crime, it is not public knowledge that they are indeed drug dealers, and again, **business people are not trained Drug Enforcement Agents.** Surely it was never the intention of Congress to allow for such things to go on in the American Judicial System.

2. Prisons are extremely overcrowded (with the wrong people).

Federal prisons are **full of first time, non-violent drug offenders**. The federal inmate population has risen from 24,000 in 1980 to 76,815 today. Without changes it will top 116,000 in 1999. Some states, under court orders to ease prison overcrowding, are **routinely releasing violent criminals early to make room for drug offenders**. There is no statutory requirement that murderers and rapists be kept in prison, but there is a requirement that drug offenders, (money launderers, etc.), be kept in. **Violent, threat imposing criminals are released into our streets to make room for non-violent minor league drug offenders**. Perhaps that is why the newspapers reek of stories such as the one involving Polly Klaas, **a child who was murdered by a violent offender who had been released. Was he released in order to make room for a money launderer**? The very idea of such things going on in my beloved country are **scary** indeed! **These mandatory minimums have created a lousy legal system that should not exist in America!**

3. The cost of maintaining prisoners is overwhelming.

American **taxpayers pay $4.5 million a day to incarcerate federal prisoners**, and according to the Justice Department's estimates, **another $100 million a week will be needed to build enough prisons just to hold mandatory minimum inmates**. Americans are tired of having to pay so much in taxes. Obviously, the maintaining and building of prisons to **house non-violent inmates is a great contributor to the tax burden**. Perhaps if the whole country were to become well informed with these circumstances, and be allowed to vote on this issue, they would vote to **release those non-violent people** who have had **draconian sentences** imposed upon them. Would an American Citizen be content with the fact that he or she was paying such a vast amount in taxes **to incarcerate someone such as a non-violent, clean record female realtor**? Or **a non-violent, clean record car dealer who sold a suburban to someone** who he had **no idea was a drug dealer**? And the examples go on and on and on. Is it right for taxpayers to be so unnecessarily burdened financially? And is it right for undeserving Americans to be denied the right to life, liberty, and the pursuit of happiness with the imposing of such **harsh, draconian sentences**?

4. Mandatory minimum sentences have packed prisons, but have not brought about any reduction in crime

Many of the nation's federal judges and members of the American Bar Association have concluded that the **mandatory minimums have been a failure.** Mandatory minimums have to be adjusted. **Distinctions must be made! Base offense levels should start out differently for different individuals**. Each accused person's history should be examined and taken into account. **A first time offender should not have to automatically start out with a five or ten year sentence**. The imposing of such a sentence is extremely harsh , to say the least. **What a waste of life!** Many of the people facing such sentences and currently serving such sentences are kind, giving intelligent people who have contributed much to society. **Why must they be torn from their families for such a lengthy period of time**? Why can't they be **allowed to contribute to society through community service**? Allow for them to contribute to society and not detract from it through all the taxes Americans must pay due to their incarceration. Each case that comes before a federal judge should be examined **individually**, with all existing circumstances being allowed to be taken into consideration.

PROPOSAL

The United States Sentencing Commission should request that **Congress immediately** adjust federal sentencing guidelines. **Base offense levels need to be adjusted** : they **need to be lowered**. Again, they need to start out differently for different individuals. This **amendment must be retro-active** so that those who needlessly suffer with their imposed **draconian sentences** may again grasp some sort of hope that their nightmare of an ordeal might soon come to an end, and so that families can be united.

JUSTIFICATION

As American Citizens, we are promised **life, liberty** and the **pursuit of happiness**. Certain laws that have existed in our country have removed some of these promises. For instance, we should remember that we had laws that agreed with slavery. **Slavery was accepted and condoned because recorded laws stated that it was legal**. The **law was wrong then**, and **it is wrong now with the imposition of mandatory minimum sentences**. Government and law are supposed to exist for the people, for the betterment of society, and not for the purpose of being unconstitutional. **It is time for this injustice to end**. Too many good, decent human beings are being ripped from their families, and **every family member painfully suffers needlessly**. Injustice is not what America is about. Incarcerating non-violent fathers, mothers, sisters and brothers for long, pain staking sentences is not bettering society. Children of all ages need their mothers and fathers. Having a father or mother figure in a young person's life is detrimental.

