Public Comment

Proposed Amendments

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THE CATHOLIC UNIVERSITY OF AMERICA

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March 15, 1994

The Honorable William W. Wilkins
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1994 Cycle

Dear Chairman Wilkins:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1994 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is

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looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

SPECIFIC AMENDMENT PROPOSALS

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 1 will be our comment on proposed amendment (or issue for comment) number 1 and so forth.

1. Proposed Amendment #1-**Theft, Property Damage, Fraud (Chapter Two, Parts B & F)**

§2B1.1. The PAG opposes this proposed amendment as written. The Introductory Commentary states that Chapter 2, Part B (including §2B1.1) "address[es] the most basic forms of property offenses." §2B1.1 encompasses theft and theft-related offenses. Such offenses are inherently pecuniary in nature, and are almost always motivated by pecuniary gain. Although §2B1.1 contains several specific non-monetary offense characteristics, there is no mention of the kinds of non-pecuniary motive, and non-pecuniary harm, addressed by this proposed amendment. Therefore, those rare situations are adequately addressed by §5K2.0, which already permits upward departure where "there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Indeed, as §5K2.0 points out, "[c]ircumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed or analyzed in advance."

The PAG also suggests that this proposed amendment, as drafted, is overbroad. For example, it is suggested that an upward departure may be warranted "if the offense involved a substantial invasion of a privacy interest." Such harm may be wholly unintended. At a minimum, consideration should be limited to harm which is either intended or reasonably foreseeable.

Moreover, any new commentary should provide clear guidance regarding how reasonable foreseeability is to be determined. The ability to predict harm often will vary significantly with the defendant's level of sophistication. If additional commentary is adopted, it should clarify that the determination of reasonable foreseeability should be made from the perspective of a person who possesses the defendant's level of skill and sophistication.

§ 2B1.3. The PAG does not oppose the proposed amendment to Application Note 4, with the following reservation. The PAG believes that neither the Commission nor the courts has yet acquired sufficient experience with computer-related cases to predict with any certainty what sorts of conduct warrant upward departure. Accordingly, the word "would" in the last sentence of Application Note 4 should be replaced with the word "may."

Although the PAG does not oppose it in principle, proposed Application Note 5, as presently constituted, raises a number of difficult issues. This proposal observes that monetary harm sometimes will not be an adequate measure of the seriousness of certain offenses, such as the destruction of a computer data file, and that an upward departure may be appropriate in such cases. However, the PAG believes that this amendment should also acknowledge that a downward departure may be equally appropriate in those cases where an offense results in wholly unintended and unforeseeable monetary damage. Indeed, the consequences of a computer-related offense will sometimes be impossible to predict. For example, supplying an acquaintance with a game disc that contains a computer virus, for home use, can result in disabling an entire office network where, in violation of the copyright laws, the disc is shared freely with the recipient's officemates. It would be inappropriate to hold a defendant automatically accountable for all such consequences.

In addition, any new commentary should acknowledge that quantifying the loss and/or cost of repairing computer data files will be extremely difficult. Repair, in particular, often will involve numerous variables, such as the skill of the individual who performs the work, and the evolution of technology. the process of attributing such costs to a defendant is also subject to error and abuse. (See, e.g., the March 22, 1993 written submission of Thomas A. Guidobini in connection with the 1993 amendment cycle.) The PAG believes, therefore, that the Commission should consider adopting an additional application note which cautions that this kind of "loss" warrants careful scrutiny.

Finally, proposed Application Note 5 might more appropriately be made a part of §2F1.1 Application Note 7, which already contains a lengthy and detailed discussion of calculating loss. This would have the obvious advantage of presenting a single, comprehensive discussion of loss, rather than addressing the subject piecemeal.

§ 2F1.1. The PAG opposes this proposed amendment as unnecessary. The kinds of harm covered by the proposed amendment are adequately addressed by existing Application Note 10(a), which authorizes upward departure where "the primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm."

Proposed Application Note 10(g), which addresses the invasion of a privacy interest, is objectionable for additional reasons. First, this proposed amendment would explicitly authorize upward departure in the case of a wholly unintended and unforeseeable harm. If such commentary is adopted, the PAG believes that, as with the proposed amendment to §2B1.1, and consistent with Application Note 10(a), consideration should be limited to those cases where the privacy invasion was either intended or reasonably foreseeable, as defined by the Commission.

Furthermore, proposed Application Note 10(g) fails to provide any guidance as to the kinds of privacy interests whose invasion may warrant upward departure. The invasion of a specified privacy interest is required to establish a violation of various subsections of 18 U.S.C. §1030. See, e.g., 18 U.S.C. §§1030(a)(1) (restricted information relating to national defense, foreign relations and the Atomic Energy Act of 1954); (a)(2) (financial institution and credit information); (a)(5)(B) (information relating to medical treatment and (a)(6) (computer passwords and similar information). Therefore, where a conviction is under one of those subsections, an invasion of the specified privacy interest is already accounted for in the base offense level. It would constitute unfair double counting for the same privacy invasion to be used as the basis for upward departure. The PAG believes that, at a minimum, any new application note should exclude consideration of those kinds of invasions. The far better practice would be to include commentary which provides explicit guidance regarding the kinds of invasions that warrant additional punishment.

The PAG opposes proposed Application Note 10(h). A "conscious or reckless risk of serious bodily injury" is already a specific offense characteristic, warranting a two level increase (to a minimum of level 13) pursuant to §2F1.1(b)(4). Other "substantial non-monetary harm" is covered by §2F1.1 Application Note 10(a). The only thing added by proposed Application Note 10(h) would be the possibility of upward departure for a risk of insubstantial bodily injury, whereas serious bodily injury would result in only a two level increase.

Appendix A (Statutory Index). The PAG endorses this proposed amendment.

2. Proposed Amendment #2-**Public Corruption**

Amendment 2(A). For the reasons stated in the synopsis of the proposal, the PAG does not oppose the proposed amendment to consolidate §2C1.3 (Conflict of Interest) and §2C1.4 (Payment or Receipt of Unauthorized Compensation).

Amendment 2(B). The PAG does not oppose the consolidation of §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) and

§2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper), for the reasons set forth in the Synopsis of Proposed Amendment. The PAG wishes to emphasize, however, its opposition to the existing increases for more than one gratuity. The PAG also opposes the 8 level increase, or any increase, for an official holding a so-called "high-level decision-making or sensitive position," particularly in cases involving gratuities. It is the PAG's position that any adjustment which depends on the recipient's position should be made by the sentencing judge within the appropriate guideline offense.

Amendment 2(C). The PAG opposes the proposed consolidation of §2C1.1 (Bribery) and §2C1.2 (Gratuity) into one guideline. The differences between a bribe and a gratuity are substantial, and any consolidation would encourage courts to blur the distinction in their sentencing function. A bribe requires a corrupt intent and a quid pro quo, whereas a gratuity requires neither. Congress recognized the distinction between the offenses when it assigned a statutory penalty of fifteen years for bribery, compared with two years for gratuity offenses. Also in contrast to bribery, the statutory definition of gratuity is extremely broad, and can include such conduct as payment of a meal for a public official for or on account of official functions already performed or to be performed by the official. Based on the foregoing, the gratuity offense level of 7 is unreasonably high, and should not exceed 5 under any circumstances.

3. Proposed Amendment #3(Issue for Comment)-**Public Corruption**

The PAG favors modification of the base offense levels for Blackmail, Bribery Affecting Employee Benefit Plans, and Gratuities Affecting Employee Benefit Plans, so that base level offenses for non-public corruption offenses are lower than those for public corruption offenses. The PAG opposes any modification which would equate guidelines for public corruption offenses and non-public corruption offenses. This is avoided by lowering the base offense level for non-public corruption offenses such that an adjustment from §3B1.3 (permitting a 2-level enhancement for Abuse of Position of Trust) would always put these latter offenses at a level below the corresponding public corruption offenses. This would be a logical modification of the existing guidelines both because the base offense levels for public corruption offenses already account for abuse of position of trust, and because of the clear difference in the order of magnitude between commercial bribery and bribery of a public official.

The PAG again emphasizes that the guidelines must clearly distinguish between bribery and gratuity offenses when determining appropriate levels. This includes a definition of bribery which encompasses both a corrupt intent and a quid pro quo, neither of

which is an element of gratuity.

The PAG opposes the proposed base level increase from level 10 to 14 for §2C1.1, as well as any increase in the base offense level for §2C1.2 and §2C1.7, because the penalty for bribery should not be imprisonment in all cases. The PAG also favors lowering the offense level for the corruption gratuity from level 7 to 5.

