008-95

THE SECRETARY OF STATE

WASHINGTON

February 17, 1995

Dear Mr. Chairman:

The Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) significantly increased the penalties for violations of passport and visa statutes (Title 18 United States Code, Sections 1541-1547) which the Department of State has responsibility for enforcing. This was an important step in establishing a more substantial deterrent to these crimes that threaten the integrity of U.S. passport and visa documents, affect the ability to control our borders, and support other serious criminal activities.

To ensure that the actual sentences imposed for these offenses are also increased, the relevant sentencing guidelines (Section 2L2.1 and 2L2.2) must be amended. The Department of State strongly urges the Commission to include amendments raising these guidelines when it submits its proposals to Congress later this year.

Your consideration of this important matter and the Department's position is appreciated.

Sincerely,

Warren Christopher

Warren Christopher

The Honorable
Richard P. Conaboy,
Chairman,
United States Sentencing Commission.

009-95

INDIANA UNIVERSITY

DEPARTMENT OF CRIMINAL JUSTICE
302 Sycamore Hall
Bloomington, Indiana 47405
(812) 855-9325

March 3, 1995

U.S. Sentencing Commission
1 Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

RE: criminalization of HIV transmission

To whom it may concern:

I am a social anthropologist who does ethnographic research on AIDS. More specifically, I am in preliminary stages of a research project on the criminalization of intentional HIV transmission. This letter is in response to the U.S. Sentencing Commission's request for public comment published in the Federal Register, January 9, 1995. I am an assistant professor in the Department of Criminal Justice at Indiana University, however, the opinions expressed herein reflect only my own views.

I believe that it is important for states be able to fairly and effectively prosecute cases of intentional, malicious HIV transmission between individuals and to be able to prosecute organizations such as blood banks for negligence leading to HIV infection of clients. I also believe that it would be advantageous to achieve greater consistency in the way in which such cases are now being handled in the courts. However, given the current state of scientific understanding of the biology and epidemiology of HIV transmission, and the current state of social scientific understanding of the impact of education and counseling on sexual desire, denial, and test-seeking behavior, *I believe it would be a mistake to enact federal laws that make HIV transmission a crime or HIV a "dangerous weapon" or that the definition of "serious bodily injury" or that "permanent and life-threatening bodily injury" should be amended to include HIV-infected bodily fluid.*

The following is an example of how our biological and epidemiological knowledge is insufficient to provide a strong foundation for legal decision-making:

If enacted, the types of laws under consideration would have to place great weight on the significance of the HIV antibody test in determining whether or not someone "knowingly" infected another sexually. As has been known for some time, there is a long latency period (six months or more) between onset of infection and antibody production, so that someone may receive a negative test and yet still be infected. In a study of over 9,000 individuals, researchers from the University of Michigan have found that "a person's chances of getting HIV through unprotected sex was as high as 3 in 10 if a male partner had been infected in the past 60 days. Afterward, once the presence of antibodies makes it possible to detect HIV infection in routine HIV tests, the risk of infection declines to about 3 in 1,000 and stays that way in

an asymptomatic phase which can last for years." In other words, said Carl Simon, a professor of economics and public policy at the university, "*A person with a negative blood test may have a better chance of being highly contagious than a person with a positive test*," (AIDS Policy and Law 1995, v. 10, n. 1, p. 5). The implications of this are staggering in terms of epidemic spread. It points to a much deeper problem than the potential negative impact of proposed laws on the willingness of persons to be HIV tested, challenging the very use of the HIV antibody test as a primary basis for legal intervention in the epidemic, i.e., *if* the goal of criminalizing HIV transmission is to stem the spread of the epidemic, rather than simply punitive.

The following is an example of how our social scientific knowledge is insufficient to provide a strong foundation for legal decision-making:

There has been little research on the question of disclosing HIV status to sex and needle-sharing partners and/or business clients (e.g. prostitutes, blood banks). From what is known so far, it seems that it is not uncommon to disguise a positive HIV status from people with whom one is not intimate in a steady, long-term relationship. There has been little research done evaluating the various forms of counseling that take place when a person receives the news of a positive HIV serostatus. What has been done, seems to suggest that denial mechanisms are quite strong in the initial phases of someone "knowing" of their infection. These denial mechanisms seem to be natural defense mechanisms which may be little affected by initial counseling and education sessions, and would be very difficult to separate from the question of "intent" in the courts. Without evaluation of current counseling techniques, and without an understanding or denial mechanisms (on the individual and corporate level), it is unwise to institute laws and enforcement mechanisms that target HIV positive persons. Such laws and enforcement mechanisms could set the stage for widespread discriminatory, and indeed persecutory, actions against classes of HIV positive persons who are more easily apprehended (gay men, prostitutes, injecting drug users). Beyond the unfairness of this, such legal mechanisms would also provide a dangerously false impression that the epidemic is being controlled, when indeed, the truth is quite the opposite.

Thank you for your attention. Please let me know if I can be of any further service,

Sincerely,

Stephanie Kane

Stephanie Kane, Ph.D.

010-95

Congress of the United States
Washington, DC 20515

February 16, 1995

The Honorable Richard P. Conaboy
Chairman
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Chairman:

We are writing to urge the Sentencing Commission to take action to strengthen the sentencing guidelines applicable to passport and visa offenses. The Commission sought comment in the January 9, 1995, Federal Register on this particular matter.

As you know, Section 13009 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) significantly increased the statutory maximum penalties for passport and visa offenses (18 U.S.C. 1541-1546). This provision addressed the growing problems associated with documents which permit illegal travel in and out of the United States and which facilitate numerous other types of crimes. It is important that revised sentencing guidelines now be promulgated to ensure that Section 13009 is fully and effectively implemented.

In almost all cases, the maximum fines and periods of imprisonment for violations of these statutes were increased to not more than $250,000 and/or ten years. A new Section 1547 set the maximum imprisonment at fifteen years if the violation had been committed to facilitate a drug trafficking offense and to twenty years if committed to facilitate an act of international terrorism.

The sentences called for by the current base offense levels for these statutes range from 0 to 10 months imprisonment. This is unacceptable. To provide a meaningful deterrent to those who would violate our passport and visa laws, actions should now be taken to raise the base offense levels, as well as to provide appropriate penalty enhancements for facilitating drug trafficking, terrorism and any other criminal activity.

We thank you for your attention to this important matter and stand ready to be of assistance in securing adoption of meaningful and effective guidelines.

With best wishes,

Sincerely,

BAG\jpm\teh

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN
UNITED STATES COURTHOUSE
DETROIT, MICHIGAN 48226

CHAMBERS OF
GERALD E. ROSEN
UNITED STATES DISTRICT JUDGE

(313) 226-[illegible]

March 3, 1995

Judge Richard P. Conaboy
Chairman
U. S. Sentencing Commission
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N. E.
Washington, D C. 20002-8002

Re: Proposed Amendments to Immigration Fraud Guidelines

Dear Judge Conaboy:

I write to support the proposed amendments to the passport and visa fraud guideline provisions published in Volume 60, No. 5, of the Federal Register for Monday, January 9, 1995, at pp. 2443-41.

As I apprehend the thrust of the proposed changes, the guidelines would be amended to increase the base offense levels -- or, in some cases, to provide specific offense characteristic enhancements -- for crimes involving immigration document fraud. As a judge on the District Court of an international border state, I believe that current guidelines do not permit sufficient reflection of the often very serious criminal activity that is attendant to the seemingly more benign crimes of immigration fraud. Too often, we know that passport or visa fraud is simply facilitative of more malignant and socially destructive criminal conduct. By enhancing sentences to specifically reflect the true nature of those crimes, in addition to increasing the base penalties for the underlying passport and visa crimes, you will be giving courts and prosecutors more effective tools to deal directly with the true objectives of the fraudulent immigration activity.

In summary, I wholeheartedly support these proposed amendments.

With best wishes, I am

Sincerely,

Gerald E. Rosen
United States District [illegible]e

bcc: [illegible] Russell

012 - 95

United States Department of State

The Inspector General

Washington, D.C. 20520–6817

March 2, 1995

The Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, DC 20002-8002

Re: Notice of Proposed Amendments to Sentencing Guidelines, 60 FR 2430 (January 9, 1995)

Dear Mr. Chairman:

I am writing to express my strong support for Proposed Amendment 23(B) to the federal sentencing guidelines which would increase the base offense levels for passport and visa offenses.

We were pleased that Section 130009 of the Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) contained significant increases in the maximum penalties for violations of passport and visa statutes (Title 18, United States Code, Sections 1541-1547). We understand that to make sure that the actual sentences imposed by judges for these offenses are also increased, the federal sentencing guidelines must be amended. Therefore, we urge you to adopt the proposed amendment, published for comment, which consolidates guideline sections 2L2.1 and 2L2.2 concerning passport and visa offenses, and provides additional enhancements if the offense was committed to facilitate certain unlawful conduct.

The Office of Inspector General (OIG) conducts investigations of passport and visa fraud under the authority of the Inspector General Act of 1978, as amended (5 U.S.C. app. 3). The OIG's focus is on internal employee corruption cases, some of which involve bribery and extortion. Passport and visa fraud cases currently comprise approximately 20% of our caseload. Increasingly, these cases involve identification documents which are being used by international criminal organizations in the pursuit of criminal activities, such as narcotics trafficking, terrorism, prostitution and alien smuggling. Such cases clearly warrant stiffer penalties. In addition, we believe that increased penalties for the more conventional visa and passport offense cases are also necessary to ensure the integrity of the passport and visa issuance process, to vigorously enforce existing passport and visa fraud statutes, and ultimately to provide a stronger deterrence to passport and visa fraud.

Thank you for considering our comments on the proposed amendments.

Sincerely,

Harold W. Geisel
Acting Inspector General

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

ATTENTION: PUBLIC INFORMATION

FROM: C.U.R.E. (CITIZENS FOR THE REHABILITATION OF ERRANTS) because there are now over 95,000 federal prisoners

SUBJECT: REQUEST FOR PUBLIC COMMENT (published in Volume 60, No. 5 of the Federal Register dated 1/09/95 at pages 2430-2469)

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 numbered order chosen by the Commission:

1. HIV should not be treated in a class by itself. Other infectious diseases should be treated in a similar fashion (i.e. if sexual activity with intent to expose another to HIV carries a criminal penalty, the same should hold true for hepititis, tuberculosis, etc.). Furthermore, anyone purposely exposing another to infectious disease should be held criminally responsible (including prison and jail personnel).