The evidence shows that the mandatory laws have drastically failed. All that these laws have created are situations in which prisons have surpassed their holding capacities, and taxpayers have unnecessarily spent millions.

I personally witnessed the **rape of justice** when dealing with federal sentences through the conviction of my father and brother. They were both accused of money laundering. A violent drug dealer was arrested, and was facing twenty to twenty five years in jail for various crimes. Through his high priced attorney, he decided to plead guilty and realized that he could have his sentence drastically reduced if he produced a "story" for the prosecutors. The drug dealer had bought several vehicles from my father's dealership, and my brother was the salesman in the transactions. At the time of his purchases, **it was not a known fact that he was in fact a drug dealer**. His brother was the County Clerk in my father's town, and had served on the school board for many years. They both represented to the townspeople that they had a legitimate horse racing business from which they derived a substantial income. They raced their horses at various racetracks, and had a business account at the local bank. (**Our attorneys, more interested in their fees than in their clients**, did not bother to mention this important fact to the jurors.) This drug dealer told the prosecutors that my family knew he was a drug dealer, and that they were very accommodating to him when selling him the vehicles. Our attorneys also failed to mention to the jury that each time a vehicle was sold to this person, a check for the cost of the vehicle had to immediately be written out to GMAC since all of the vehicles on the lot were simply lent to the dealership on a consignment basis. There is not much profit in the sale of new vehicles. My father's dealership made about two or three hundred dollars (or less) each time a vehicle was sold to this person. The jury was kept under the impression that each time a vehicle was bought by this person, the full amount went

straight into my father's and brother's pockets. **No amount of money in the world could compensate for this nightmare that we all now currently live in.**

The outcome of the trial was that the **violent** drug dealer, a cold-blooded thug, (as we learned through the trial as his crimes were exposed), **got his sentence reduced to a measly three years,** due to his "honesty and cooperation", and my father and brother were damned with almost seven.

My **brother** is a hard working **non-violent young man** who simply did his job and sold cars for a commission. He never even handled any of the money at the dealership, yet he stands convicted of being a money launderer. The commissions he earned will never add up to the cost of many years of his life and freedom.

My father is probably **one of the last living altruists**. He was a **Volunteer Fireman** in his community, as well as a **Boy Scout Troop leader to many fine men**. He has **never** been involved with drugs, and would probably not even know what they look like, yet he stands convicted on a drug offense. This fifty-three year old man who continuously served his community throughout his life, must now waste it in a prison. The prosecutor, a woman who asks for leniency where thugs are concerned, stared at him throughout the trial as if he were a mass murderer. **It broke my heart, but not quite my hope. I still possess some sort of hope** that justice can come into our lives, and the lives of others like us, **who needlessly suffer**.
That is the purpose of this letter; to try and make my hopes a reality.

CONCLUSION

By adjusting federal sentencing laws, and **lowering base offense levels**, constitutional rights can be restored, and accused Americans won't have to face **inhumane, barbaric** sentences where they are incarcerated for **inanely mandated periods of time**. Improved laws will make for a better society. Human compassion must come into focus, and non-violent human beings who made a mistake, or who were found guilty by an uncaring, uninformed jury, should have their lengthy sentences reduced so that they can bring to an end their unbearable nightmares.