The PAG believes that §2C1.1(c)(1) should be modified to eliminate the overly broad cross reference that applies the non-public corruption guideline notwithstanding the defendant's intent to commit the other offense. The PAG wishes to ensure that the Commission differentiate between offenders who intentionally engage in bribery in order to facilitate another criminal offense, and those offenders whose bribery offense inadvertently leads to another criminal offense. Such a delineation would be in keeping with the mens rea requirement which is ordinarily necessary to sustain a charge of criminal conspiracy against a defendant. This modification would also be consistent with the Commission's desire to account for the seriousness of the crime in a relative context.

4. Proposed Amendment #4-**Public Corruption**

Amendment 4(A). As established by USSC data, most bribery and gratuity cases involve multiple incidents of payments. Accordingly, the PAG emphatically opposes the 2-level enhancements at §§ 2C1.1(b)(1) and 2C1.2(b)(1) on the basis of improper double counting of characteristics already considered by the value table. Thus, with regard to clarifying the adjustment for more than one incident of bribery, extortion, or gratuity, the PAG favors OPTION 2 which eliminates the adjustment as duplicative with the second adjustment based on value or benefit of the payment which is intended to reflect the severity of the offense. The PAG also supports a reduction of the base offense level for gratuity from 7 to 5.

Amendment 4(B). Commentary discussion of the adjustments for multiple payments in §§2C1.1(b)(1) and 2C1.2(b)(1) should be eliminated consistent with OPTION 2, noted above.

5. Proposed Amendment #5-**Public Corruption**

Amendment 5(A). The PAG opposes the proposed amendment to make adjustments for value of the payment and for high-level official cumulative. Rather, the PAG support the current system whereby any increases are in the alternative.

The PAG favors a reduction in the mandatory 8 level enhancement for high-level officials, particularly in light of the ambiguous guideline language: "Any official holding a high-level

decision-making or sensitive position." The enhancement produces results too severe in nature and the guideline language encourages inconsistent, arbitrary and excessive sentences. The enhancement is unnecessary because currently the judge can use the official's position as a factor in determining the appropriate sentence. If official position must be used as an enhancement factor, the increase should not exceed 2 levels.

The current 8 level increase for a high level official involved in a gratuitous transaction, when coupled with the current base offense level of 7, provides for a minimum offense level of 15, which translates into a statutory maximum of 18 to 24 months imprisonment. This can yield incongruous results, such as a mandatory sentence of 18 months to two years for a meal paid to an individual determined to be a high-level official. The increase for so-called high-level officials should be eliminated, for both bribery and gratuity, to avoid such an outcome. Again, if the increase is unavoidably retained in cases of gratuity, it should not be in excess of level 2, and the statutory language should be narrowed and clarified.

Amendment 5(B). The PAG favors elimination of any enhancement depending on position of the bribee, but if there must be an enhancement it should not exceed 2 levels. The PAG opposes the use of charts or other objective criteria in determining the appropriate level of officialdom, as this tends to encourage increased attention to the maximum level of 8, or to the even larger increase proposed by the Justice Department. If the Commission determines that there must be an increase for the official level of the bribee, and that a 2 level increase is too small, then the increase should range from 2 to 6 levels. The current 8 level increase is too severe, given that the base offense level for bribery is as high as 10. (See our discussion in paragraph 2 at comment to Amendment 5(A), above.)

The PAG also favors the proposed adjustment for high-level officials in §2C1.2 for reduction by [2-6] levels to limit the frequency with which the adjustment results in sentences at the statutory maximum.

The PAG also favors amending the commentary to provide for downward departure in unusual cases such as those involving low-level elected public officials.

6. <u>Proposed Amendment # 6</u>-**Public Corruption**

Amendment 6(A). The PAG does not oppose the proposed amendment to clarify in §2C1.1 and §2C1.7 that the payment involved in the offense need not be monetary but rather may be anything of value, and that in offenses involving extortion under color of official right, value includes the value of the benefit that would have been

denied to, or the loss that would have been effected on, the victim had the victim not made the extorted payment(s).

The PAG favors the proposed amendment to §2C1.7 to clarify that private officials are not considered high-level officials for purposes of the 8-level enhancement. The PAG also notes its opposition to the 8 level increase for a public official, however, particularly as presently defined but even if defined more precisely.

Amendment 6(B). The PAG favors the definition of "benefit received" discussed by the Seventh Circuit in United States v. Narvaez, wherein the individual making a bribe is not liable for the actions of others which were not reasonably foreseeable to him. United States v. Narvaez, 995 F.2d 759, 763 (7th Cir.1993). Thus, the net "benefit received" should be limited to that which personally accrues to the defendant, regardless of the operations of a large-scale organization of which he might have been aware. Id. The PAG therefore rejects the position of the Fourth Circuit in United States v. Muldoon, which suggests that an individual may be held responsible for the actions of others based on a corporate perspective, rather than the perspective of the individual making the bribe. United States v. Muldoon, 931 F.2d 282 (4th Cir.1991).

Amendment 6(C). The PAG opposes the proposed upward departure where the offense involves ongoing harm or a risk of ongoing harm to a government entity or program, regardless of actual benefit received. It is the risk to the integrity of a proposed program that causes bribery to have a base offense level as high as 10, the same base offense level as offenses in §2(C)1.7. Moreover, the phrase "risk of on-going harm" is overly vague and subject to dissimilar interpretations and applications. Any need to account for a risk of ongoing harm to the government can be accomplished by the judge in selecting the higher range of the already stringent base offense level. Finally, the court already has departure authority pursuant to §5K2.7, Disruption of Governmental Function.

7. Proposed Amendment # 7(Issue for Comment)-**Departures**

While the PAG does not necessarily share the view that the holdings of the three cases cited and the requirements contained within 28 U.S.C. §994(d) provide an example of a critical policy matter that warrants immediate Commission attention, we believe that issues such as this should typically be allowed to additionally peculate throughout the federal court system before the Commission attempts to resolve or bring cloture to them. For the present, we believe that the trial and appellate courts should be permitted to read both 28 U.S.C. §994(d) and 18 U.S.C. §3553(b) and then decide for themselves whatever tensions might exist between the two provisions and how to resolve same in the context

of the facts and circumstances before them. With the arguable exception of the "Crack" provisions, the Commission has significantly and successfully performed its §994(d) obligation and there exists no present need to revisit that effort for cultural matters in general for public corruption cases in particular.

PROPOSED DRUG AMENDMENTS

(Amendments 8A,8B,8C,8D,9,10,24 and 33)

The Practitioners Advisory Group most strongly favors a comprehensive set of amendments to alter sentencing for controlled substance violations so as to create a more rational drug sentencing policy but to preserve the basic philosophical choices originally made by this Commission relating to drugs.

We favor, as a package, reducing the quantity table by two levels, eliminating levels 42 and 40, creating a cap for minor participants, adding an enhancement for assaultive behavior, and improving the commentary to the role in offense adjustments.

This package of amendments should be considered as a group in total because they represent compromises reached concerning drug sentencing policy between competing interests. The three-year debate concerning these changes have synthesized various proposals to the point that we feel a consensus has been achieved as to changes which should be made in drug sentencing provisions. No other proposal has emerged which prudently offers positive change in this troubling area. The time to act is now without further delay. We endorse in the strongest manner as possible this package of amendments.

8. Proposed Amendment 8A-**Drug Trafficking and Role in the Offense**

When the Commission originally structured §2D1.1, the drug quantity tables ended at level 36, but the table was later amended to level 42. The Commission also keyed the offense levels for drug amounts which corresponded to the 10-year (1 kilogram of Heroin, 5 kilograms of Cocaine, 1,000 kilograms of Marijuana, etc.) and 5 year (100 grams of Heroin, 500 grams of Cocaine, 100 kilograms of Marijuana, etc.) mandatory minimums at guideline ranges so that the mandatory minimums were encompassed by the low point in the corresponding range rather than the high point in that range. The result of these two fundamental decisions have made drug quantity the linchpin in federal sentencing for controlled substances violators. The PAG recognizes that mandatory minimums must play a role in designing sentences for all drug defendants and that because mandatory minimums focus on drug quantity, the guidelines must reflect such a focus. However, both the selection of a low point keyed to the mandatory minimum and the increase of the tables up to the maximum level of 42 have severely overemphasized quantity in achieving the final sentence for a drug offender. The PAG believes that this overemphasis on quantity provides less rather than more protection to citizens of the United States.