2. The words "physical contact" should be replaced with "bodily injury" in §2A2.3(a)(1). Minor physical contact (like a push) should not carry the same penalty as physical contact that results in bodily injury. There should be no cross-reference to §2A2.3 because an offense that is not "aggravated," so as to carry a felony conviction, should not be treated as such. The criteria for "aggravated assault" carries with it penalties that are self-supporting.

3. The base offense levels for involuntary manslaughter are adequate as is. Adequate punishment for a crime involving no criminal intent is already applied. For those egregious situations that arise, a judge can now depart upwards twice the number of months as previously was the case.

4. C.U.R.E. feels that courts should not be involved in family custody disputes, particularly when there are conflicts in court orders from foreign jurisdictions. There should be no further enhancements for parents abducting their own children on top of the existing penalties.

5. C.U.R.E. feels that there should be no additional enhancements in §2A3.1 Extraordinary situations can be dealt with by sentence departures. There are already enough enhancements to deal effectively with violent sexual abuse.

6. C.U.R.E. favors Option #1 to reflect that death to a victim must be found to have resulted from the offense beyond a reasonable doubt. A defendant should never face the death penalty using a preponderance of the evidence standard which can be skewed by prosecutorial misconduct or wilful withholding of exculpatory evidence.

7. C.U.R.E. feels the proposed amendments are more than adequate to support use of upward departures for those who have committed more than one of the same type crime. Higher offense levels because of the similarity of prior conduct (which might be quite minor compared to the instant offense) is not warranted.

8. C.U.R.E. favors Option #2 leaving discretion for but another enhancement to the judge in the case, rather than making an enhancement mandatory.

9. C.U.R.E. strenuously objects to the definition of a "major drug offense" to include Title 21 U.S.C. §846 indiscriminately, since that section can include drug conspiracies involving tiny amounts (parts of grams). Since Title 21 U.S.C. §841(b)(1)(A) or §960(b)(1) also involve amounts that are mixtures (involving tiny amounts of drugs), offenses under these subsections cannot remotely be called "major drug offenses" and should not be used as the basis for any additional enhancements in any situations. Present penalties are adequate for reckless endangerment.

10[A]. Why should a violation of 18 U.S.C. §1791 carry greater punishment than the mandatory minimum level of 26 (see cross-reference of §2P1.2 to §2D1.1), when the amount involved is the simple possession of very small amounts of drugs for personal use by mainly narcotic addicts? There is no reason to enhance this punishment any more than the 63 to 150 months already available under Level 26.

10[B]. The appropriate offense levels for simple possession of controlled substances in correctional facilities should be the levels set out in §2D1.1, plus the enhancement stated in §2D1.2(a)(2).

11. The enhancements set out in §2D1.2 are more than adequate for drug trafficking in protected locations, simply because criminal intent is not a stated requirement for violation of Title 21 U.S.C. §860. It is not fair to further penalize those who are ignorant of an obscure statute and who had no intention to violate that statute. There should be absolutely no enhancement when the Government chooses the location for the crime.

12. C.U.R.E. takes no position on Proposed Amendment #12.

13. C.U.R.E. objects to the wording of subsection (2) of Proposed Amendment #13 because the phrase "had reasonable cause to believe" severely inhibits a finding of guilt beyond a reasonable doubt, which is a cornerstone of criminal behavior in this country. Nobody should be found guilty of a crime only because the Government, acting through an AUSA, finds that a Defendant should have "had reasonable cause to believe" that perfectly legal behavior was a prelude to illegal behavior. The new statute [21 U.S.C. §843(a)] should itself be declared unconstitutional.

14. C.U.R.E. urges adoption of Option #1 as simpler and more appropriate for hate crime offenses, including implementation of new guidelines for penalty provisions of the Freedom of Access to Clinic Entrances Act of 1994.

15. C.U.R.E. has no comment on this Proposed Amendment.

16. C.U.R.E. favors Option #1, which results in a base offense level of 6 for transfer of a firearm to a juvenile. Such transfers are often by other youngsters, who should not be treated as adults.

17. The enhancement directive from Congress for semi-automatic firearm involvement in crimes of violence or drug trafficking should be implemented only against firearms more dangerous than other firearms, and only where the firearm is actually "involved" in the crime (i.e. not locked in somebody's car trunk). Congress' directive was specific and the Commission should not expand the directive to other crimes.

18. C.U.R.E. favors Option #2, where an application under §2K2.4 would include a recommended departure when the sentence (combined with the sentence of the underlying crime) does not provide adequate punishment. Discretion should be vested in the judge to determine an appropriate enhancement in lieu of a specific enhancement table.

19. The definitions for crime of violence and drug trafficking offense should be con-

sistently the same as those used in §4B1.1, which would eliminate liability for burglary of abandoned buildings and using a telephone to facilitate a drug distribution - crimes which may actually have nothing to do with violence or drugs. The current offense levels in the guidelines should not be increased.

20. C.U.R.E. favors Option #1 and believes that the existing penalties are adequate for these offenses and that no further upward enhancements serve any public purpose.

21. C.U.R.E. believes that the penalty for a conspiracy to violate Title 21 U.S.C. §924(c) should be referenced only to that section and should not be referenced to a guideline for an underlying offense for which there is no relevant conduct attributed to the Defendant.

22[A]. C.U.R.E. opposes any increase in the guidelines for §2L1.1.

22[B]. C.U.R.E. opposes penalties for reentry of aliens after conviction of a felony being extended to misdemeanors.

22[C]. C.U.R.E. opposes the suggested increases in base offense levels for these immigration offenses as suggested by the DOJ.

22[D]. C.U.R.E. opposes this DOJ suggestion for upward departures.

23[A]. C.U.R.E. opposes any change in §§5K2.9 & 5K2.15 guidelines for passport offenses because the existing guidelines adequately cover the offenses.

23[B]. C.U.R.E. opposes this DOJ Proposed Amendment because it skews the penalties for non-violent passport crimes to unwarranted terms of incarceration.

24. C.U.R.E. favors the addition of a non-binding recommendation of a pre-set upward enhancement for a felony that is intended to promote international terrorism.

25[A]. C.U.R.E. favors a two level adjustment commensurate with the adjustment for abuse of trust for involving a person under the age of 18 in other than a drug crime.

25[B]. C.U.R.E. agrees with this DOJ Proposed Amendment for using a minor to commit a crime.

26[A]. C.U.R.E. suggests any enhancement be left to a judge's discretion.

26[B]. C.U.R.E. has no comment regarding this Proposed Amendment.

27[A]. The present guidelines provide sufficiently stringent punishment for crimes against the elderly. There should be no enhancement unless a crime against an older person was committed knowingly and intentionally.

27[B]. C.U.R.E. agrees with this Proposed Amendment.

27[C]. Current victim-related adjustments are adequate for frauds against the elderly; a counterpart presumption for vulnerability of younger victims (under 16) should be established; and, a telemarketing fraud should be treated the same as any other fraud.

28. No action need be taken because the issue is already covered by §5G1.1.

29. C.U.R.E. takes no position on this Proposed Amendment, which is likely to be affected by currently proposed Congressional legislation.

30. C.U.R.E. takes no position on this Proposed Amendment.

31[A]. C.U.R.E. has no comment on this Proposed Amendment.

31[B]. This proposed amendment of §7B1.4 should specifically recite the old wording of Note 5 that the Court has discretion not to impose reimprisonment for failure of a drug test. There are many reasons why false positives come up on drug tests (i.e. a releasee should not be subject to incarceration merely because he ate a poppy seed roll, etc.). This Proposed Amendment does not adequately deal with the problem.

32. C.U.R.E. makes no comment to this Proposed Amendment.

33. C.U.R.E. urges adoption of Option C. The drug offense levels are too high because use of prosecutorial discretion for enhanced sentences makes them that way. Neither society's interests nor the drug dealer need the enormous amount of time in prison that is presented by the current guidelines and/or Options A or B.

34. C.U.R.E. urges adoption of a maximum level of 28 for those qualifying for a Mitigating Role in a drug offense. C.U.R.E. further urges a maximum level for mitigating roles in drug offenses where ingestion of the drug cannot be done intravenously up to a level of 20 (i.e. marijuana, LSD and other pill offenses would fit this category).

35[A]. C.U.R.E. opposes adoption of this amendment. Persons who are not criminally responsible should not be subject to enhancements.

35[B]. C.U.R.E. makes no comment on this Proposed Amendment.

36. C.U.R.E. opposes adoption of this Proposed Amendment. First, the words "leader" and "organizer" have never been sufficiently defined and are always manipulated by the prosecution. Second, the Amendment affords far too much discretion to AUSAs to utilize the enhancement. Third, so-called "leaders" and "organizers" are already sufficiently punished. Fourth, a very small amount of drugs would now result in a very large sentence just because of this enhancement. C.U.R.E. further opposes the alternative proposal by the Practitioner's Advisory Group because all firearm offenses in conjunction with drug offenses are already adequately enhanced under Title 18 U.S.C. §924(c).

37. C.U.R.E. strongly urges adoption of this Proposed Amendment to equate all marijuana plant cases to 100 grams per plant.

38. C.U.R.E. strongly urges adoption of a 1:1 ratio between cocaine and crack offenses because there is no scientific evidence of any difference between the two.

39. C.U.R.E. favors a twelve month continuous window on drug crimes for Option #1 because large drug importation schemes may be only one-time affairs. C.U.R.E. also supports the adoption of Option #2.

40. C.U.R.E. strongly urges adoption of this Amendment, so that Defendants are no longer punished for sale or possession of "filler." C.U.R.E. has no position on FAMM's proposal to reduce the methamphetamine ratio relative to other substances (penalties for <u>all</u> drug offenses are still far too high).