030 - 95

ATTN: Public Information: Crack

Mrs. Lisa Brown
3825 NE 11th
Portland, OR 97212

Dear US Sentencing Commission,

My name is Lisa Brown, I am a 32yr old wife of a crack cocaine defendant sentenced to 17½ years for 9 grams Crack Cocaine. This is ridiculous and unconstitutional, true enough Selling or Using any drug is legally wrong. But, why does the young black man get more time for selling Crack Cocaine than the White man who sells powder Cocaine to the black man. It is all the same, one is powder and the other is rock form. My Children will be ages 17yrs of age, 15 yrs, and 25yrs when there father is released. By then it is too late to be apart of raising his Children, My husband is needed to support his family financially and spiritually. Since his incarceration in FCI Sheridan I am on Welfare, and on the verge of being homeless with 3 Kids and nowhere to go. These defendants who are non-violent first time offenders are needed at home to support their families, it is far Cheaper to have them on the Electrictronic Monitor and make them get employment, than to take up unnecessary jail space, that could be used for violent Criminals and Child Pedifiles. Please Change these guidelines and make them Retroactive. Make these guidelines fit the Crimes. Thank You Lisa Brown

031 - 95

January 1995

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

ATTENTION: Public Comment

REGARDING: Sentencing Amendment - Marijuana

Since it has come to my attention that the Sentencing Commission is accepting public comment in regards to changing the Sentencing Guidelines for marijuana, I feel compelled to provide you with my concerns.

Public opinion is not that anti-marijuana. Marijuana was mistakenly made a Schedule 1 Narcotic. Given this erroneous classification, marijuana was "Lumped In" with far more dangerous hard drugs. Now we sentence so severe as to be borderline cruel and unusual punishment. Myself, like many other Americans have a greater fear of gun violence than some pot grower.

The current guidelines of a kilogram per plant in cases involving 50 or more plants is absurd. It is intolerable to ascribe this unrealistic weight to each plant, when 1 to 49 plants are ascribed a weight of 100 grams. It doesn't take a Rhodes Scholar to see the inconsistency. I would suggest a more sensible weight per plant somewhere in the 50 to 100 gram range. This should be uniformly applied regardless of the number of plants. This would just make sense. If sentencing is done by weight, it should be a reasonable approximation of weight, not the exorbitant weights currently used for sentencing.

I would also like to suggest in the true spirit of undoing a past wrong, that the proposed new guidelines be made retroactive.

Thank you for an opportunity to express my feelings.

Sincerely,

Darcelle Johns
11710 N.E. Sacramento
Portland, Or 97220

032-95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
611 Broad Street, Suite 237
LAKE CHARLES, LOUISIANA 70601

JAMES T. TRIMBLE, JR.
U.S. DISTRICT JUDGE

TELEPHONE (318) 437-3884
FAX (318) 437-3899

March 2, 1995

U. S. Sentencing Commission
Attn: Public Comment
Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C. 20002

Dear Ladies and Gentlemen of the Commission:

I enclose herewith a letter that I wrote to you on December 17, 1992 which is self-explanatory. In response to that letter, I received a telephone call from one of the Commission employees who advised that in 1993 there would be some review by the Commission of sentencing guidelines related to the taking of property. He did not indicate whether the Commission was considering increasing or decreasing the sentences for property-related offenses.

I write you again because I am faced with the prospect of sentencing a woman who systematically, over a period of several years, stole money from her mother's employers who were close personal friends. In addition, she embezzled from accounts which the employers had set up in the names of their children. The resultant loss to the employers, the children, and banks involved amounts to in excess of $133,000.

For the above heinous conduct, I, under your guidelines, am authorized to sentence this individual to a total of 18 months imprisonment. She cannot make restitution.

Again, I ask your venerable group, how can you seriously contend that crime does not pay when someone can take another person's property to the tune of over $133,000 and face a maximum of 18 months imprisonment?

Since writing you in 1992, I have had a number of other cases where I have almost written again. One involved the sentencing of a bank employee who defrauded an elderly widow, a customer of the bank, of $187,000, virtually all of her life's savings. With the proceeds, he purchased himself a new car and built a swimming pool in his backyard, among other things. Under your guidelines, which I was constrained to follow, he was sent to prison for 27 months, the maximum.