The guidelines system is significantly built on the underlying theoretical justification of deterrence. Potential defendants are discouraged from committing crimes, and persons who committed lesser offenses are deterred from aggravating their conduct because increasing penalties are prescribed.

The Commission has identified certain specific aggravating factors which increase a defendant's sentence so as to deter persons from engaging in such acts.

The entire guidelines system presupposes that the more aggravated a crime becomes the higher the sentence should be so that the system is designed to punish in a graduated manner with incremental increases as conduct becomes more serious so that society is protected from the serious offender.

Unfortunately, the current guidelines contain no incentive for persons distributing larger quantities of substances to desist from engaging in aggravating conduct, because at the upper end of the guidelines quantity determines the maximum sentence without regard to aggravating factors. There is no differentiation between the large quantity dealer who uses a firearm (15%), who obstructs justice (5%), who uses special skills (1%), or who realizes substantial gain, from the large scale dealer who does not engage in such conduct. In essence, for the level 42 dealer, the guidelines speak words of encouragement to obstruct justice because the dealer's sentence is only determined by quantity, and if the dealer successfully obstructs justice, the dealer may receive no sentence at all.

The larger scale, non-violent drug dealer who uses no weapon, pays no hush money, bribes no official, and uses no special skill should not receive the same sentence, simply because of quantity, as the dealer who does engage in such aggravating conduct.

By adjusting the guidelines downward so as to further punish those upper end drug defendants who committed egregious acts in furtherance of their drug enterprises, the Commission can reestablish deterrence as an element of sentencing for these offenders without violating the intent of Congress which established mandatory minimums. Proposal 8A would establish level 38 as the upper end for quantity. The proposal also would key the mandatory minimum to the upper end of the guideline range so that persons below that range would be sufficiently deterred from larger scale distributions and to provide more emphasis on aggravating factors. These proposals preserve quantity as an important factor but contain the additional benefits of protecting society by discouraging offenders from aggravating their conduct. Only 3% of all drug offenders are career offenders, yet Congress and the Commission have focused attention on this group. This proposal impacts upon 15% to 20% of offenders while preserving congressional mandates. This proposal is strongly endorsed by the PAG.

8. Proposed Amendment 8B-**Drug Trafficking and Role in the Offense**

During the last Amendment cycle the Practitioners Advisory Group proposed that a 4-level increase be added for the following:

If a dangerous weapon, including a firearm, was actually used by the defendant, or the defendant induced or directed another participant to use a dangerous weapon, increase by 4 levels.

The increased possession, display and use of firearm in association with drug offenses remains a societal problem which demands increased protection. However, the Practitioners Advisory Group was divided between the above proposal and Option two below which was only slightly favored.

Option One can be interpreted to apply to all participants in jointly undertaken activity and was therefore disfavored. Applying a 4-level enhancement to minimal or minor participants is simply not appropriate and casts too large a net. The former Practitioners Advisory Group proposal covered those who discharge and those who direct or induce. We felt that these were the appropriate participants who should be sanctioned for this conduct. The reasonably foreseeable standard offers no protection to the minor participant here because guns are involved in a significant enough percentage of drug offenses to foster the argument that the discharge of a weapon in a drug offense is always reasonably foreseeable. Sanctioning those who discharge firearms and those who direct such use appropriately narrow the application of this characteristic to only those who should be held accountable for this behavior.

The 2-level increase for serious bodily injury is unanimously disfavored by the Practitioners Advisory Group because this conduct is included in the use or discharge provisions discussed above. Again, any serious injury aggravator should only apply to those perpetrators actually causing serious injury or directing that it be caused.

Option Two was recommended by the Practitioners Advisory Group by a one-vote margin over our former proposal. By creating a directive that assaultive behaviors which occur during drug crimes are to be treated as separate non-grouped offenses, the Commission would create two ranges of offenses which add from 0 to 2 points to the highest of the two ranges. Based on weight, the offense level for drug crimes ranges from 6 to 42 currently and would range from 6 to 38 under proposed Amendment 8(A). Based on a variety of factors such as use of weapon, injury seriousness, intent to murder and the pecuniary nature of the transaction, the range for engaging in an aggravated assault is from Level 15 to 36. These two levels are compared and if they differ by 0 to 4 points, 2 points are added to the highest range, but no points are added if the differential is 9 points or more. If the difference is 5 to 8 points, only one point is added. Those favoring this proposal felt it was consistent with guidelines principles.

8. Proposed Amendment 8C-**Drug Trafficking and Role in the Offense**

During the last amendment cycle the PAG proposed the following amendment to §2D1.1(a)(3):

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and

(i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:
  (a) Heroin (or the equivalent amount of other Schedule I or II Opiates);
  (b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  (c) Cocaine Base;
  (d) PCP;
  (e) LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
  (f) Fentanyl; or
  (g) Fentanyl Analogue;
  (h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24."

This proposal capped base offense levels for serious drug offenses such as distributions of Heroin and Cocaine at 32 for those offenders who qualify for a mitigating role adjustment. Those mitigating offenders who commit less serious drug crimes had their base offense levels capped at 24.

The PAG favors this proposal over the current proposal of a single cap of level 32/30 because of this differentiation between the so-called "hard" and "soft" drugs. The PAG believes that this differentiation more significantly protects against overly harsh punishment for offenders whose involvement is peripheral. However, if given the choice of no change at all or a cap of level 30, the Practitioners Advisory Group would favor this cap or, as a final measure, a single cap of 32.

Restructuring the drug table downward, capping offenders who are peripherally involved and differentiating between those who aid in the distribution of more and less addictive substances will result in significant punishments remaining for drug offenders but will reduce the opportunity for excessive penalties.

8. <u>Proposed Amendment 8D</u>-**Drug Trafficking and Role in the Offense**

While we welcome the continued invitation to de-emphasize weight in the drug calculus, we do not favor further delay in enacting Amendments 8A, 8B and 8C so as to further study quantity. Study has occurred, and now the time is to act. We ask that these amendments be adopted.

9. Proposed Amendment 9-**Role in the Offense**

The main thrust of this amendment is to count undercover law enforcement officers as participants in jointly undertaken activity for the purpose of determining aggravating role. There appears to be no good reason to change what has been a seven-year practice of not including officers in counting the number of persons a leader supervises in assessing the appropriate aggravation. The PAG does not favor this proposal but does favor deleting the language "or otherwise extensive," from §3B1.1(a) and (b).

10. Proposed Amendment 10-**Role in the Offense**

This amendment revises the introductory comment to the guidelines section on the role in offense adjustment. It is a welcomed clarifying addition which parallels the recent amendments to 1B1.3 (relevant conduct). Because some courts have inconsistently interpreted the role adjustments according to past Commission studies, this clarifying language is strongly supported by the PAG.

The remaining changes in the commentary to mitigating role can be endorsed by the PAG provided certain provisions are altered.

In §2(c) the PAG favors deleting the phrase "i.e., a value of $1,000 or less generally in the form of a flat fee." Tying mitigation to a $1,000 fee is far too limiting. Providing guidance that compensation should be small in amount without pinning down a specific amount is far more consistent with the underlying philosophy of assessing role in the context of the activity for which the defendant is being held accountable. In a "mega" kilo conspiracy a $5,000 fee for one act might not disqualify, while in a small crack ring whose total profits are $10,000, such a fee would eliminate mitigation.

The PAG also believes that paragraph (4) should be deleted. "Mules" should be treated in the context of the entire conspiracy, and removing minimal role consideration for a one-time courier is too inflexible. Again, role in the offense should be determined in the context of the activity for which the defendant and his co-conspirators are being held responsible.

Likewise, paragraph (5) should be eliminated. The use of firearms has nothing to do with the role an offender plays in the offense for which he is being held accountable. Firearms possession and use are appropriately considered as specific offense characteristics and in fact are taken into consideration as those factors. A minimal participant is treated less severely because he played a minimal role. If he used, possessed or carried a weapon, his base offense level will be increased for that activity. Disqualifying the mitigating role adjustment because of activity unrelated to role is not consistent with the structure of the guidelines.

The remaining changes in the commentary to the mitigating role adjustment are clarifying and will help eliminate the inconsistent application of the mitigating adjustment.

24. Proposed Amendment 24-**Drug Trafficking**

The PAG strongly endorses this proposal. Currently when negotiations do not lead to a completed drug transaction §2D1.1 Note 12 advises that the amount that was the subject of the negotiations determines the offense level, but adds that if the defendant establishes that he did not intend and was not capable of delivering the negotiated amount the offense level is reduced. The proposal changes the word "and" to "or" so that either capability or intent can reduce the amount negotiated. A skilled law enforcement officer can drive the amount unrealistically upward because he is familiar with the guidelines. In such a situation a defendant may have intent but no capability or may have capability but no intent. Under either scenario, the defendant is less culpable and should not be held to the higher amount because under either set of facts the higher amount would not have been distributed if the offense had been completed.

