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

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[42]Pub. 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.

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

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[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.

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[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

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[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

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[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 Schwartz[10] 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

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[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 Goldstein[15] 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

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[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,

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[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.

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[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 socio-economic 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

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[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

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[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

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[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

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[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 Seltzer[36] 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

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[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

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[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-Blanton[38] 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

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[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

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[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

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[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)

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[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.

COMMITTEE ON UNJUST SENTENCING

SUITE 280, 615 MOUNT PLEASANT ROAD, TORONTO, ONTARIO, CANADA, M4S 3C5 TEL: (613) 969-6090

March 23, 1994

JOHN S. BERESFORD, M.D., ADVISOR

Mike Courlander
USSC Information Specialist
Washington, D.C.

Dear Mike,

Enclosed please find 20 copies of the text you require.

When you have time, would you be kind enough to let me know what happens to these copies, where they go, and why 20? Also, is there an official record the text is published in, and if so how is a copy of that obtained?

I would appreciate it if you see to it that I am introduced as representing our Committee.

Thanks.

Sincerely,

John Beresford.

John S. Beresford, M.D.

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 Commemtary 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 eligibilty 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. In 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 ~~was~~ is 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-blotter 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 blotter 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~~ that the top of the guideline range in an LSD-blotter 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-blotter paper offenses. (The reader may be reminded that the 0.4 milligram method applies in practice only to LSD cases that involve blotter 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-blotter 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.

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.

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.

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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.