Public Comment

Proposed Amendments

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United States Sentencing Commission
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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

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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

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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.

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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 penalt ies 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.

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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

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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 dependent 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

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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

COMMENTS OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
REGARDING PROPOSED 1994 AMENDMENTS TO
THE SENTENCING GUIDELINES

Respectfully submitted,

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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. Peerce 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 that $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

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[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]

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[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.

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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.

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[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 <u>not</u> 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

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[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 <u>not</u> 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

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
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Respectfully submitted,

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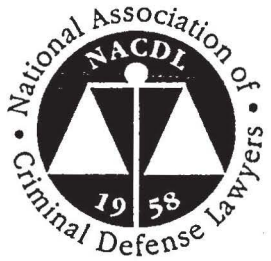

Statement Of

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