33. Proposed Amendment 33-**Drug Trafficking**

The PAG strongly supports this issue for comment which would provide that the Commission would modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1.

The PAG also supports the proposition that the Commission should modify the 1 kilo per plant weight allocation for marijuana. The guidelines should reflect scientific reality not arbitrary allocations.

PRACTITIONERS ADVISORY GROUP

PROPOSED MODIFICATIONS TO DECEMBER, 1993, AMENDMENTS

AMENDMENT 8A:

Text recommended as published.

AMENDMENT 8B:

§2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These offenses); Attempt or Conspiracy**

* * *

(b) Specific Offense Characteristics

(1)(A) If a dangerous weapon, including a firearm, was actually used by the defendant, or the defendant induced or directed another participant to use a dangerous weapon, increase by 4 levels.

(B) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

AMENDMENT 8C:

§2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These offenses); Attempt or Conspiracy**

* * *

(a)(3) the offense specified in the Drug Quantity Table set forth in subsection (c) below. *Provided*, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and

(i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:

(a) Heroin (or the equivalent amount of other Schedule I or II Opiates);

(b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

(c) Cocaine Base;

(d) PCP;

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(e) LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
(f) Fentanyl; or
(g) Fentanyl Analogue;
(h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24.

AMENDMENT 9:

The Practitioners Advisory Group rejects this proposal, but favors the following:

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants ~~or was otherwise extensive~~, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants ~~or was otherwise extensive~~, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

AMENDMENT 10 - Introductory Comment:

Text recommended as published.

§3B1.2 Mitigating Role

* * *

(a) If the defendant was a minimal participant, decrease by 4 levels.

(b) If the defendant was a minor participant, decrease by 2 levels.

Commentary

Application Notes:

1. *This section provides a downward adjustment in offense level for a defendant who has a mitigating (minimal or minor) role in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). One factor that determines whether a defendant warrants a mitigating role adjustment is the defendant's role and relative culpability in comparison with other participants, including any unindicted participants, in the criminal activity. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).*

   The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating role. Example: Defendant A plans a bank robbery and hires Defendant B to commit the robbery. Defendant B commits the actual robbery. Both defendants plead guilty to bank robbery, and each has a Chapter Two offense level of 24. Although Defendant B may be less culpable than Defendant A who will receive an upward adjustment under §3B1.1 (Aggravating Role), Defendant B does not have a minimal or minor role in respect to the robbery.

2. *The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating role:*

   (A) *the defendant performed only unskilled and unsophisticated tasks;*

   (B) *the defendant had no decision-making authority or responsibility;*

   (C) *total compensation to the defendant was small in amount ~~[, i.e., value of $1,000 or less, generally in the form of a flat fee]~~; and*

   (D) *the defendant did not exercise any supervision over other participant(s).*

   In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity and of the activities of others may be indicative of a mitigating role.

3. *With regard to offenses involving contraband (including controlled substances), a defendant who*

   (A) *sold, or played a substantial part in negotiating the terms of the sale of, the contraband;*

   (B) *had an ownership interest in any portion of the contraband; or*

(C) financed any aspect of the criminal activity

shall not receive a mitigating role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant.

For example, a defendant who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating role adjustment. In contrast, a defendant who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating role adjustment in respect to that jointly undertaken criminal activity, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendants sold.

~~4. *A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule), shall not receive a minimal role adjustment for that quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.*~~

~~5. *[Option 1: This section does not apply if the defendant possessed a firearm or directed or induced another participant to possess a firearm in connection with the criminal activity.]*~~

~~*[Option 2: A defendant who possessed a firearm or directed or induced another participant to possess a firearm in connection with the criminal activity shall not receive a minimal role adjustment. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]*~~

64. *To qualify for a minimal role adjustment under subsection (a), the defendant must be one of the least culpable of the participants in the criminal activity within the scope of §1B1.3 (Relevant Conduct). Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Application Note 2(a)-(d) above.*

75. *To qualify for a minor role adjustment under subsection (b), the defendant must be one of the less culpable participants in the criminal activity within the scope of §1B1.3 (Relevant Conduct), but have a role that cannot be described as minimal. Such defendants ordinarily must have most of the characteristics listed in Application Note 2(a)-(d) above.*

86. *Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.*

97. *If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.*

Background: This section provides a range of adjustments for participants in the criminal activity within the scope of §1B1.3 (Relevant Conduct). The determination whether to apply subsection (a) or (b) involves a determination that is heavily dependent upon the facts of the particular case.

AMENDMENT 24:

Text recommended as published.

AMENDMENT 33:

Text recommended as published.

End of Text and Discussion on Proposed Drug Amendments

11. Proposed Amendment #11-**Money Laundering**

The PAG strongly supports the proposed amendments to §§ 2S1.1-2S1.2, pertaining to money laundering offenses. The amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. While the amendment constitutes a much needed reform, we believe that the

underlying objective of the amendment, achieving "real offense" sentencing, could best be achieved by the modifications to the proposal which are set forth below.

Initially, the need for some amendment to the existing money laundering guidelines is substantial. The money laundering statutes, 18 U.S.C. §§ 1956 and 1957, are quite expansive. Indeed, the Department of Justice in its policy statement, dated October 1, 1992, recognized that the statutes are "extraordinarily broad," and that they "apply to the movement of funds derived from most serious federal crimes and a larger number of state crimes, as well." In our experience, the statutes have been applied in relatively minor fraud and other cases in which the defendant merely deposited the proceeds of illegal activity into his or her bank account. See, e.g., United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (Affirming conviction under 18 U.S.C. § 1956 where state official deposited into his personal checking account a $3000 check representing a bribe).

Furthermore, as noted by the Money Laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Working Group recognized, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they significantly reduce the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense." Id.

However, in order to achieve the Commission's stated goal of "relating offense levels more closely to the offense level for the underlying offenses from which the funds were derived," we recommend that the Commission make the following modifications to the proposal:

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, we suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3). Without this modification, the proposed guideline would maintain an inequity where a defendant was charged with mail or wire fraud rather than money laundering for virtually identical conduct and would not eliminate the potential for sentence manipulation by over-zealous prosecutors or law enforcement agents in the context of an

undercover sting case.

Second, the amendment would eliminate reliance on the table found in § 2S1.1(b)(2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of funds involved in a money laundering transaction. While we understand the Commission's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the value of funds in a money laundering transaction and the loss involved from fraud is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving forcer behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a $5 million dollar insurance policy. See, e.g., United States v. Smith, 13 F.3d 1421, 1428 (10th Cir. 1994) (Noting that money laundering counts should not be grouped for sentencing with wire fraud counts "because there are different victims and separate and distinct losses.")

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendment's proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate, a revised money laundering table should be employed.

Third, if the Commission nevertheless determines to incorporate the fraud table into the money laundering guidelines, then the amendment should be revised so that the base offense level in § 2S1.1(a)(3) is the same as the base offense level for fraud and deceit § 2F1.1. Without this revision, a defendant who committed a $1600 mail fraud and then deposited the proceeds of the fraud in the bank could be charged with mail fraud and/or money laundering. As a mail fraud case, the defendant's offense level is 6; but, as a money laundering case, his or her level would be 8. There is no logical basis for this distinction. Further, equating the two base offense levels makes particular sense in light of the comparable two point adjustment where the fraud involved more than minimal planning, pursuant to § 2F1.1(b)(2), and the two point adjustment where the financial transaction involved actual money laundering, pursuant to § 2S1.1(b)(1).

Fourth, the proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. This obviously provides continued opportunities for sentence manipulation given that the government controls the "value of funds" involved in the transaction and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table.

In order to prevent such guideline manipulation in sting cases, we suggest that the Commission include as the following statement as Application Note 6.

> If a defendant is convicted in an undercover sting, pursuant to 18 U.S.C. § 1956(a)(3), and the Court finds that the government agent influenced the "value of funds" involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted.

12. Proposed Amendment # 12-**More than Minimal Planning**

The PAG supports the changes proposed in Amendment 12(A) that would result in the elimination of the term "more than minimal planning" as a specific offense characteristic in several guidelines and that would substitute in its stead the term "sophisticated planning." We believe that this change will improve the structure of the guidelines in two significant respects.