When the sentencing guidelines were instituted, I regarded them in a much more positive light than many of my fellow judges. I saw the merit in having some uniformity in sentences. Overall, I do not have any serious complaints with the guidelines, except in the area of property losses. I do not feel that the Commission considers the victim in the slightest in devising guidelines in these cases. I cannot imagine that there is one member of the Commission who would feel that 18 months would be an adequate sentence if someone stole $133,000 of his or her hard-earned cash with no prospect of having it repaid. That is what we are facing in the case that causes me to write today.

Please "get real" when it comes to guidelines involving the taking of people's property.

Yours very truly,

James T. Trimble

JAMES T. TRIMBLE, JR.

JTTjr/rh

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December 17, 1992

U. S. Sentencing Commission
Attn: Public Comment
Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C. 20002

Dear Ladies and Gentlemen of the Commission:

This letter is sent in the hope that it will influence you to substantially raise the offense level of crimes involving theft of property, which in some cases carry a tremendous victim impact, so that we as judges can mete out meaningful punishment to theft offenders. What prompted this letter is the fact that within less than two weeks, I will have sentenced six defendants who entered guilty pleas to car theft and one who entered a plea of guilty to mail fraud.

I simply do not have time to outline all of these cases for you, but will give you illustrative samples. In one case, the defendant, along with his cousin, stole a new GMC Suburban valued at some $24,000. He was assigned one criminal history point for having been found guilty of possession of marijuana in 1988 and in 1985 he was found guilty of unlawful possession of a handgun, for which he was assigned no criminal history points. Under the guidelines, he has an offense level of 12 and a criminal history category of I, for which he can be imprisoned for from 6 to 12 months. In my mind, the idea that someone can get away with stealing $24,000 of another man's property and be exposed to only 12 months incarceration (none of these people are able to pay a fine, costs of incarceration, etc.) totally belies the adage that crime does not pay. Such a lenient sentence, I feel, is a virtual invitation for repetition of what I consider a very serious crime. We have come a long way, perhaps too far, since the days when a man could be hanged for theft of a horse. This defendant's cousin, with two prior DWI convictions, can be sentenced to a maximum of 14 months under the guidelines. The other vehicle thefts were limited to correspondingly insubstantial sentences.

The mail fraud case involved an individual with no prior convictions who, using the mail service, as an employee of an insurance adjusting agency, defrauded an insurer of over $150,000. His offense level of 14 and criminal history category of I provides a guideline range of imprisonment from 15 to 21 months. The fraud that he perpetrated against the insurance company client of the

firm caused the owner of the firm to be personally liable for repayment of the funds stolen by the employee. Twenty-one months, even in state facilities where there are fewer "amenities" than in our federal accommodations, does not begin to be adequate to deter a criminal mind - which we are dealing with in all of these cases -from its nefarious purpose.

I might add that I spoke to an attorney friend of mine who does not work in the criminal law field, but who has a most compassionate disposition, about the first case discussed above. Without revealing the statutory limit of 10 years or the guideline range of 6 to 12 months, I asked him what type of sentence he felt would be appropriate in such a case. His response, after reflecting several minutes, was that he felt that imprisonment for 3 to 5 years would be justified. I fully agree with him.

This letter is, purely and simply, a plea that the Sentencing Commission reconsider the guideline ranges in all offenses involving loss of property by the victim with a view to substantially increasing the ranges.

Thank you very kindly for your consideration.

Sincerely,

JAMES T. TRIMBLE, JR.

JTTjr/rh

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF NATIONAL DRUG CONTROL POLICY
Washington, D.C. 20500

033-95

The Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8022

Dear Mr. Chairman:

I write in response to amendments proposed to the drug offense guidelines issued in January 1995 by the United States Sentencing Commission.

