use domestic have switched to lower price imports.

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

For instance, in Portland, OR, a center of indoor cultivation, domestic buds sell for \$300 an ounce and Mexican buds, slightly less potent, retail for as little as \$125 an ounce. The situation is similar in other areas. Rather than unorganized cultivators a more organized criminal element is getting involved in supplying the market.

Since somebody will always be around to meet demand, no matter what risks they may face, making the laws or penalties harsher presents a niche for the more desperate and reckless person as the supply side is vacated by people who do not think possible gain is worth the risk. This is not a good trade-off.

SENTENCING POLICY ALTERNATIVES

It is inherently unfair to sentence a grower for yields that s/he wasnot expecting nor able to produce. As it stands now, a person with a small garden which has a potential yield of about two kilograms can be sentenced to 63 months or more, while an individual with a garden with many fewer, but much larger plants might receive only 10 months.

Rather than fixing an arbitrary weight to each plant, which is not based on a realistic assessment of the individual situation, the guidelines in the case of cultivators should be amended to reflect either the potential yield or the yield at seizure. In this way, the system will be more equitable. Although it would take more work by the courts, it would lead to a system of justice based on rational consideration.

The law has been particularly hard on indoor growers who use the "sea of green method" and fall under the mandatory minimum sentencing laws. Under these provision a minimum sentence of five years is required for the cultivation of 100 plants or more, and ten years for 1000 plants. The Sentencing Commission should recommend that the law be changed to reflect the actual yields of the plants in the same way that weight is considered for other marijuana offenses.

If the Sentencing Commission desires to allocate a specific weight to each plant, the weight of 100 grams per plant, which is applicable up to 49 plants at present in sentencing procedures should be extended to all plants, and the Sentencing Commission should recommend that the law should be changed to reflect this.

If a plant count is to be used, consideration should be made for plants not likely to be harvested. Clones and seedlings have a variable success rate and consideration should be made for clones not likely to grow to maturity. Perhaps the best way to do this would be to exclude all plants under six inches tall from the plant count.

Male plants are ordinarily removed from the garden, so that should

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

be taken into account in figuring the plant count in gardens which have not been "sexed".

The Guidelines should also be amended so that the court can consider downward departures based on mitigating circumstances for marijuana crimes of Level 24 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.

It would be a step in the right direction if penalties for all marijuana offenses were lowered, especially considering that violent crimes and crimes against property are treated lighter in sentencing than some marijuana offenses. Certainly possessing, growing or selling marijuana is not as serious threat to society than a crime with a clear victim who complains.

Obviously, neither the people who are buying nor selling feel victimized. In order to apprehend these people police must employ snitches and invade privacy, two things considered un-American until a few years ago. The Constitution is bent by assaults by the prosecution on the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

LONG TERM PROSPECTS FOR THE MARIJUANA LAWS

the campaign to wipe out marijuana is doomed to failure for reasons which are not applicable to other drugs. Heroin, opiates and other drugs which induce a physical dependence seem to the user to limit free choice. They are dependant on the drug just as we need food, several times a day. Cocaine users over a period of time become dysfunctional. Marijuana however, does not induce a physical dependency and rarely induces a dysfunctional situation. Instead, most marijuana users enjoy its recreational use. They do not feel that it has caused them much harm except possibly for legal hassles.

If you asked most heroin or cocaine addicts whether they regret their use, most would answer affirmatively. The same is not true of marijuana. Most people who use it feel it has been a positive thing in their lives. You can lock a person up and throw away the key, but s/he will still tell you that your law is wrong and that the law should be changed.

No matter how harsh the laws are you cannot hide the truth that people enjoy using marijuana and will risk liberty to indulge in it. The current policy does the exact opposite of its intentions. By making marijuana hard to get through interdiction or destruction of plants, the price goes up because of reduced supply. This induces more people into the trade and at the same time causes a certain

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

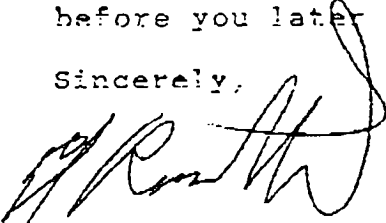
group of people who are experimenting with drugs to choose less expensive substances such as cocaine, crack or heroin. Certainly members of the committee would consider it more serious to the persons health and well being if a family member was using heroin or cocaine than if they lit up an occasional joint.

With the civil regulation of marijuana, use of hard drugs such as heroin and cocaine would plummet. This has been proven in Holland. Which has developed a successful hard drug-soft drug policy. Members of the committee who say we cannot take the risk should look at the dismal failure of the current regulatory system, which has been in effect since 1937, 57 years, most of our lives.

In 1937 there were estimated to be 50,000 marijuana users. Now estimates for regular users run between 25,000,000 - 50,000,000 people. That is an increase of 50,000 - 100,000%. Criminal regulation of marijuana, no matter how harsh or inappropriate the penalties will not work because a large minority of our citizenry know that marijuana use is not very risky to health and is very enjoyable.

I hope you will take the information I have provided into account during your consideration of the Sentencing Guidelines. I look forward to answering any questions you may have when I speak before you later in March.

Sincerely,



Ed Rosenthal