First, the continued recognition of planning and preparation as an important factor in assessing relative culpability is consistent with the analysis that the Commission conducted on pre-guideline practices. However, it appears that the courts, in interpreting the existing language, have found "more than minimal planning" in virtually all the facts and circumstances that they face. As a result, the basic guideline heartland-type concept of differentiating base offense level cases from others through the use of specific offense characteristic adjustments has seemingly been lost: if all defendants receive the associated level increase for clearly dissimilar quantities/qualities of planning, then the specific offense characteristic serves no function other than to indirectly increase the base offense level. Therefore, the various guidelines would advance the original intent of the Commission in this regard and would promote fairness by providing the courts with a better mechanism to rationally distinguish between offenders and their offenses.

As regards the proposal in Amendment 12(B) that seeks to raise the base offense level in §2B1.1 to the same as that in §2F1.1, the PAG opposes this change. We maintain that there

exists sufficient differences between and amongst larceny and theft cases and fraud and deceit cases (particularly at the low end) as to warrant the current base level differential. We believe that prior practice correctly reflected those differences and that the change as proposed would tend to increase disparity by treating dissimilar cases similarly.

If, however, the Commission were to continue to view the need for seeming consistency as an imperative, then we suggest the formation of a working group to further study the issue. Without a thorough examination of the circumstances of the cases that have arisen under these two provisions, it is not possible to either demonstrate the true need for this change and/or to eliminate the potential that such a change might then result in increased disparity by imposing the same sentencing consequence for clearly disparate conduct. If the results of such a study were to uncover both a real need to harmonize these two provisions and a limited potential for disparate results, then the PAG would support a reduction to the base offense level in §2F1.1 rather than an increase in that level under §2B1.1.

Finally, as Amendment 12(C), the Commission has sought comment on changing the increments in the loss tables for §§ 2B1.1, 2F1.1 and 2T4.1, offering two options in that regard. The stated reason for such a change relates to the non-uniform slop of the existing tables. The PAG is strongly opposed to any change in these tables. While we do not view the rationale offered as a sufficient reason to undertake such a change, we also remain concerned about the guideline application confusion that such a change would engender. And, again, if the Commission is convinced that this type of tinkering is important, we recommend the formation of a working group to establish and demonstrate how the new amount threshold better differentiate between offenses.

13. Proposed Amendment #13-**Career Offender**

The PAG opposes Proposed Amendment 13(A) which would add additional background commentary explaining the commission's rationale and authority for Section 4B1.1 (Career Offender). In United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993) the court invalidated application of the career offender guideline to a defendant convicted of a drug conspiracy because 28 U.S.C. Section 994(h), which the Commission cites as the mandating authority for the Career Offender Guideline, does not expressly refer to inchoate offenses. While the court in Price indicated that it did not foreclose Commission authority to include conspiracy offenses and other inchoate offenses under the Career Offender Guideline, the PAG believes that a person should not be eligible for Career Offender status based on a conviction for a conspiracy to commit a substantive offense or for an attempt to commit a substantive offense. Conspiracies and attempts do not present the same kinds of harm as do completed offenses and career offender status should be reserved for the truly serious federal crimes, i.e., completed crimes of violence or completed drug offenses.

The PAG favors Proposed Amendment 13(B) which would revise Section 4B1.1 (Career Offender) by defining the term "offense statutory maximum" as the statutory maximum prior to

any enhancement based on prior criminal record. Thus, if this amendment passes an enhancement of the statutory maximum sentence that itself was based upon the defendant's prior criminal record would not be used in determining the offense level under Section 4B1.1. Such an amendment would avoid what now appears to be unwarranted double-counting.

The PAG supports Proposed Amendment 13(C) - Option 1 - which would have the effect of making Section 4B1.1 (Career Offender) more of a true "recidivist" provision by providing that the offenses that resulted in the two qualifying prior convictions must be separated by an intervening arrest for one of the offenses. We oppose Option 2 because it would unduly broaden the portion of the Career Offender provision for prior convictions of a crime of violence or possession of a weapon during, and in relation to, a
drug offense.

The PAG favors the adoption of Proposed Amendment 13(D), which would have the effect of providing that a non-residential burglary is not a crime of violence under Section 4B1.2.

Finally, the PAG favors the adoption of Proposed Amendment 13(E). We agree with the position taken by the Third Circuit in United States v. Parson, 955 F.2d 858 (3d. Cir.1992) wherein the court indicates that application note 2 of Section 4B1.2 calls for a considerably broader reading of the definition of "crime of violence" than is set forth in 18 U.S.C. Section 924(e). The Proposed Amendment is needed and would have the effect of narrowing the portion of the definition of crimes of violence that "otherwise involve conduct that presents a serious risk of physical injury" to offenses that are in some respect similar to the offenses expressly listed.

14. Proposed Amendment #14-**Specific Offense Characteristics and Departures.**

The PAG supports in part and opposes in part Proposed Amendment 14. We favor the amendment to the Introductory Commentary of Part H and the proposed amendment to Section 5K2.0, with the bracketed language " or combination of characteristics or circumstances". We note the Judicial Conference Committee on Criminal Law also supports our position.

We oppose that portion of proposed amendment 14 which would add to the Commentary to Section 5K2.0 the United States v. Rivera, 994 F.2d 942 (1st Cir. 1993) so called "analytic framework" for departure circumstances. This is only one Circuit's formulation of the framework and the Commission should not give its "blessing" to any particular framework.

We strongly favor the inclusion of the bracketed language "or combination of characteristics or circumstances" as part of the proposed amendment. The PAG notes that a majority of the Circuits that have considered this issue have held that the sentencing court can consider a combination of characteristics or circumstances, as opposed to a single characteristic or circumstance, that may distinguish a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines. See, United States v. Cook, 938 F.2d 149, 153 (9th

Cir.1991); United States v. Peña, 930 F.2d 1486, 1494-96 (10th Cir.1991); United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir.1990); United States v. Naylor, 735 F.Supp. 928 (D.Minn. 1990); United States v. Ramirez, 792 F.Supp. 922-923 (E.D.N.Y. 1992).

15. Proposed Amendment #15-**Consolidated of Offense Guidelines.**

The PAG strongly supports Proposed Amendment 15 which would provide for the additional consolidations of closely-related guidelines. This amendment is welcomed because it would further simplify the operation of the guidelines.

16. Proposed Amendment # 16(Issue for Comment)-**Aging Prisoners**

While the PAG believes that it is most appropriate to provide more flexibility throughout the entire system as regards older and infirmed and older, infirmed defendants, the issue is not one that lends itself to simple, discrete suggestions. It is recommended, therefore, that the Commission develop a working group (made up of Commission and Bureau staff and others) to explore this issue and its guideline and statutory ramifications. The goal of such an effort would be, amongst other things, to develop a uniform set of criteria and definitions to inform the initial sentencing decision, to develop similar criteria and definitions for changes in circumstances during the period of confinement and supervision and to develop a mechanism for addressing those changed circumstances in a uniform, expeditious and consistent manner. Given the fact that the overall federal prison population is rapidly aging and considering the fact that current legislative initiatives may result in more individuals serving longer periods of time, the need to address this issue in a more systemic manner appears imperative.

17. Proposed Amendment #17-**Miscellaneous, Substantive, Clarifying and Conforming Amendments.**

The PAG favors Proposed Amendment 17(A), which would clarify the operation of Section 1B1.3 (Relevant Conduct) in respect to the liability of a defendant for actions of co-conspirators prior to the defendant's joining the conspiracy. Proposed Amendment 17(A) would also add a well-phrased formulation for analyzing the same course of conduct, as provided by the Ninth Circuit in United States v. Hahn, 960 F.2d 903 (9th Cir.1992).

The PAG also favors Proposed Amendment 17(B) which would make conforming changes to the interaction of Chapter 2 (Offense Conduct) and Chapter 8 (Sentencing of Organizations).

The PAG supports Proposed Amendment 17(D) which would add definitions of hashish and hashish oil to Subsection (c) of Section 2D1.1 (unlawful manufacturing, importing, exporting, or trafficking; attempt or conspiracy) in the notes following the Drug Quantity Table.

The PAG does not oppose Proposed Amendment 17(E) which would provide that Section 3B1.1 (Aggravating Role) would be applied independently of the operation of Section 2D1.2.

The PAG does not oppose the adoption of Proposed Amendment 17(F).

The PAG does not oppose the adoption of Proposed Amendment 17(G).

The PAG does not oppose the adoption of Proposed Amendment 17(H).