The Office of National Drug Control Policy (ONDCP) was established by Congress in 1988 to develop counternarcotics policy for the President. The recently released *1995 National Drug Control Strategy* identifies the President's priorities for addressing this Nation's continuing drug problem. The 1995 Strategy also develops plans for reducing illegal drug use, drug trafficking and availability, crime, and violence. The accomplishment of this goal depends upon an aggressive and coordinated law enforcement effort as well as certainty and appropriateness of punishment for all drug offenders.

I find that the proposed amendments to the drug offense guidelines are generally consistent with the Administration's goal of ensuring swiftness and certainty of punishment. The Commission is to be lauded for its attempt to solve the problems of fairness and proportionality with changed guidelines.

As I indicated in my January 19, 1995, letter to you regarding the U.S. Sentencing Commission's *Special Report to the Congress: Cocaine and Federal Sentencing Policy* on powder and crack cocaine, the differential between the impact on "low end" users and traffickers versus "high end" users and kingpins, and the enormous impact on the African American community is of great concern to ONDCP. It is clear to me that the impact of crack cocaine in primarily poor, urban, African American neighborhoods has been devastating; and it is also clear that African-Americans have been disproportionately affected by the sentencing for powder and crack cocaine.

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One of the goals of sentencing policy in general should be to eliminate race-based differentials in sentencing. However, as the Commission's report demonstrates, the research does not clearly support elimination of the sentencing differential for powder versus crack cocaine. In fact, the greater availability of crack cocaine, the greater degree of addictiveness of crack cocaine, the impact on many inner city communities, and the greater systemic violence which surrounds the crack trade indicate that some differential may be warranted.

As your research shows, African Americans accounted for 88.3 percent of federal crack cocaine distribution convictions in 1993, compared to 7 percent for Hispanics, and 4.1 percent for whites. Those individuals convicted of selling crack are overwhelmingly the low-level street dealers; yet they receive longer sentences than many individuals convicted of higher-level sales of powder cocaine.

I strongly believe that swift and certain punishment is key to an effective criminal justice policy. However, the Commission's data indicate that the present sentencing process disproportionately affects one segment of the population. Recently, a Federal appeals court in California upheld the dismissal of crack cocaine trafficking charges against five African Americans after they made a "colorable" showing of selective prosecution because a study revealed that all the defendants in 24 crack trafficking cases concluded by the Los Angeles Federal public defender's office in 1991 had been black.

I agree with your recommendation, "that Congress's objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on the current Federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio," and that the "current sentencing scheme, therefore, should be amended to account for and punish more fully and appropriately for the dangers associated with both crack and powder cocaine."

I feel that it is imperative upon the Sentencing Commission to recommend a way to account for both forms of this dangerous drug in sentencing in a fair and equitable manner. For example, further examination should be given to the level of violence and other external results of these illegal transactions in relation to the severity of the sentence. A change in the primary focus from quantity of drugs to offender characteristics, including but

not limited to, use and possession of weapons, related violence, defendant culpability, and role within the trafficking structure might then make it possible to severely punish the violent act and "high end" dealers regardless of whether they are trafficking in powder or crack.

Thank you for the opportunity to contribute to this important debate.

Sincerely,

Lee P. Brown
Director

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500
WASHINGTON, DC 20002-8002

public comment notebook

(202) 273-4500
Fax
(202) 273-4529

March 16, 1995

MEMORANDUM:

TO: Chairman Conaboy
Commissioners
Staff Director
Deputy Staff Director
Office Directors

FROM: Mike Courlander

SUBJECT: Public Comment

In addition to items contained in the public comment notebook, the Commission has received considerable written comment on the proposed amendments from inmates, their families, and concerned citizens.

9,435 comments on issue 38 (crack/powder cocaine equivalency) request a more equitable crack/powder cocaine penalty ratio (most advocating 1:1);

3,375 comments support proposed amendment 37 (marijuana plant equivalency);

116 comments support amendment 44 (money laundering); most wished to make it retroactive;

39 comments support amendment 39 (drug trafficking);

23 comments support proposed amendment 42 (offenses involving drugs), one comment opposed; and

14 comments support proposed amendment 29 (safety valve); most writers also called for retroactivity.