41. C.U.R.E. supports adoption of this Amendment so that Defendants are not penalized for "filler."

42. C.U.R.E. takes no position on the hashish/oil amendment; supports adoption of a dry marijuana weight distinction; takes no position on the Commission's definition of marijuana; takes no position on the addition of two obscure drugs for equivalency pur-

poses; opposes the loss of distinction between l-meth (weak) and d-meth (stronger); opposes a rebuttable presumption that if a weapon is present, it is connected with the offense (since most are not)); opposes the new wording of Note 12 to §2D1.1 because it still allows the Government to control offense severity in reverse-sting buys; supports adoption of Note 21 allowing a Defendant to rebut what was reasonably foreseeable in an unusual case; supports adoption of theoretical presumptions for uncompleted drug manufacture cases, but with different percentages for different drugs which more closely mirror reality; opposes Option #3 for drug offenses involving part of the amount for personal use because the Ninth Circuit approach is more realistic (placing a burden on the Defendant to rebut such a presumption may be an impossibility); supoorts the adoption of Additional Note 2 to §2D1.2, so that the Government cannot determine the location of a drug transaction to enhance the Defendant's sentence; supports the miscellaneous amendments to Application Note 1 of §2D1.8.

43. C.U.R.E. supports adoption of Option #1 of this Proposed Amendment, so that degree of bodily injury and number of participants in the offense carry more weight than the amount of drugs in the crime to determine the degree of punishment.

44. C.U.R.E. favors the use of Level 12 in subsection (a)(2) and Level 6 in subsection (a)(3) of §2S1.1 for setting Offense Levels for money laundering offenses. C.U.R.E. objects to the absence of a specific definition ofor the word "sophisticated" when adding two levels for such activity. Proposed Table §2S1.1 should not replace the Table in 2F1.1 because the inflated increase in levels is far too high. A downward departure for the Government influencing the amount of money in the crime should be recommended by an Application Note.

45. C.U.R.E. strongly urges changes in the structure of Supervised Release. §5D1.1 should be amended to eliminate required supervision in every case. §5D1.2 should be amended to reduce terms of Supervised Release. Judges should be given complete discretion to set and amend Supervised Release terms.

46. C.U.R.E. supports adoption of Option #2 for §5G1.3(c), so that judges have as much discretion as possible to adjust punishment to individual Defendant characteristics in the case of over-lapping offenses and sentences.

C.U.R.E. thanks the Commission for the opportunity to provide input to the rule-making process that affects all those soon-to-be incarcerated and those already in federal facilities.

C.U.R.E. hopes that the Commission will consider the plight of those very sick and terminally ill elderly federal prisoners and come up with a plan for a dignified release. C.U.R.E. also urges that any measures that shorten the terms of incarceration that take effect as new amendments will also be made a part of §1B1.10 for those already incarcerated.

DATED, this 24th day of February, 1995.

PUBLIC COMMENT FROM MARIJUANA POLICY PROJECT (MPP) (DOCUMENT 014-95, PAGES 49-54) TRANSFERRED TO WRITTEN TESTIMONY BINDER

015 - 95

JONES, GILBREATH, JACKSON & MOLL
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ROBERT L. JONES, JR.
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AREA CODE 501
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* ALSO LICENSED IN OKLAHOMA

March 2, 1995

ATTN: Public Information
United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-800

Gentlemen:

I am opposed to mandatory federal sentencing guidelines as I believe discretion should be left with the judge. Furthermore, the current war on drugs is a failure. Our prisons are overcrowded, courts are congested, violence is at a high level, the availability of drugs has not been reduced, and the whole thing is costing too much money. A new approach needs to be considered.

Be that as it may, I have some comments concerning the proposed amendments to the sentencing guidelines.

1. Drug purity. I support the new guideline which I understand would base the sentencing on the actual amount of the drug in a powder mixture instead of the entire mixture.

2. Methamphetamine enhancement. It is my information that methamphetamine is now enhanced five to one (1 gram met. -5 grams cocaine) for sentencing purposes as compared to cocaine. Is there a rational basis for this distinction? I thought both drugs were equally bad. One to one would seem to be the desired ratio.

3. Precursor chemicals. When labs are found but no drugs, a determination is made about how much drug could be produced with the chemicals on hand. I understand the current law is you calculate on a 100 percent yield using the most abundant chemical. I would think as a matter of practicality, it would only be possible to produce a drug in the amount of the least abundant chemical.

There are many people in our prisons for drug related offenses who have learned their lesson. They are not violent and not a threat to society. Therefore, it is important that these amendments be made retroactive to reduce the sentences of those in prison and to make room for violent offenders. Protecting society by removing the violent offenders from the street should be our number one priority.

Your consideration of these views is appreciated.

Yours very truly,

Robert L. Jones, III

cp

016 - 95

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States Post Office & Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Honorable Joseph Anderson
Honorable Richard J. Arcara
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Honorable Morton A. Brody
Honorable Charles R. Butler
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March 6, 1995

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N. E.
Suite 2-500, South
Washington, D. C. 20002-8002

Dear Judge Conaboy:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, I appreciate the opportunity to respond to the proposed amendments and issues for comment published for consideration for the 1995 guideline amendment cycle.

After careful analysis, we have decided to focus on a few amendments which we believe merit the most serious consideration this cycle. We particularly urge the Commission to adopt amendments involving role, supervised release, and undischarged sentences. Our comments on those proposed amendments are outlined in the first few sections below. In addition, we have commented on some of the proposed amendments which would implement the Violent Crime Control and Enforcement Act of 1994, and some of the proposed drug amendments.

I. ROLE AMENDMENTS (Amendments 34-35)

The centerpiece of our presentation this year is the need to refine and improve the role guidelines. The Criminal Law Committee believes that

change in this area is of paramount importance and long overdue. The Committee applauds the work your staff has done in generating the proposed role amendments, attempting to identify and utilize factors which more accurately define what constitutes an aggravating or mitigating role in any particular offense. While the Committee strongly supports the concept of the proposed amendments, we also believe that further refinements are essential.

Need for Change

The role adjustments potentially impact almost every criminal sentence. The present adjustments are not adequately explained or defined, which is perhaps one reason why the role adjustments have been seriously under-utilized to date.[1] For example, there is a two-level distinction between a minimal and minor participant. The former is defined only as one "among the least culpable of those involved in the conduct of a group," while the latter is defined as one "who is less culpable than most other participants" but not enough to be minimal. Similarly, the aggravating adjustments make distinctions between one who is "an organizer or leader" and one who is a "manager or supervisor." We strongly believe that these distinctions are so gossamer that they strip the guidelines of their potential real value. The vice is compounded by the fact that different guideline scores result from the use of these very imprecise terms. As a result, judges are frequently inclined to simply avoid going down a road that is so poorly marked. Our beliefs are confirmed by tests recently conducted by the Probation Advisory Group, which concurs that major reform is needed in this area.

The role adjustments that we support would further the goal of simplifying the guideline system. Since role adjustments apply day in and day out in virtually every case, we believe that the role guidelines should be amended now, regardless of what action the Commission chooses to take or not take with respect to drug guidelines. In that connection, however, the Judicial Conference has repeatedly urged that sentences in drug cases be driven less by drug quantity. It is our firm belief that a realistic, practical scheme of making role adjustments would go a long way toward balancing the quantity factor in drug cases. We further believe that such an adjustment would be far better than attempting to totally remove quantity from the sentencing formula and would also be more logical and appropriate than ad hoc efforts to arbitrarily adjust some present drug offense levels.

---

[1] The Commission's 1993 Annual Report, page 88, indicates that only approximately 10% of defendants received any mitigating role adjustment in 1993: 3% received "minimal," 6.5% received "minor," and .6% received between minor and minimal. Only 7.3% of defendants received any aggravating role adjustment in 1993: 2.4% received +4, 1.6% received +3, and 3.5% received +2.

Our Proposal

While the Committee strongly endorses the concept of the currently proposed role amendments, we believe that the proposed role amendments are too lengthy and too complicated. Moreover, to a considerable extent the amendments are still overly mechanical and rigid, considering the fact that, as stated in one of the proposed application notes, the difference in roles in any particular case is always one of degree, depending upon the presence and intensity of various factors. For that reason, the cornerstone of our proposal is that there be only a "mitigating" or an "aggravating" role adjustment. One could receive an increase or decrease of anywhere from one to four levels, depending upon the number and intensity of the factors existing in that particular case. More specifically, our proposal would include the following significant features:

1. The adjustment would be simply an "aggravating role" or a "mitigating role" adjustment. Both guidelines would be similar, and symmetrical.

2. The court would be asked to consider a list of factors, and the court would determine if the defendant's role was predominantly aggravated or mitigated, or neither, depending on the presence and intensity of the factors.

3. The court would decide, based on the presence and intensity of the factors, how large an adjustment to apply (1-4). This gives the court a "sliding scale" upon which to place the defendant's role.

4. Key terms would either be defined or would be self-evident; no adjustment would depend on a single terminology distinction (such as organizer or manager; minor or minimal).

5. It would not be necessary for the court to perform the difficult and meaningless task of comparing the defendant's activity to a defendant who might commit the entire offense alone.

6. There would be no mechanical measurements, such as a requirement that a certain number of persons be involved or be supervised, in order for the adjustment to apply.

Based on the above criteria, we have redrafted the role amendments in the **Attachment**, to illustrate at least one form that they might take.

Summary

This proposal: a) provides needed definition and guidance, b) assists in providing more proportional sentences, c) eliminates ambiguous terms, d) encourages full use of the role adjustments, e) provides for a judgment by the court based on multiple factors, and f) remains relatively simple in organization and application. The court's findings, which would usually be based on a combination of fact-based factors, will not be easily reversed on appeal because of the multiple-factor basis of the findings.

We urge the Commission to make a significant contribution this amendment cycle by enacting new role guidelines which would be similar to, and embody the significant features of, our proposed amendments.

II. SUPERVISED RELEASE (Amendment 45)

The Committee asked the Commission to publish an "Issue for Comment," asking whether "...the supervised release guidelines should be amended to permit greater consideration of the individual defendant's need for supervision after imprisonment...?" More specifically, we asked whether §5D1.1 should be amended to eliminate the current requirement that supervised release be imposed in all cases where a term of imprisonment of one year or more is imposed, and whether §5D1.2 should be amended to reduce the terms of supervised release required to be imposed? We believe that these questions very definitely should be answered in the affirmative.