The PAG opposes in part, and supports in part, proposed Amendment 17(I). The PAG opposes any attempt at clarification of the application of subsection (c) of Section 2K2.1 as the PAG favors the position taken by the court in United States v. Concepcion, 938 F.2d 369 (2d Cir.1992).

The PAG does not oppose that portion of Proposed Amendment 17(I) that would substitute a single, revised definition of firearms listed under 26 U.S.C. Section 5845(a).

The PAG favors the adoption of Proposed Amendment 17(J).

The PAG does not oppose the adoption of Proposed Amendment 17(K).

The PAG does not oppose the adoption of Proposed Amendment 17(L).

The PAG favors the adoption of Proposed Amendment 17(M) because by expressly listing additional sections under subsection (d) of Section 3D1.2 (Groups of Closely Related Counts) the Commission will be simplifying the application of this guideline.

The PAG does not oppose the adoption of Proposed Amendment 17(N).

The PAG supports the adoption of Proposed Amendment 17(O).

The PAG does not oppose the adoption of Proposed Amendment 17(P).

As to Proposed Amendment 17(Q), the PAG would support proposed option 1 of this amendment which would provide that a false statement made to a probation officer during supervision is to be treated as a Grade C violation (absent a felony conviction for such false statement).

18. Proposed Amendment #18-**Acquitted Conduct.**

As we have consistently in the past, the PAG strongly supports the adoption of Proposed Amendment 18, which would provide that conduct of which the defendant has been acquitted after a trial may not be used in determining the guideline range, but may, if found by a

preponderance of the evidence, provide the basis for an upward departure. While this proposed amendment may not be constitutionally required, it makes good sense. If a defendant is acquitted after a court or a jury trial there may be reasons specific to that case as to why the sentencing court may not want to use such acquitted conduct in determining the guideline range, even if the government could prove such conduct by a preponderance of the evidence. The proposed amendment authorizes (but does not require) a district court judge to use acquitted conduct as a basis for an upward departure. This is a much more flexible way to handle the matter of acquitted conduct than automatically requiring the use of such conduct in determining the guideline range if the sentencing judge finds the conduct to have been proven by a preponderance of the evidence.

19. Proposed Amendment #19 and Issue for Comment #31-**Revisions to Clarify the Operation of Section 1B1.10 (Retroactivity of Amended Guideline Range).**

The PAG firmly supports Proposed Amendment 19, which would make a number of minor revisions to clarify the operation of 1B1.10 (Retroactivity of Amended Guideline Range) and which would delete current Section 1B1.10 (c), which is a rather complex subsection. This proposed amendment would assist trial courts and the parties in more easily applying the provisions of Section 1B1.10.

The PAG, in responding to the Issue for Comment set forth in Proposed Amendment 31, would support a modification of Section 1B1.10 (b) so that the amended guideline range under Section 1B1.10 would be determined by using only those amendments that have been expressly designated for retroactive application -- such amendments would be applied in conjunction with the Guidelines Manual used at the defendant's original sentencing. This Issue for Comment makes good sense because if the amended guideline range is determined by applying the revised Guidelines Manual in its entirety, all other amendments that have taken place from the time of the defendant's original sentencing would be used in determining the amended guideline range, even though these other amendments would not have been made retroactive by the Commission. Moreover, other amendments may be harmful to the defendant and for true retroactivity to apply, the defendant should not have to be burdened by unfavorable amendments to the guidelines that have not been made retroactive by the Commission.

20. Proposed Amendment # 20-**Theft and Fraud**

Amendment 20(A). The PAG favors the proposed revision to the Commentary to §2F1.1 providing for greater consistency between definitions of loss in §2B1.1 and §2F1.1.

Amendment 20(B). The PAG favors the proposed alteration in the Commentary to §2B1.1 such that it conforms to §2F1.1 by stating that a victim's loss be reduced to reflect the amount which was recovered prior to discovery of the offense, or which is expected to be recovered. The PAG also favors downward departure where actual loss overstates the seriousness of defendant's conduct.

Amendment 20(C). The PAG favors the proposed revision to the provisions concerning loss in Chapter Two, Parts B and F, to clarify that interest is not to be counted under any circumstances in the calculation of loss. This will prevent a court's erroneous inclusion of lost interest when calculating loss, which recently occurred in the 6th and 4th Circuits.

21. Proposed Amendment # 21-**Attempt**

The PAG strongly supports proposed amendment #21, for the reasons listed by the Commission.

22. Proposed Amendment # 22-**Diminished Capacity**

The PAG supports Option 1 as a more rational and reasoned approach to the issue and opposes the need for the additional sentence that forms Option 2. Option 1 appears to well capture and explicate the intent of the Commission and should serve to resolve the cited circuit conflicts. The synopsis contained within the published proposal adequately addresses the matter and needs little further comment.

23. Proposed Amendment # 23-**Multiple Sentences**

The PAG opposes this amendment. While the language of new section (c) would appear on its face to afford more flexibility for the imposition of concurrent or consecutive sentences, the other changes as proposed actually will require defendants to serve unnecessarily longer and often disparate periods of incarceration. The current version of §5G1.3 should be maintained.

While the amendment is designed in an attempt to resolve the difficulty in obtaining information about prior unexpired state and local offenses and the problems in accurately applying such information to the guideline process, the PAG believes that that difficulty and those problems has been overstated. While recognizing that the Commission has long struggled with this issue as reflected by the numerous changes to this provision, we maintain that further change at this time will not achieve the desired results.

24. Proposed Amendment # 24-**Drug Trafficking**

Discussed on page 14, supra, under Proposed Drug Amendments.

25. Proposed Amendment # 25-**Escape**

In the name of consistency, the PAG support Option 1 of this proposal.

26. Proposed Amendment # 26-**Obstructing an Election**

The PAG does not oppose the proposed amendment.

27. Proposed Amendment # 27 - **Enhancements for Gang Memberships**

The PAG strongly opposes the two amendments to § 2K2.1 and § 2K2.5 proposed by the Department of Justice which would impose a 4 point enhancement where the defendant committed the offense "as a member of, on behalf of, or in association with a criminal gang." The definition of criminal gang is "a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2."

The obvious problems with these proposals are manyfold. First, the requirement of the defendant's involvement with the "gang" is too expansive. Under the proposals, merely being a member of the gang would justify the enhancement, even if the firearm possession had nothing to do with gang activities. Indeed, the "association" element is independent of the membership requirement, and thus suggests that a defendant could be subject to the enhancement where the defendant was not a member of the gang but somehow "associated" with it. Such broad and undefined terms permit too much prosecutorial discretion.

Second, the due process and overbreadth problems regarding the required relationship between the defendant and the gang are exacerbated by the definition of "gang," which includes any "association of five or more persons" whose members engage in a "continuing series" of violent and/or drug crimes. These issues arose when Congress initially passed the RICO statute. Indeed, the reason for the elaborate enterprise formulations in that statute was to avoid status offense problems that would arise form punishing people criminally for merely being members of the gang. The guideline, by providing an enhanced sentence for mere membership in a gang, would trip over the same Constitutional problems that have plagued this area of the law for quite some time.

Under the terms of this amendment, there is no requirement of a prior criminal conviction by the other gang members. The amendment uses the term "engaged in" rather than "convicted of" the continuing series of crimes. In addition, there is no required nexus between the prior bad acts by the "gang's" members and the gang. Accordingly, a defendant may receive an enhanced sentence because of unknown criminal activities by a club's members although those prior activities were before the other members joined the club and were completely unrelated to club business. For example, a member of the Kiwanis or of Congressional Country Club could find an enhancement if other members of the club engaged in prior criminal conduct, like spousal abuse or drug possession, even if the defendant was unaware of it.

Third, there is no definition of "continuing series of crimes." Accordingly, it would appear that merely two prior criminal acts by other club members could expose a third club

member to the enhancement.

Fourth, the enhancement as provided for in the amendment would result in double or triple counting. A defendant would be exposed to an aggravating role enhancement under § 3B1.1 if he supervised or managed five or more participants in the gang, club, or organization. The instant proposal would add an additional 4 point enhancement for the same conduct. This would be further compounded if the defendant were convicted of a RICO or CCE since the elements of these crimes include the existence of a criminal "enterprise."

28-30. Proposed Amendments #28-30-**Issues for Comment**

The PAG does not believe that any of the areas suggested in Issues for Comment, Numbers 28-30, would be useful at the present time. In particular, with regard to Issue Number 28, the primary question is whether the defendant's possession of a loaded gun or his discharge of the weapon should subject him to an additional enhancement under § 2K2.5. At the outset, it is clear that having a loaded firearm is heartland conduct under this guideline. While having an unloaded weapon perhaps should provide grounds for a downward departure, there is no basis for suggesting that having a loaded weapon or possessing ammunition should result in an additional enhancement. Section 2K2.1(b)(5) already provides for a four point enhancement, with a minimum offensive level of 18, where a "defendant used or possessed any firearm or ammunition in connection with another felony offense" and there is no evidence to suggest that this offense level is not sufficiently punitive. Issue Number 28 also seeks comment on whether § 2K2.1 should be amended in order to increase the base offense level from 12 to 14 for persons who sell firearms with knowledge or reason to believe that the buyer is a prohibited purchaser. Again, there is no evidence to suggest that this additional enhancement is necessary, and § 2K2.1(b)(5) enhancement also applies where a defendant "transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense."

Regarding Issue Number 29, the PAG is not aware of any evidence to suggest that a specific enhancement is necessary in order to address the rare case in which a gang member is prosecuted for committing, or requiring another gang member to commit, a violent crime in order to obtain membership in the group.

Issue Number 30 re-visits the question regarding whether or not there should be additional distinctions in the criminal history categories. Given the extensive discussion and study of this issue by the Commission in previous years, the PAG sees no reason to re-open the debate at this point in time.

31. Proposed Amendment #31(Issue for Comment)-**Retroactivity**

Covered on page 27,supra, along with discussion on Proposed Amendment #19.

32. Proposed Amendment #32-**Additional One-Level Decrease Under Acceptance of Responsibility**.

The PAG strongly opposes Proposed Amendment 32 which would provide an additional one-level decrease for a defendant who goes to trial but avoids actions that unreasonably would delay or burden the proceedings or place an undue burden on the government. As a matter of policy, the PAG opposes this proposed amendment because it seems to suggest that a defendant who goes to trial but basically participates in a "slow guilty plea" should be rewarded. The proposed amendment seems to suggest that those defendants who go to trial and vigorously contest the government's proof by objections, vigorous cross-examination, etc., should be placed in a worse situation than those defendants that go to trial and meekly contest the government's proof. While perhaps well intended, this proposed amendment should be opposed by any defense attorney worth his/her salt.

33. Proposed amendment # 33 (Issue for Comment)-**Drug Trafficking**

Covered on page 14,supra, under discussion of Proposed Drug Amendments.

34. Proposed Amendment #34-**Adjustments to Address the Harm Caused When There is More than One Victim.**

The PAG strongly opposes Proposed Amendment 34(A) recommended by the United States Postal Service which would create a new adjustment in Chapter 3, Part A, to address the harm caused when there is more than one victim. There are already enough Chapter 3 upward adjustments, including Part A (Victim Related Adjustments). The mere number of victims, absent other factors, should not be the basis of an upward adjustment under any circumstances.

As to Proposed Amendment 34(B) - Issue for Comment - the PAG favors the continued use of special offense characteristics, as opposed to the use of a victim table, to reflect the harm when there is more than one victim of the offense. In other words, on certain offenses the criminal law should more severely punish a defendant if more than one victim of the offense is harmed. This can be taken care of by adding an offense level/levels by way of a special offense characteristic for that specific crime.

35. Proposed Amendment # 35-**Theft**

PAG opposes the amendment as proposed. The amendment contains no definition of the key word "organized." As drafted, therefore, the amendment could apply to several persons, even only two or three, working together to steal letters with objects in them that have the feel of coins. That certainly does not warrant an offense level of fourteen.

The proposed amendment requires no minimum amount of gain or loss. Establishing a base offense level of fourteen, greater than bribery, for example, is disproportionate. The present guidelines with increase in the offense level for the amount of gain or loss and for a supervisory role are sufficient. There is no need to single out in the proposed vague way an

alleged "organized" scheme to steal, what that may mean.

On behalf of the Practitioners' Advisory Group, thank you for allowing us to comment on the Proposed amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

Fred Warren Bennett
Chairman
Practitioners' Advisory Committee

cc: Commissioner Julie E. Carnes
Commissioner Michael S. Gelacak
Commissioner A. David Mazzone
Commissioner Ilene H. Hagel

Amendment 16: Aging and Infirm Prisoners

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

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

Medical cases

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

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

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

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

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

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
PROBATION OFFICE

JIM MCKINLEY
CHIEF PROBATION OFFICER

ROOM 234
FEDERAL BUILDNG
167 N. MID-AMERICA MALL
MEMPHIS, TN 38103
901-544-3256

December 31, 1993

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

Attention: Public Information Officer
Re: Proposed Amendments

Dear Commissioners:

I am writing to call to the Commission's attention a sentencing issue which, I believe, needs addressing at the next amendment cycle.

Guideline 4A1.2, comment.(n.3), defines "related cases" by stating, in part, that these are cases "consolidated for trial or sentencing." Within the last year, our Court has been receiving with ever increasing frequency from defense counsel nunc pro tun orders signed by state criminal court judges which consolidate cases retroactively that were disposed of years and years ago. The sole purpose has been to defeat the more onerous sentencing provisions of Guideline 4B1.1 "Career Offender."

For example, the enclosed "Order of Consolidation" signed Oct. 12, 1992, consolidates nunc pro tun three felony convictions disposed of in 1989 (the digits "89" in the masthead of the order indicate the year of filing). While none of our judges has honored any of these retroactive orders, it has been a very, very close call on one or two.

To alleviate this problem of violent, repeat offenders escaping the provisions of 4B1.1, I propose that the Commission add a provision to 4A1.2, comment. (n.3), to the effect that "prior sentences are considered related if they resulted from offenses that were consolidated for trial or sentencing at the time of said trial or sentencing.

I am certain that this practice of securing nunc pro tun orders consolidating long-ago-disposed-of convictions will spread like the Beijing flu, incapacitating the "Career Offender" provision. For that reason, I am requesting that the Commission set some sort of time frame for the consolidation of cases under 4A1.2, comment.(n.3).

Cordially,

Harry J. Jaffe
Deputy Chief

IN THE CRIMINAL COURT OF SHELBY COUNTY TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

STATE OF TENNESSEE

vs.

NO. 89-04020
89-08148-49

FREDDIE HOWARD,

Defendant

ORDER OF CONSOLIDATION

This cause came on to be heard on the 12 day of October, 1992 upon the motion of the defendant, Freddie Howard. Upon good cause shown and for clarification of the record, the Court finds the following:

1) That the criminal offenses attempted felony in no. 89-04020; theft under $10,000.00 in no. 89-08148; and violation of T.C.A. 55-5-113 in no. 89-08149 were consolidated for the purpose of sentencing in order that the defendant could receive concurrent time.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that case nos. 89-04020, 89-08148-49 were consolidated for sentencing on the 7 day of November, ~~1992~~ 1989, in order for the defendant, Freddie Howard, to receive concurrent time, and the records should reflect such consolidation.

[signature]
JUDGE nunc pro tunc

002

John M Hartman
Molly S Hartman
1081 Rosalie Ave
Lakewood, OH 44107

January 6, 1994

Judge William Wilkins, Jr
US Sentencing Commission
One Columbus Circle, NE Suite 2-500
Washington, DC 20002-8002

Dear Judge Wilkins:

We would like to share our opinion regarding the current Federal Sentencing Guidelines for those people convicted of cultivation of cannabis hemp.

We feel that currently there is some disparity in the sentencing scheme that one cannabis plant would yield one kilogram or 1000 grams per plant. We have received information from Dr Mahoud A Elsohly, Research Professor Coordinator of the Drug Abuse Research Program from the Research Institute of Pharmaceutical Sciences, school of Pharmacy, University of Mississippi located in Oxford, Mississippi, that indicates yields of 100 grams per cannabis plant is more realistic.

The current Guidelines are arbitrary and irrational and should be changed to 100 grams per plant rather than 1000 grams per plant now in effect.

Thank you for this opportunity to express our feelings on this issue that is now before the Sentencing Commission.

Yours truly,

John M Hartman
Molly S Hartman

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TELEPHONE
(206) 382 0000
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January 6, 1994

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Attention: Public Information

Re: Comment on Proposed Amendments to Sentencing Guidelines

Dear Commissioners:

I write to express my views on several proposed amendments to the guidelines.

I favor proposed Amendment 8(A), keying the mandatory minimum levels in the Drug Quantity Table to levels 30 and 24, and proposed Amendment 33(A) to modify the provisions in section 2D1.1 that distinguish between cocaine and crack cocaine at the ratio of 100-to-1.

As a criminal defense lawyer, I have seen how disproportionately harsh the current provisions are. In particular, I have seen that the 100-to-1 ratio means that black people do more time than white people, since most crack dealers are black.