Changing Numbers and Character of Supervised Offenders

The court system and, most particularly, the probation system, is already beginning to feel a heavy burden from the rapidly growing numbers of supervised release cases. For example, in 1989 there were 1,673 offenders on supervised release and 53,589 offenders on probation. All categories of supervision (including parole, mandatory release, and military parole) totaled 77, 284 offenders on supervision. In 1996 the projected numbers show 49,100 on supervised release and 34,800 on probation, with a total on supervision of 92,100.[2]

Not only are the total numbers rising, but the character of the supervised offenders is markedly changing. In 1989, 32% of offenders under supervision had been released from prison (69% were on probation). In 1994, 54% of offenders under supervision had been released from prison (46% were

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[2] The numbers on supervised release are rising far faster than the numbers on probation and parole are falling. The consecutive years between 1989 and 1996 show the following figures for supervised release: 6,138 (in 1990), 11,949 (in 1991), 19,362 (in 1992), 26,384 (in 1993), 33,900 (in 1994), and 42,600 (in 1995).

on probation). It is projected that in 1996, 61% of the 92,100 offenders under supervision of the court will have been released from prison (with only 39% on probation).

Supervised release offenders are post-custodial offenders. Such offenders generally demonstrate a higher violation rate than probationers. For example, in fiscal 1993, the violation rate for post-prison release cases was 37% compared to 15% for individuals on probation. Supervised releasees also require more intensive supervision by probation officers than probationers, and are more likely to require substance abuse treatment and tests. With 92,100 offenders on supervised release in 1996, if 37% require violations, that means there will be 34,040 violation hearings in federal court in 1996. This is a significant new demand on court time, especially given that parole violation hearings did not involve the courts.

Varying Needs for Supervised Release

It is also clear that not all defendants need supervision and those that do, do not need the same term of supervision. While some period of supervision may be helpful for most defendants, there is no convincing evidence that extensive periods of supervised release are needed to meet the goals of the criminal justice system. In fact, there is evidence that shorter periods of supervised release serve the purpose of rehabilitation and permit a determination to be made of whether the offender is likely to recidivate or not. A 1994 study by the Bureau of Prisons indicates that most people who are going to recidivate do so within the first year after release.

Statutory Authority

Title 18 U.S.C. § 3583(a) allows for court discretion in imposing supervised release: "The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, [but shall do so if a statute requires it]." (emphasis added). In addition, the Commission has the authority to promulgate guidelines for use by the court in making "a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term." 28 U.S.C. § 994(a)(1)(C).

The courts have read guideline sections 5D1.1 and 5D1.2, which mandate terms of supervised release, to be consistent with the discretion provided in section 3583(a), on the theory that courts could "depart" from the terms of supervised release set out in the guidelines. U.S. v. Chinske, 978 F.2d 557, 558-9 (9th Cir. 1992); U.S. v. West, 989 F.2d 1493, 1503 (11th Cir. 1990). However, courts are understandably reluctant to depart, given the burden to

be met by the court (i.e., the court must find "aggravating or mitigating circumstance[s] of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." §5K2.0), which would be unlikely to be met if the sentence was not otherwise a departure.

Our Proposal

The Committee urges that the Commission amend the guidelines to reflect the discretion provided in the statute, i.e., to allow the court to decide whether supervised release should be imposed or not, and what the length of the term of supervision should be if it is imposed, unless a term of supervised release is mandated by the offense or otherwise set by law.

Specifically, the Committee requests that the Commission change its current guideline section 5D1.1 to the following:

(a) *The court shall order a term of supervised release to follow imprisonment when required by statute.*

(b) *The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, unless the court specifically finds that supervised release is not required to protect the public from further crimes of the defendant, for the facilitation of payment of a financial penalty or participation in a drug treatment program, and for the reintegration of the defendant into society.*

(c) *The court may order a term of supervised release to follow imprisonment when a sentence of imprisonment of one year or less is imposed.*

This language would create a rebuttable presumption in favor of the imposition of supervised release when the sentence is over one year, but allow the court the flexibility, without requiring a departure (as currently suggested in the notes), not to impose it where the court makes specific findings that it is not necessary.

The Committee further requests that the Commission change the current guideline section 5D1.2 to the following:

(a) *If a defendant is convicted under a statute that requires a term of supervised release, the term shall be not more than five years unless otherwise provided by law.*[3]

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3 This proviso is designed to account for any longer mandatory minimum sentences in title 21 cases. It does not attempt to account for the holding in the Fifth Circuit

(b) *Otherwise, when a term of supervised release is ordered, the court shall order a term of supervised release that is no longer than that required to protect the public from further crimes of the defendant, to facilitate payment of a financial penalty or participation in a drug treatment program, and to reintegrate the defendant into society.*

We believe these changes would result in much more efficient and rational allocation of judicial resources and serve the purposes for which Congress intended supervised release.

III. UNDISCHARGED TERMS OF SENTENCE (Amendment 46)

no need for it - no clear goal -

General Comments

The Committee strongly urges the Commission to significantly change Policy Statement §5G1.3(c). The Probation Officers' Advisory Group has urged simplification of this provision two years in a row. We believe, as well, that the Policy Statement is desperately in need of simplification.

Although not all courts have yet experienced the extreme difficulty of attempting to carry out the commentary's suggested procedure, nearly all probation officers have been required to do so in order to provide the court with the option of following this Policy Statement.

The confusion and excessive use of resources caused by this provision are, simply put, not worth the benefits that may occasionally result from its application. The few cases in which a perceived injustice might take place if the suggested procedure were not followed could easily be prevented by the exercise of discretion which the statute (18 U.S.C. § 3584) grants the court. The suggested §5G1.3(c) procedure raises the frustration level, wastes resources, and erodes confidence in the guideline system. The harm sought to be avoided is no worse than the harm brought about by the process; indeed, the cure may well be worse than the disease.

We believe the procedure itself is far too complicated and esoteric, and asks courts to rely on unreliable information. It also asks courts to "credit" the instant sentence with time served on other sentences. This not only may result in double crediting by the Bureau of Prisons, but is something the

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that the caps on supervised release terms in section 3583(b) limit the terms of supervised release in title 21 cases. See, U.S. v. Kelly, 974 F.2d 22, 24 (5th Cir. 1992); But see, U.S. v. Eng, 14 F.3d 165, 173 (2d Cir. 1994), cert. denied, 115 S.Ct. 54. *Courts in that circuit may not be able to impose terms of supervised release up to five years in some cases.*

Supreme Court has said only the Bureau of Prisons is authorized to do. See, Wilson v. U.S., 112 S.Ct. 1351 (1992).

Also, the Commission's desired result of imposing only an incremental increase for the instant offense, as if all sentences were imposed simultaneously with the federal one, is not necessarily appropriate. That is, there is no clear policy underpinning for §5G1.3(c) as there is for sections (a) and (b).

Finally, the disparities created by the provision are as great or greater than those sought to be avoided. For example, a defendant receiving a §5G1.3(c) adjustment off a federal sentence fares better than a similarly situated co-defendant who did not commit another crime for which there is an undischarged term, and better than one who had recently completed serving another term who will also not receive the adjustment.

Our Proposal

Our proposal is to change §5G1.3(c) to simply state:

"(Policy Statement) In any other case, the court should exercise its discretion in complying with 18 U.S.C. § 3584 to sentence the defendant concurrently or consecutively, to effect a reasonable punishment for the instant offense."

Further, the current commentary should be omitted. No "incremental" sentence is suggested, merely a just and reasonable sentence. No detailed explanation is necessary. We believe that the statutory discretion given the court, combined with the advocacy on which the judicial system depends, would generally provide just sentences by the use of concurrent sentencing in those few cases in which purely consecutive sentences would generate an apparently unjust result. The guidelines would be a couple of pages shorter, the hot line would be relieved, and the resources currently expended on this exercise could be directed elsewhere.

In the alternative, if the Commission decides to retain the suggested result of an incremental sentence, we suggest that the Commission add to our proposed Policy Statement, above, some simple commentary which merely states the desired result, such as:

"In effecting a reasonable punishment for the instant offense, the court should attempt to determine what reasonable incremental punishment should be imposed for the instant offense, in addition to the time already served on the other offense, taking care not to generate successive consecutive sentences which would result in significantly more total imprisonment than if the offenses were sentenced federally, together. This

should be done only to the extent that the court can accurately determine the information necessary,"

If the Commission does not accept our primary or alternative proposals, we strongly urge that, at a minimum:

a) Section 5G1.3(c) should remain a Policy Statement, no matter what; and

b) Option 2 is far superior to Option 1 or the current Policy Statement, because it only suggests that this complicated procedure be done when the undischarged term is another federal (non-departure) sentence, ensuring reliable information regarding the guidelines and time to be served.

IV. OTHER AMENDMENTS

Our comments on the other proposed amendments will be relatively brief. We will comment only on those which we either oppose, or which we believe deserve comment or support.

A. Violent Crime Control and Enforcement Act of 1994

Where the Commission has suggested alternative ways to implement a provision, we would generally prefer the use of a suggested departure, where possible. This is particularly true for sentencing factors which would appear relatively infrequently. We believe new Chapter Three guidelines should only be created sparingly.

Amendment 7 - Repeat Sex Offenses

The Commission's proposed amendments insert departure suggestions in certain sexual offenses under Chapter Two. They also provide for a departure under "Adequacy of Criminal History Category" for prior convictions involving death, serious bodily injury (or attempts to inflict either), as well as sexual offenses which are similar to the instant offense, if not otherwise accounted for by Career Offender or Armed Career Offender guideline provisions. The proposal also seeks comment on whether Chapter Two sexual offenses should provide for an adjustment rather than the suggested departure for similar prior offenses.

After careful review, we believe that there are advantages to the broader approach and, thus, recommend a departure under Chapter Four (adequacy of criminal history) not only for sexual offenses, but for all similarly serious prior violent offenses. As the Commission notes,

this change implements the congressional directive more broadly than required, but it recognizes that all forms of aggravated assault, sexual or non-sexual, deserve the same treatment. It thus avoids creating disparities which would result from suggesting departures only for prior similar sex crimes but not for prior similar murders, attempted murders, or other violent felonies. If this approach is adopted, it would seem unnecessary and repetitive (as well as incomplete) to also note the same possible departure under each sex offense.

Amendment 11 - Drug Offenses Near Protected Locations

We prefer a modification of the proposed revision listed in sub-part eleven of **Amendment 42**, discussed below, to this proposal.

Amendment 22(B) - Immigration Offenses

This provision involves statutory changes for unlawfully entering or remaining in the United States. The statutory sentence limitations in some parts of 8 U.S.C. §§ 1252(e) and 1326(b) are decreased, but most are dramatically increased. In addition, a new offense is created for reentry after convictions for 3 or more certain misdemeanors. Again, the Commission asks if any adjustments should be made. We recommend that, at a minimum, a specific offense characteristic (SOC) be added to §2L1.2(b) to accurately and completely track the statute involving the three misdemeanors. If not changed, the guideline would track part, but not all, of the statute's aggravating factors.

Amendment 22(D) - Immigration Offenses

We recommend the amendment as proposed by the Department of Justice. It suggests a departure, rather than a high point within a sentencing range, for §2L1.2 when a defendant has repeated prior instances of deportation without a criminal conviction. Because of the large numbers of these types of immigration cases, the use of aliases by defendants, and the overburdened court system, it is often easier to use voluntary deportation rather than to seek a criminal conviction when dealing with a defendant's first or second illegal entry. This is a very common factor in many immigration cases, and it is not specifically accounted for in the guidelines other than with a non-specific departure based on the adequacy of criminal history. We believe that the amendment we recommend would make it easier for a judge to depart and be sustained on appeal.

B. Drug Amendments

While we support the general intent of the more sweeping proposed changes to the drug guidelines,[4] we believe such proposals require more detailed study and extensive analysis before being adopted by the Sentencing Commission. We urge the Commission to move cautiously in this area, and to study how these proposals would interact with each other and with current statutory penalties, and what effect, if any, they would have on the safety valve.

Before these kinds of fundamental changes are made, there needs to be a consensus on the need for and direction of these kinds of revisions. While we do not dismiss these proposals out of hand, we urge caution and study of their interaction and effect on actual cases and court practice. We believe that the worst thing that could occur would be to change the drug guidelines dramatically, only to discover that other dramatic changes are needed soon thereafter to accommodate the revisions.

Also, if simplification is, indeed, given serious consideration in the near future, major drug guideline reform should be commensurate and consistent with whatever changes are made, to achieve a coherent whole.

Finally, as we noted in our first section, we believe that an intelligent redefinition and expansion of the role determination would relieve many of the problems perceived with the drug guidelines, at least for the time being, until comprehensive change of the drug guidelines can be agreed upon and effected, perhaps as part of a simplification scheme.

However, there are some proposals within Approach One which would be helpful this year. They would refine the accuracy and fairness of the application of the drug guidelines, and would not effect a dramatic, fundamental change to the drug guidelines. We will comment briefly on those, below.

Amendment 37 - Marihuana Plants

This proposal would use a consistent scheme for counting marihuana plants. This appears sensible and fair, and represents a fine-tuning, based on experience, of the application of the drug guideline to marihuana plants.

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4 These would include the drug chart compression options, the cap for mitigating role, and the purity amendment in Approach One, and all of Approach Two.

Amendment 38 - Crack

The crack ratio question is a critical issue. We applaud the Commission for doing a study, and urge it to resolve the issue as fairly and expeditiously as possible.

Amendment 41 - Counting Pills

This proposal appears to be another reasonable, fine-tuning of the drug guideline as applied to certain drugs. The information regarding drug weight is apparently easy to obtain, and this amendment would be consistent with prior amendments regarding LSD and cocaine base.

Amendment 42 - Twelve Miscellaneous Drug Amendments

Most of the twelve sub-parts of this proposal are reasonable, non-disruptive, and helpful improvements to the drug guideline calculations. Where alternatives are offered, we support a departure suggestion, where possible. We wish to specifically comment on only three sub-parts of this proposal, one we specifically support, and two which we oppose.

Parts 8 and 10

We have serious reservations about ***Parts 8*** and ***10*** of proposed **Amendment 42**. These relate to possible departures for a defendants who allegedly did not know the type or quantity of the controlled substance which they possessed (***Part 8***), and for defendants who allegedly intended personal use of some portion of the controlled substance that they otherwise possessed for distribution (***Part 10***).

With respect to ***Part 8***, our concern is that such a claim, i.e., ignorance of the type or amount of contraband, is very frequently made. At the same time, it is a claim almost always impossible to verify. We suggest that it might be more prudent to await the development of caselaw in this area before inviting departures on that ground.

With respect to ***Part 10***, it is our experience that such a case, i.e., where the defendant claims that part of the contraband possessed for distribution is intended for personal use, is rare, and therefore we would not ordinarily support making any changes in this regard. However, it may be reasonable to resolve the circuit split by noting that ordinarily amounts claimed for personal use should not be subtracted from amounts possessed for distribution. Beyond that, a departure

should not be encouraged, because to do so would benefit drug users over non-users.

Part 11

The Committee asks the Commission to adopt a slightly modified version of the proposed change listed in the eleventh sub-part of **Amendment 42**, which amends Application Note 2 of §2D1.2 dealing with drug trafficking near protected locations. The Committee believes that this amendment is preferable to the proposed **Amendment 11**, which we understand would arbitrarily fix the offense level at 13 if the stipulated condition(s) were met, apparently regardless of the amount of narcotics involved, or regardless of whether the persons or locations intended to be protected by the statute are exposed to the criminal activity.

We do, however, believe that it is desirable to provide the court with an appropriate remedy in the rare instance when this kind of law enforcement activity occurs. We suggest the following form for Application Note 2 of §2D1.2 (our changes are underlined):

If the offense was committed at or near a protected location, but (A) the offense did not create any increased risk for those this guideline was intended to protect; <u>and</u> (B) the location was determined by law enforcement personnel <u>or someone acting under the direction or control of law enforcement personnel</u>, rather than by the defendant, a downward departure (to the offense level that would have applied if the offense had not involved a protected location) may be warranted.

The proposed change from "or" to "and" restricts the use of this departure only to cases where not only the law enforcement agents selected the location, but also where it is clear that no additional risk to protected persons or locations is created by the offense (such as if the offense took place near a school at night or in the summer, or in a motel out of sight of the protected location). This modification of the proposed amendment reflects our belief that the statute is intended to provide for serious punishment when there is harm done to protected persons and places, regardless of who selected the location. Our proposal also adds a phrase which we borrowed from proposed **Amendment 11**, to include confidential informants as well as actual law enforcement agents.

We believe this proposal, as modified, will sufficiently deter the selection of locations by law enforcement agents for the purpose of impacting the sentencing process.

Amendment - 43

The Committee believes that sentences in drug cases should not be driven so completely by drug quantities, which is why we so strongly support meaningful amendments to the role adjustments. At the same time, however, we believe it unwise and unrealistic to almost totally eliminate the quantity factor.

C. Money Laundering (Amendment 44)

We support this amendment's goal of tying the money laundering offense level more closely to the underlying criminal activity, where known. With regard to choosing among the various forms of this proposal, we generally support making sentences for drug offenses higher than for fraud offenses.

D. Career Offender Circuit Split

On February 15, 1995, we wrote the Commission asking that consideration be given to an amendment which would resolve the circuit split regarding whether drug conspirators can be sentenced as career offenders, sometimes referred to as the "Price issue." We asked that the Commission consider issuing a second publication just for this amendment, if it believes that publication is necessary in order to resolve the issue this amendment cycle. We ask that our letter of February 15 be considered, along with this letter, regarding proposed amendments for this amendment cycle.

V. CONCLUSION AND OTHER THOUGHTS

The Committee on Criminal Law appreciates the opportunity to comment on this year's proposed amendments. We know that the duties of implementing the Violent Crime Control and Enforcement Act of 1994, combined with several significant reports required by Congress, has impacted the Commission's usual business of attending to the yearly amendment cycle. We hope that our comments are helpful.

We have two final requests which relate to the amendment cycle process itself. First, we would request that the Commission publish each cycle's proposed amendments and issues as early as possible, preferably in December, and that the Commission make the "reader friendly" version available at the time of publication. (Incidentally, we appreciate the Commission's preparation of the "reader friendly" version, which helps our analysis greatly.)

If we are to be able to conduct a careful analysis of the published amendments and issues and make intelligent and helpful comments, we need, and would appreciate, more time for response than was available this year.

Second, we request that the Commission make available a package of purely legal, or "technical" amendments, designed to avoid or eliminate needless litigation or resolve circuit splits, well in advance of the time necessary to decide what to publish. This would allow response groups to support those amendments which they believe would be most helpful, and make it less likely that such amendments would be lost in a larger packet of amendments involving policy changes, simplification, or consolidation.

Again, we appreciate the Commission's consideration of our views, and we look forward to the meeting on March 13, 1995.

Sincerely,

Maryanne Trump Barry

Maryanne Trump Barry

cc: Honorable Michael S. Gelacak, Vice Chairman
Honorable A. David Mazzone, Vice Chairman
Honorable Wayne A. Budd, Commissioner
Honorable Julie E. Carnes, Commissioner
Honorable Michael Goldsmith, Commissioner
Honorable Deanell R. Tacha, Commissioner
Honorable Jo Ann Harris, ex-officio
Honorable Edward F. Reilly, Jr., ex-officio

ATTACHMENT

Part B - ROLE IN THE OFFENSE

Introductory Commentary:

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), (i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction). Sections 3B1.1 and 3B1.2 are designed to work in conjunction with §1B1.3, which focuses upon the acts and omissions in which the defendant participated (i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused) and, in the case of jointly undertaken criminal activity, the acts and omissions of others in furtherance of the jointly undertaken criminal activity that were foreseeable.

Only one role adjustment, either a §3B1.1 (Aggravating Role) or a §3B1.2 (Mitigating Role), is to be applied. In making this determination, the court shall assess whether the defendant's role is predominately aggravating or predominately mitigating and, if neither predominates, no role adjustment shall be applied.

For §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been apprehended, convicted, or identified, so long as the court is satisfied that another participant(s) was involved in the criminal activity. In some cases, some defendants may warrant an upward adjustment under §3B1.1, other defendants may warrant a downward adjustment under §3B1.2, and still other defendants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may also apply to offenses committed by any number of participants.

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level by **1, 2, 3,** or **4** levels, according to the presence and intensity of the factors listed in Application Note 1.