I also support proposed Amendment 17(A), clarifying the operation of section 1B1.3 concerning conspirator liability. I have two clients who are serving sentences of about eighteen years each because they were found to be minor players in large drug conspiracies. Any step to see that

offenders are punished according to their own particular culpability is a step in the right direction.

Thank you for your attention.

Yours truly,

DAVID S. MARSHALL

DSM;sd

U.S. Department of Justice

United States Attorney
Eastern District of Louisiana

Hale Boggs Federal Building
501 Magazine Street, Second Floor
New Orleans, Louisiana 70130

(504) 589-2921
FTS 682-2921

January 10, 1994

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Proposal #32

Dear Judge Wilkins:

Our criminal justice system is based upon a premise of all or nothing. One pleads guilty and admits guilt or avails himself of all legal avenues to defend his position, and through the adversary nature of the proceeding, the truth emerges. As a prosecutor, I derive a sense of security from a belief that the system adequately protects the innocent from a mistaken conviction.

This proposal awards those who fight half-heartedly. There is no place for that in our system. How does one determine that a motion that could have been made can ethically not be made, and a benefit derived? In any case, it is already a lawyer's ethical duty not to make frivolous motions and stipulate appropriately. Why reward defendants lucky enough to have ethical lawyers or provide consolation prizes to those so unlucky as to have non-aggressive ones? This does not promote the overall goal of the fair and just administration of justice and brings into question the entire system.

Sincerely,

Robert J. Boitmann

Robert J. Boitmann
United States Attorney

RJB:as
misc\guidelin.ltr

Rocket Empire Machine
Div. Engine Parts Network
6935 N.E. Glisan
Portland, Oregon 97213
(503) 257-7947
Ted Stanwood, President

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

11 Jan 94

To Whom it May Concern:

It appears that we finally have an opportunity to correct a wrong in the Laws on sentencing for Marijuana. I understand that this Commission will soon consider changing the gudelines to accurately reflect the amounts a criminal is dealing in.

Many persons are now in prison, at huge costs to us, the taxpayers, for dealing in volumes that are pure fantasy. Everyone knows that it is impossible to produce 1000 grams of this drug per plant, yet we convict and sentence our people on that basis, if they are caught with more than 50 plants.

This is a great wrong, and should be corrected. I also feel quite strongly that the law should be applied fairly to those now in jail, as well as those who will be charged in the future.

It is so incredibly important that the law be fair, and right, for all. That is the only way our laws will hold respect.

Correcting this error would have the added benefit of returning many persons to productive lives, at great savings to the taxpayers.

I think we can all afford to incarcerate hardened criminals, but I protest loudly paying taxes to jail persons who have done no more than make a stupid mistake.

I urge that this commission take the steps now that will make these laws fair for all.

Thank you,

Ted Stanwood

006

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: January 14, 1994

REPLY TO
ATTN OF: Michael J. Santella, Supervising USPO E/D PA
215-597-8583

SUBJECT: Proposed Sentencing Guideline amendment

TO: U.S. Sentencing Commission

The proposal that follows is an attempt to reduce the inordinately long Sentencing Guidelines that apply to street sellers involved in long-term conspiracies assuming correct application of the Relevant Conduct standard. I believe it has merits above other proposals which seek to cap the defendant's culpability by only considering the amount of drugs distributed within a limited period of time[one week or one month}. This type of limitation ignores the highly aggravating factor that such defendants made a conscious decision each and every day to peddle drugs within the community.

The proposed amendment could also be used in deciding whether mandatory minimum terms apply. A few application notes would be necessary for clarification purposes. I have some thoughts on this as well. If you care to hear them, let me know.

Section 2D1.1 {a] [4]

Where the offense level is established largely through the attribution of drugs distributed by others within a jointly-undertaken conspiracy, and the defendant had no decision-making authority and performed only unskilled or unsophisticated tasks, did not posses a firearm or engage in violent conduct during the offense of conviction and all relevant conduct, reduce the offense level established by aggregating all quantities involved in the offense by 25%.

OPTIONAL FORM NO 10
(REV 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
*U.S. GPO 1988 204-760/80102

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607 Fourteenth Street, N.W.
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TELEX 884964 USLAW G

47 AVENUE HOCHE
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TELEPHONE 33-1-47-63-11-00
FACSIMILE 33-1-42-67-50-81
TELEX 651617 EURLAW

53 AVENUE MONTAIGNE
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TELEPHONE 33-1-42-25-64-45
FACSIMILE 33-1-42-89-22-03

LINDENSTRASSE 37
60325 FRANKFURT/M 1
FEDERAL REPUBLIC OF GERMANY
TELEPHONE 49-69-97-57-11-0
FACSIMILE 49-69-97-57-11-33

WRITER'S DIRECT DIAL NUMBER

(202) 434-0764

January 27, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Courlander:

This letter is in response to the Sentencing Commission's request for comment on proposed amendment number 11 which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

Proposed amendment number 11 with the modifications suggested below would be in the public interest and should be adopted because it would tie the base offense levels for money laundering violations more closely to the underlying illegal conduct. The suggested modifications would help to carry out this worthwhile objective.

The current money laundering guidelines operate to thwart the Commission's policy determinations because they escalate the sentences above the punishment which the Commission determined was appropriate for non-violent non-drug crimes. As the Commission's Money Laundering Working Group's study clearly demonstrates, simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield in the normal case. The Commission staff's study of 1991 sentences showed that 40 percent of the prosecuted money laundering cases were not related to drug trafficking and in those cases the offense level for the money laundering conduct exceeded that for the underlying conduct 96 percent of the time.

The following modifications to the proposed amendment would better achieve the Commission's stated goal and the public's interest in relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived.

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, the Commission should make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, I would suggest changing proposed § 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,

Whitney Adams

cc: Amy Rudnick

TO: U. S. SENTENCING COMMISSION
#1 COLUMBUS CIRCLE, NE
SUITE 2-500
SOUTH LOBBY
WASHINGTON D. C. 20002-8002

ATTENTION: MR. MICHAEL COURLANDER

FROM: C. U. R. E. (Citizens for the rehabilitation of Errants) on behalf of the nearly 90,000 federal prisoners

SUBJECT: REQUEST FOR PUBLIC COMMENT (published in Vol. 58, #243 of the Federal Register dated December 21, 1993 at page 67522)

C. U. R. E. would like to offer the following comments and proposals relevant to the published request of the Commission. These comments are in the Commission's numbered order:

#7. C.U.R.E. suuports the availability of departures for the cultural characteristics or collateral consequences to a Defendant that might come to the attention of public officials. In particular, INS detainees invariably are held far past the termination of their sentences. Until the INS sees fit to deport those detainees whose sentences are finished when those sentences are terminated, it is only fair that since INS holds are suffering collateral consequences not taken into consideration by the Commission, they should have discretionary departures available to them to mitigate the extra time they are kept in prison. C.U.R.E. feels that departures should be allowed for any and all unusual cases, not just those under the heading of "public corruption."

#8(A). C.U.R.E. agrees the lowering of levels for drug and other violations is a good first step towards a more just sentence. However, this lowering of the highest grades, is not enough because at the higher levels, sentence add-ons and enhancements are routinely utilized to make the eventual sentence oftentimes the equivalent of a life term.

#8(B). C.U.R.E. opposes Option #2 and any other amendments that sentence "as if the Defendant had been convicted of a separate count charging such conduct." C.U.R.E. opposes any sentence that provides enhancement for conduct for which a Defendant has not been convicted.

#8(C). C.U.R.E. supports a ceiling in Chapter 2 offense levels for Defendants who receive a mitigating role adjustment under §3B1.2 (Mitigating Role). The current guidelines over-punish low level Defendants because the sentences are now driven by drug quantities. C.U.R.E. would also support a greater level departure than is now available under present guidelines practice.

#8(D). C.U.R.E. supports deemphasis on drug quantity to drive all drug sentences and instead supports emphasis on associated violence as a sentence enhancement. Instead of a broader range of quantity at each level, the levels themselves for the present quantities should be lowered.

#9. C.U.R.E. opposes the proposed amendment to §3B1.1(a) and (b) because it appears to simply lower the threshhold for "supervisor" liability from five to four participants. C.U.R.E. also strongly opposes the proposed amendment to Note 1 of the Application Notes of the Commentary to §3B1.1, which will allow undercover law enforcement agents to be counted as participants. This concept totally contradicts the history of the criminal law of this country. Requiring recruitment by a criminally responsible participant simply makes a factual issue, which will ultimately be lost by most Defendants because