Application Notes:

1. Characteristics ordinarily associated with an aggravating role include:

   (A) the defendant planned or initiated the criminal activity;

   (B) the defendant had decision-making authority or management responsibility over the property, finances, assets, or other participants involved in the criminal activity;

   (C) the anticipated or total compensation or benefit to the defendant would have been or was greater than that anticipated or received by the other participants in the criminal activity;

   (D) the defendant had an ownership interest in, or helped finance, the criminal activity;

   (E) the defendant induced other participant(s) to engage in the criminal activity;

   (F) the defendant performed sophisticated tasks in furtherance of the criminal activity;

   (G) the defendant possessed substantial knowledge or understanding of the scope and structure of the criminal activity or of the relevant criminal activity of other participants; and

   (H) the defendant possessed a firearm or directed or induced other participant(s) to possess a firearm.

could be either aggrav. or limiting.

2. When applying this section, the court must make specific findings regarding the defendant's role in the offense, and clearly articulate the factors the court is relying on to impose a **1, 2, 3,** or **4**-level increase. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed in Application Note 1 (A)-(H).

3. Because the court's determination of the amount of the aggravating role adjustment requires a weighing of the factors listed in Application Note 1 (A)-(H), the Commission recognizes that such a determination will be heavily dependent upon the facts of each case.

4. Consistent with the overall structure of the guidelines, the government bears the burden of persuasion in establishing the factors associated with an aggravating role adjustment. In determining whether an aggravating role adjustment is warranted, the court should consider all of the available facts that may be relevant to a determination of the defendant's role in the offense.

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level by **1**, **2**, **3**, or **4** levels, according to the presence and intensity of the factors listed in Application Note 1.

Tacha - only requires abuse of discretion

Application Notes:

1. Characteristics ordinarily associated with a mitigating role include:

   (A) the defendant did not plan or initiate the criminal activity;

   (B) the defendant had no more than minimal decision-making authority or management responsibility over the property, finances, assets, or other participants involved in the criminal activity;

   (C) the anticipated or total compensation or benefit to the defendant would have been or was less than that anticipated or received by the other participants in the criminal activity;

   (D) the defendant neither had an ownership interest in, nor helped finance, the criminal activity;

   (E) the defendant held or transported contraband for others;

   (F) the defendant primarily performed unsophisticated tasks, whether necessary or unnecessary to the successful completion of the criminal activity;

   (G) the defendant did not possess substantial knowledge or understanding of the scope and structure of the criminal activity or of the relevant criminal activity of other participants;

   (H) the defendant facilitated the successful commission of the criminal activity, but was not essential to that activity; and

   (I) the defendant did not possess a firearm or direct or induce other participant(s) to possess a firearm.

2. When applying this section, the court must make specific findings regarding the defendant's role in the offense, and clearly articulate the factors the court is relying on to impose a **1, 2, 3,** or **4**-level decrease. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed in Application Note 1 (A)-(I).

3. Because the court's determination of the amount of the mitigating role adjustment requires a weighing of the factors listed in Application Note 1 (A)-(I), the Commission recognizes that such a determination will be heavily dependent upon the facts of each case.

4. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his 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.

5. Consistent with the overall structure of the guidelines, the defendant bears the burden of persuasion in establishing the factors associated with a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all of the available facts that may be relevant to a determination of the defendant's role in the offense.

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3134 Woods Circle
Davis, California 95616
March 6, 1995

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

Re: Amendment #37

Commissioners:

I am writing in support of proposed Sentencing Guidelines Amendment #37. This amendment calls for the Commission to adopt a standard marijuana plant weight of 100 grams per plant, regardless of the number of plants involved in a case. The most notable benefit of this amendment is that it addresses the major sentencing inequity that exists between a person convicted of distributing a certain amount of bulk marijuana (i.e., 100 kilos) and one convicted of growing the same number (100) of marijuana plants. Under the existing guidelines, these two offenders receive the same sentence, even though it is impossible for 100 marijuana plants to produce anywhere near 100 kilos of "finished product". The current law obviously leads to a patently unfair result. Adoption of this amendment would also eliminate the huge increase in sentence that occurs between 49 and 50 plants. This arbitrary increase serves no legitimate sentencing purpose.

I also support two provisions being considered under Amendment #42. The first, which calls for approximating the dry weight of wet marijuana for sentencing purposes, is simply a matter of consistency and fairness. If the weight of a drug is to be the determining factor in sentencing, every effort must be made to ensure that the method of weighing a particular substance is consistent in every case. To allow wet marijuana to be used in one case and dry marijuana in another would lead to inconsistent sentences for the same offense. This is not only unfair, but it undermines the most important policy consideration underlying the Guidelines, which is consistency in sentencing in every case in the Federal Court system.

The second provision I support under Amendment 42 is the proposed definition of a marijuana plant. This definition, requiring, among other things, that plants have roots, is consistent with the holdings of at least four United States Circuit Courts. Adopting this definition will give guidance to courts in determining the correct number of "plants" to support sentencing calculations. Again, it will help lead to more consistent systemwide sentencing results.

Thank you for your consideration of these suggestions.

Sincerely,

Martha J. Hanna

Martha J. Hanna

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 6, 1995

The Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Chairman:

The Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) includes three provisions that impact Part L of the Sentencing Guidelines relating to offenses involving Immigration, Naturalization, and Passports. Section 60024 provides enhanced penalties for alien smuggling; Section 130001 alters penalties concerning failing to depart or reentering; and Section 130009 increases the penalties for passport and visa offenses.

Each of these provisions addresses an important element of border security as well as other criminal activities so often associated with those who would violate our borders. Passport and visa violations, for example, not only permit illegal travel in and out of the United States, but facilitate a host of other crimes. Raising the offense levels for travel document offenses, along with providing penalty enhancements for those who supply or use passports or visas to further other criminal acts, is necessary to reflect the intent of Congress in enacting Section 130009. Appropriate guideline revisions are also necessary for Sections 60024 and 130001.

Although there are a large number of issues before the Commission this year, I am hopeful that amendments in the guidelines will be promulgated to ensure that these three sections of P.L. 103-322 are effectively implemented. I strongly urge the Commission to take such action.

Most sincerely,

Alan K. Simpson
Chairman
Subcommittee on
Immigration

AKS:cw

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Carol Carayannis
AMERICAN ASSOCIATION FOR CONSTITUTIONAL
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February 27, 1995

Judge Richard P. Conaboy, Chairman
United States Sentencing Commission
1 Columbus Circle N.E.
Suite 2-500, South Lobby
Washington D.C. 20002-8002

Fax: (202) 662-7631

SUBJECT: U.S. Sentencing Commission's Guidelines on Laundering Monetary Instruments; Abuses of the "sting" money laundering statute, 18 U.S. Code, Section 1956 (a)(3); Need for sentencing guideline amendments; Need to amend or repeal 18 U.S. Code, Section 1956 (a)(3). a statute which has been used unconstitutionally and has become an instrument of oppression.

Dear Judge Conaboy:

Reference is made to the U.S.Sentencing Commission's Proposed Amendments to the Sentencing Guidelines for which the Commission held a public hearing on March 22, 1993. The purpose of my letter is:

(1) to inquire why the Commission's proposed amendments have not yet been implemented when there was such overwhelming support by the Commission itself and by participants who testified at the hearing;

(2) to ask for the Commission's support in calling immediate Congressional attention to the urgent need for ratification of these proposed sentencing amendments and for reevaluation and modification of the money laundering laws, particularly of the "sting" money laundering statute (18 U.S. Code, Section 1956 (a)(3)). This is a law which, in its present form, prearranges a "crime" and its evidence with guaranteed conviction and level of sentencing, in violation of Constitutional amendments, including the Eighth, in that it produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines; This statute has become an instrument of oppression.

(3) to bring to your attention, as an example, how the abuse of 18 U.S. Code, Section 1956 (a)(3) in Hawaii and its unjustifiable sentencing levels have resulted in the orchestrated conviction and ludicrous 41 month sentencing of my husband, Dr. George Pararas-Carayannis, a prominent international scientist with 25 years of outstanding U.S. government service, 35 years of community service, a man who never had a criminal record (not even a traffic ticket) and who never engaged in any type of criminal activity.

As an American and as a member of The American Association for Constitutional Laws and Justice, (AACLJ), I am particularly concerned that abuses in the application of 18 U.S. Code, Section 1956 (a)(3) and in sentencing are continuing, in spite of the public opposition clearly evidenced at the Commission's own hearing. I am particularly concerned and very angry of my husband's

ludicrous conviction and sentencing for a crime that did not occur, for which there was no victim, for an alleged "sting" offense which was never represented as such, and which -if indeed had occurred - would have been at worse a petty misdemeanor punishable with a small fine and probation. Instead, **more than $2 million of taxpayers' money has been already wasted in this frivolous prosecution** (money which could have been spent to fight real crime) and a law-abiding, professional scientist contributing enormously to society was destroyed emotionally, physically, financially and professionally. In support of my concerns and request for action on the above stated matters, I wish to bring to your attention the following documentation:

(A) The U.S. Sentencing Commission's own report and record of its hearing of March 22, 1993, summarizing the criticism expressed pertaining to the abuse of 18 U.S. Code, Section 1956 (a)(3) and its associated disproportionate sentencing levels, as well as of the overwhelming support the Commission's proposed amendments received.

(B) To illustrate further the statute's improper application and extreme and cruel sentencing level under the present guidelines, I will provide a brief account of how the statute was grossly abused to target selectively and to prejudicially prosecute my husband (a member of a Greek ethnic minority), in order to destroy him emotionally, financially and professionally, and to convict and sentence him to a preposterous 41 months imprisonment for alleged "laundering of monetary instruments". This was for an alleged petty misdemeanor offense that did not occur, which was not represented as such and for which there was no victim (other than my husband). This ludicrous and unprecedented sentence was imposed on my husband in spite of the fact that the stress of the four year long, unreasonable and relentless prosecution and persecution recently culminated in a nearly fatal heart attack.

A. Criticism of the "Sting" Money Laundering Statute. Support of U.S. Sentencing Commission's Proposed Amendments.(U.S. Sentencing Commission's Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993, Washington DC)

The U,S, Sentencing Commission generated an internal report proposing amendments to its own sentencing guidelines for money laundering offenses. Specifically for offenses prosecuted under the "sting" money laundering statute the Commission proposed amendments would tie the sentencing level to those of the underlying "sting" offenses, when properly represented. The following are abstracted portions of the U.S. Sentencing Commission's hearing proceedings pertaining to sentencing levels for money laundering offenses and particularly those prosecuted via the "sting statute. There was an overwhelming support for the Commission's proposed amendments from those who testified at the public hearing. There was also severe criticism of the abuses of 18 U.S. Code, Section 1956 (a)(3) and its associated disproportionate sentencing levels.

One of the people that testified at the public hearing was one of the principal authors of the money laundering statutes, Mr. Charles W. Blau (Transcripts of the hearing p.256-261). Mr. Blau is presently in private practice, but has worked for the Department of Justice in different capacities, including Chief of Narcotics, Associate Deputy Attorney General and Associate Attorney General, He played an active role in drafting the money laundering statutes and the memorandum of understanding between the various law enforcement agencies in using these statutes. He was extremely critical of the unexpected abuses of the laws that he helped draft. At the hearing he stated:

> *"In looking at these statutes, I think basically the intent, or at least my intent, was to create a broad criminal statute which would reach every kind of sophisticated money laundering that was out there. In short, I thought, and I think basically the people that were in the process with me felt, that the real intent of this statute was to get at professional money launderers, principally those associated with narcotics and organized crime.*

In retrospect, I think there are probably two mistakes that we made....I think I would have liked to have limited this statute to instances where there was sophisticated criminal activity present, either with narcotics or with organized crime.

Secondly, I think I would have required the Department (Justice) to have exercised some central control over the use of this statute much more so than we did. The Department, in my view, basically has failed to have what I would call a realistic or a centralized process dealing with the use of this statute. There are, in essence, 94 separate policies, and each U.S. Attorney, basically, in essence, decides how the statute is going to be abused or used, as the case may be.

What we are seeing at least in my part of the country, which is Texas and the Southwest, is a continual threatening of the use of the money laundering statute in non-drug and non-organized crime cases."

On page 259 of the Sentencing Commission's Hearing proceedings, Mr. Blau continues:

"My view, however, I think is that this statute is a very, very important powerful prosecution tool. I think that it has tremendous potential to be abused. I think in at least my area of the country, and particularly in the white collar non-drug area, we are seeing an abuse of the use of this statute. Plea negotiations, in short, have been replaced by threat negotiations, and using a very substantial and heavy-wielding club, the money laundering statute. This is a real threat. One may argue that it is either good plea bargaining on the part of the government or, alternatively, it is a little bit overzealous and coercive of the criminal justice process.

The question that I raise with the use of this statute, without any centralized controls, is whether the criminal justice process is being undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or with organized drug activity. And the question with these guidelines has been, should a person be subjected to severe criminal sanctions, when his conduct amounts to no more than the base underlying offense. It is a bit like using a nuclear weapon against a single individual.

I think these changes proposed by the Commission are essential in bringing a little reality back into the prosecution charging process. I would have preferred that the department basically would have taken this on itself, would have overseen basically the use of this statute and would have culled out the cases where it was clearly an abuse of process to bring such an enormous charge against underlying conduct which did not deserve it.

My view of these guidelines, until basically Congress gets around to amending the statute, is that the underlying offense should be relevant and important factor in determining what penalties for money laundering connected with those type of offenses are.

I do believe that the courts are going to I think reach a position where they will not forever tolerate these charging abuses, and a very valuable prosecution tool will be unnecessarily limited, or bad case law. So I support your amendments completely."

Mr. Stephen R. LaCheen, representing the Pennsylvania Association of Criminal Lawyers, in his endorsement of the Commission's guideline amendments commented (page 75):

"We also comment favorably on your money-laundering amendments, as well as the amendments regarding sting operations, and there both, again, informed out of

the concern to avoid manipulation of the guidelines in the plea-bargaining process, which in vast majority of cases, as you know, are resolved in plea negotiations."

Mr. James M. Becker, representing the Criminal law Committee of the Federal Bar Association, commented as follows (p. 157):

".....Our group has identified several instances in the Eastern District of Pennsylvania, and we think they exist nationwide, where the mere addition of that money laundering charge, especially under 18 U.S.C. sections 1956 and 1957, artificially raises the guideline level beyond that of the underlying offense, when there is no real money laundering activity that somehow makes the person's conduct more culpable than if they were just charged with a fraud offense, so for that reason, we applaud the proposed Amendment No. 20, heartily endorse it."

Mr. Chuck Morley, an expert on the subject of money laundering and currency reporting laws under the Bank Secrecy Act, having served with the Criminal Investigation Division of the IRS and as Chief investigator of the U.S. Senate Subcommittee on Investigations, stated (p. 224):

".....I come here today to urge you to approve the money laundering and the structuring guidelines as proposed by the committee staff." "....the revised guidelines reflect greater sensitivity to such factors as sophistications of money laundering conduct." "....the staff (Sentencing Commission) found that, historically, prosecutors have been stretching these guidelines significantly,..."

"Offenses that technically qualify as money laundering are frequently simply incidental to or component parts of the underlying crime. This has given rise to extensive disproportionate sentencing.....The sentencing report indicated that 68 percent of the defendants convicted of structuring either didn't know or did not believe the funds were illegal. .....Yet, these people could still get the same type of sentence as a major money launderer, somebody involved in a huge smurfing operation. So do the guidelines work? I don't think they work, unless what we are trying to do is fill the jails up....."' The Justice Department has said to me informally that we are trying to decriminalize money laundering or that we are trying to greatly lessen the offense of money laundering....." ".....To continue under the current guidelines is to ignore the realities of money laundering totally, while continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants."

Mr. David Stewart of the law firm of Ropes and Gray, commented:

The basic principle announced by the Commission, which I strongly endorse, is an attempt to tie the base offense levels for this offense (money laundering) more closely to the underlying conduct that was the source of the illegal proceeds.....in non-drug offenses you really do get an extraordinary increase in the penalty by including the money laundering charge. .....I would even report that prosecutors confirm that is why they add money laundering counts, because the guidelines are so powerful with them. It is a bigger hammer. One case I saw that was 27 months in prison versus 6 months in prison.....Finally, I would note my agreement with the observation to the American Bar Association on the subject of stings, again, the concept of the money laundering offense to the underlying offense seems to me very important in that context, as well. It is a little trickier, of course, because there is no true underlying offense, so it has to be the represented underlying offense, but, again, it seems to me the proper ways to approach the problem."

Mr. Paul B. Bergman, representing the New York Council of Defense Lawyers, had the following comments:

> *"I think that this proposed amendment on the guidelines for money laundering goes one way towards eliminating what we consider to be unfair leverage and sometimes abusively exercised leverage with money laundering."*

B Illustration of the abuse of 18 U.S. Code, Section 1956 to (a)(3) to convict and sentence Dr. George Pararas-Carayannis.

18 U.S. Code, Section 1956 to (a)(3), (alleging "laundering monetary instruments") was abused to prejudicially target, selectively prosecute, and wrongfully convict and sentence my husband, Dr. George Pararas-Carayannis (a member of a Greek ethnic minority), for the purpose of terminating him from 25 years of honorable Federal service. On December 21, 1994, he was sentenced to 41 months of imprisonment, in spite of the fact that he had a recent, almost fatal heart attack and two angioplasties. His doctors testified at the sentencing hearing on the seriousness of his emotional trauma, progressing congestive heart failure and the fact that incarceration will be detrimental to his health and may even result in his death. Arguments for departure were made that his extraordinary impairment and advanced age were reasons to impose a sentence other than imprisonment, under **U.S.S.G. Ch. 1, Part A, 4(b) and Chapter 5, Part K** of the Guidelines (**U.S.S.G. § 5K2.0 and U.S.S.G § 5H1.4**), and as honored in precedent cases (**United States v. Long, 977 F.2d 1264 (8th Cir. 1992)** and **United States v. Lara, 905 F.2d 599, 605 (2nd Cir. 1990)**). These arguments were rejected.

Ironically, my husband was not found guilty of an actual crime but of a "sting", make -believe "crime" for his alleged, circumstantially established, "state of mind". The alleged underlying offense of the "sting" was a fabricated petty misdemeanor, which was not even represented as such as due process of the law requires. There was no victim for this hypothetical "crime" and there was no demonstration of his knowledge or intent of breaking any law. He was not charged with violation of either the underlying, non-represented State petty misdemeanor, or of any federal Travel Act or Rico violations. These federal laws require substantive rather than hypothetical state offenses and cannot borrow the "sting" provision of another statute. These laws were only used for definitional purposes in "structuring" the statutory tracking necessary to bridge the hypothetical State petty misdemeanor and thus fabricate my husband's conviction under the money laundering "sting" statute, 18 U.S. Code, Section 1956 to (a)(3), alleging the hypothetical "laundering of monetary instruments". Through such nebulous statutory tracking, my husband's sentencing level was artificially and enormously escalated. This is an unprecedented and preposterous extrapolation of the money laundering "sting" statute for an alleged State petty misdemeanor violation that does not even come under the Travel Act and certainly not under any of the RICO offenses.

There were violations of my husband's constitutional rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments in selectively targeting him and prejudicially prosecuting him. He was not engaged in an ongoing criminal misconduct to justify a "sting". Probable cause for an indictment was obtained through misrepresentations and false information from a coerced government witness (a Confidential Informer) threatened with deportation to Japan, and whose criminal record, questionable credibility, wrong motivation and other exculpatory materials (proving my husband's innocence) were improperly withheld from the Grand Jury. This became clear at trial following this government key witness's testimony. The "sting" prosecution against my husband was highly selective and prejudicial for the purpose of removing him from 25 years of honorable Government service. The scenario of the "sting" was artificially orchestrated to fabricate nexus with his work place in order to cause his termination from Federal Service.

Clearly, my husband's conviction was improperly obtained through the abuse and misapplication of Title 18, U.S. Code, Section 1956 (a)(3), for an alleged fabricated offense which is outside the

intent of Congress. Allegedly he "laundered monetary instruments" representing a few hundred dollars for a hypothetical government escort service. There were serious misinterpretations and statutory extrapolations of the statute in escalating artificially a petty misdemeanor offense level of a non-represented State, underlying, hypothetical offense (and its alleged "monetary instrument proceeds" - something that the banks process every day) to the sentencing level of a 22 "money laundering" offense. Congress intended the law to apply to organized crime involved in drug trafficking, not for regulating or punishing hypothetical, non-represented petty misdemeanors.

Furthermore, there were serious violations of procedural and evidentiary rules before and during the trial in orchestrating my husband's conviction. The videotaped "evidence" of his conversation with the undercover agent was sent twice to a government audiovisual laboratory in the Washington D.C area for "enhancement" - a euphemism for tampering. There was no chain of custody for this "evidence". The tapes sent back as "originals" were altered copies which had been grossly tampered (See feature article on tampering videotapes in the February 1994 issue of Scientific American entitled ,"Seeing is not Believing"). Critical exculpatory portions showing my husbands' innocence were crudely erased from these tapes, blaming later television station interference. The most critical of the videotapes contained over 150 inaudible parts. The jury was provided by the government prosecutor with creatively-edited transcripts as an "aid" in understanding the inaudible "evidence". Jurors were seen taking written notes from these creative transcripts because they could not hear what was on the videotapes. After being admitted officially as "evidence" in court, and during trial, it was accidentally discovered that these videotapes, transcripts, and other government evidence were illegally being removed from the court by the government prosecutor every afternoon after trial because allegedly the court did not have an evidence storage facility (this has been a standard practice of handling evidence by the Hawaii Federal District Court). Worse yet, **during trial, the videotapes admitted as evidence were improperly removed from court and taken by the government prosecutor to a hotel room** (Hilton Hawaiian Village Hotel, Room 1362). The room was registered to a government audiovisual expert who had been brought in from the Washington D.C. area, together with his electronic equipment. He had set up an audiovisual laboratory during the entire duration of the six week trial to "enhance" the evidence (from approximately November 1 to December 21, 1993). At a special hearing outside the presence of the jury, government witnesses (IRS agents) testified and confirmed that indeed the court's evidence had been removed without the Court's authorization, **during trial**, and taken to the hotel room where electronic equipment capable of tampering had been brought in. Allegedly nothing was done to the videotapes. This type of misconduct is unprecedented and legal research failed to find a single case of such outrageous handling of the court's evidence anywhere else in the country.

The jury was not allowed to hear these facts or hear the testimony of the government witness or that of the audiovisual expert who was occupying the hotel room. Regardless, the jury was allowed to view this tainted evidence (the videotapes) during their 12 day long deliberation period. The erroneous claim was made that it was my husband and his attorney who wanted the jury to view this tainted evidence when, in essence (and the record shows it), they had complained vigorously and demanded that the tainted evidence should be stricken and not be shown. Finally, there were erroneous jury instructions on entrapment and what constitutes "predisposition". Exculpatory evidence showing my husband's innocence and wrong motivation for his prosecution was withheld from the trial jury. His defense of entrapment was nullified in advance through the orchestrated, Hollywood-like scenario and design of the "sting", and through the confusing 75-page jury instructions given to the jury at the end of the trial. In these instructions, the nebulous statutory tracking pertaining to the "definitional" Travel Act violation necessary for my husband's conviction was completely de-emphasized and buried near the end. The jury was totally confused as to the elements of the "crime" for the alleged "laundering of monetary instruments" under the money laundering "sting" statute. They were further confused by the vague and confusing definitions of what constitutes "proceeds", "unlawful activity", "some form of unlawful activity" and "though not necessarily which form of unlawful activity". Worse yet, facts and important

testimony pertaining to the "validity" of the evidence and the illegality of removing it from court during trial, was withheld from the jury.

It is interesting to note that the jury's verdict of guilty on only two of the seven trumped up counts of "laundering monetary instruments" (amounting to an insignificant amount of money), was reached with great difficulty and after a six week trial and twelve days of deliberations. It was not a clear cut decision. The jury looked and asked questions as to when entrapment begins having determined that there was entrapment because of the outrageous government conduct in the structuring of the "sting". However, the design of the "sting" nullified this defense by creating circumstantially and artificially "predisposition". The jury was forced to abandon entrapment. Nonetheless, after 11 days of deliberations, the jury found my husband not guilty on five of the seven trumped up counts of laundering monetary instruments. However, the jury was confused by the instructions. They were "hung" on the two "sting" money laundering counts of "disguising and concealing" the "proceeds" of the hypothetical government escort service. The instruction was clear on this issue. If he "deposited in an intrastate bank" the two checks from American Express and Diner's that was "disguising and concealing", even if he declared it on his income tax return. This is the low threshold element of the "crime" that always guarantees conviction under the "sting" money laundering statute (18 U.S. Code, Section 1956 (a)(3). The jury was forced to deliberate further and resolve their "hung" decision on this issue. It was three days before Christmas and the trial had lasted almost two months. The members of the jury were anxious to go home. At that time they were allowed to view the most critical of the videotapes taken to the hotel room (the one which had 150 inaudible portions). They were given once again the creatively-edited copies of the transcripts as an "aid" to help understand the inaudible portions of this further tempered "evidence". Jurors were again seen taking written notes from these transcripts. Shortly thereafter, the jury returned with a guilty verdict on the two counts on which they had been "hung" which alleged the "disguising and concealing" of the "proceeds" of the hypothetical government escort service which was allegedly the unlawful activity (but for which no representation had been made). The jury missed completely the statutory "definitional connection" with the Travel Act violation necessary to convict my husband under the vague wording of the "sting" money laundering statute. They failed to understand that he was not charged with comitting or participating in the alleged underlying offense for which no representation had been made. They failed to understand that a representation of a Travel Act violation had not been made, either, and that he was not charged with a violation of the Travel Act. They failed to understand the complex statutory tracking and that there was no underlying offense, or victim. Through the abuse of the "sting" money laundering statute, the government prosecutor had reduced the issue of my husband's guilt on whether a representation had been made that the proceeds were from an escort service, even if that service was hypothetical. Such representation indeed had been made and my husband (believing there was nothing unlawful about an escort service since dozens operate legally in Hawaii) had agreed at the first meeting with the undercover agent to process through his merchant account, as a personal favor, a few hundred dollars of credit card slips. This was the "predisposition" established through the scenario of the "sting" to nullify the jury's consideration of my husband's entrapment defense. However, it is important to note that the jury found my husband not guilty of any "substantive" counts of "laundering monetary instruments" or of promoting any unlawful underlying activity. Obviously the jury did not believe that my husband was motivated by profit.

In summary, the alleged "proceeds" (allegedly the monetary instruments that were "laundered") were never represented to my husband as being from an actual unlawful activity as due process of the statute requires. **Hearsay testimony was admitted as evidence that "all escort services are fronts for prostitution"** and therefore that satisfied the representation requirement of the statute. Such misrepresentation is the pattern of the abuse of 18 U.S. Code, Section 1956 (a)(3). The U.S. Sentencing Commission's internal report on the need for amendments related to mandatory sentencing guidelines suggests that 68% of those convicted under this statute did not really know or believe the proceeds to be from a "specified unlawful

activity". More often than not, there is no clear representation by the undercover agent that the proceeds are indeed those of an "unlawful activity", or even a hint of "some form of unlawful activity" to satisfy the statute's due process requirement. It was certainly true in my husband's case. There was never a representation made and no due process was followed by the prosecutor in staging and directing a "sting" involving a few hundred dollars of credit card slips from the alleged escort service. The "proceeds", monetary instruments he allegedly "laundered", were never represented even circumstantially to be from prostitution. Ironically, even presently, dozens of escort services openly advertise in the Yellow Pages acceptance of credit cards and are issued merchant accounts by the banks. If indeed "all escort services are fronts for prostitution" why is it that neither the banks nor the escort services were ever prosecuted for "laundering monetary instruments", which is something they do on a daily, routine basis and in large amounts. No effort was ever made by the credit card companies to stop issuance of merchant accounts to escort service business, or to prevent the advertising of credit card acceptance or the Yellow Pages' display of credit card logos. The Yellow Pages, the telephone companies, and the State and Federal government receive escort service "proceeds" in the form of fees or taxes. Ironically, American Express Company, the company that provided the government with credit cards of fictitious card holders to help the government prosecutor fabricate the sting against my husband, was fined recently $50 million by the government for actual laundering of Colombian drug money. In this case and in many other cases, there were no criminal indictments for such actual, hard-core, illegal money laundering, on-going activity. This and other cases have been settled as civil cases through the imposition of fines. Obviously a double prosecutorial standard exists on how the money laundering laws are applied. My husband's prosecution was downright hypocritical, selective and prejudicial. His conviction was improperly obtained through the abuse and misapplication of Title 18, U.S. Code, Section 1956 (a)(3), a statute which has become an instrument of oppression. **The cost of his prosecution to the American taxpayers has been enormous (over $2 million) and unjustifiable**. My husband's 41-month sentencing is ludicrous and hypocritical. His life, health and reputation have been ruined. He was forced to spend all his life's savings and retirement funds on defending himself for these frivolous charges. His job was taken away and he was left penniless and in extremely poor health.

Conclusions

18 U.S. Code, Section 1956 (a)(3) is a statute which prearranges a "crime" and its evidence with guaranteed conviction and level of sentencing. It has become an instrument of oppression. It produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines. Congress should amend the statute and provide guidelines for its proper constitutional application. Congress needs to ratify the U.S. Sentencing Commission's proposed sentencing guidelines on laundering monetary instruments.

18 U.S. Code, Section 1956 (a)(3) clearly violates the Eighth Amendment, because it imposes excessive bail, excessive fines, and cruel and unusual punishment often totally out of proportion to the underlying offenses. It produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines. For each count it provides for $250,000 in fines and up to 20 years imprisonment; the same as a major drug trafficking violation, even if the alleged, misrepresented, underlying offense of the "sting" is only a petty misdemeanor. Often the alleged unlawful activity does not fall within the predicate offenses of section (7) of the law to qualify as a money laundering offense. A nebulous and circuitous statutory tracking is often used by prosecutors to bring the alleged offense within the ambit of money laundering offenses with considerable, unusual and cruel escalation of the offense level. Clearly, this was not the Congressional intent.