Some letter writers took the opportunity to comment on a variety of proposed amendments; all this public comment is available for inspection at the Communications Unit.

034-95

United States District Court
Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
Chief Judge

February 28, 1995

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

RE: Proposed Guideline Amendments
for 1995

Dear Commissioners:

The attached comments are being submitted on behalf of the Judges of the United States District Court for the Eastern District of Michigan. Each year, since the inception of the sentencing guidelines, this Bench has accepted the invitation of the United States Sentencing Commission to offer comment on those issues in the proposed amendments which we feel will effect the sentencing practices of the Judges in this District.

If there are any questions regarding any of the comments submitted, please feel free to contact me.

Sincerely,

Julian Abele Cook, Jr.
Chief Judge

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RECOMMENDATION

6. Option 1 is preferred, which amends the statutory index to reference guidelines in Chapter Two when death results from the underlying offense. This reference will only apply if it is found beyond a reasonable doubt that death resulted from the offense. A preponderance of the evidence standard is far too low for such serious penalties as death or life imprisonment.

RECOMMENDATION

8. Because firearms are rarely utilized in crimes of forgery or counterfeiting, discretion should be left to the court to decide if an upward departure is warranted. There should be no specific offense characteristic for firearm possession. Option 2 is preferable.

RECOMMENDATION

9. Option 2 would be preferred since it creates more options for the court to choose, based on the actual conduct of the defendant.

RECOMMENDATION

11. A two level enhancement already exists at section 2D1.2 for distribution of controlled substances involving a protected location or an underage or pregnant individual. This enhancement appears sufficient.

The guideline should not be amended to provide a lower offense level if the protected location is selected by law enforcement or its agents. Instead, there should be a provision for a downward departure in an amount selected by the court.

RECOMMENDATION

15. The probation department sees no good reason to amend section 2K2.1 to provide for an enhancement for a conviction under 18 U.S.C. s 922(v). Application note 16 now recommends an upward departure if the offense involved multiple military-style assault rifles. The commission could add to that note their approval of departures for semi-automatic weapons, if the court believes a higher sentence is warranted.

RECOMMENDATION

19. The current offense levels for firearm violations appear adequate. No good reason has been advanced as to why they should be increased.

It is recommended that the definitions and counting of prior convictions for crimes of violence and drug trafficking be the same as those used in Career Offender. There would be disparities if the narrower definition in 18 U.S.C. § 924(e) was used. That is, if one state imposes a ten year maximum for the same conduct that in another jurisdiction carries a five year maximum, the Career Offender definition would count both; the 924(e) definition would not. Furthermore, there seems no reason to extend the definition of a crime of violence to comport with the 924(e) definition.

RECOMMENDATION

25(A). The option preferred is to create a departure policy statement in Chapter Five, in order to leave more discretion with the court. However, should the Commission see fit to provide a Chapter Three adjustment, a two level enhancement would be sufficient.

RECOMMENDATION

26(A). Since the sentencing court will have to decide if the new statutory sentencing enhancement applies to each defendant when it is alleged that he or she is a member of a "criminal street gang", it should be left to the court to determine the extent of the enhancement. It is preferable that this be accomplished by the creation of a departure policy statement.

RECOMMENDATION

27(A). Since there seems to be no particular information to suggest that the current guidelines do not provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim, the applicable guidelines should not be changed.

27(B). If a defendant has previously been convicted for a crime of violence against an elderly victim, his enhanced punishment would be best determined through a provision recommending an upward departure.

RECOMMENDATION

28. Since § 5G1.1 already provides instructions regarding mandatory statutory penalties, there is no good reason to replace the current career offender provisions. At the most, an application note referring to 18 U.S.C. § 3559 would suffice.

RECOMMENDATION

29. The current § 5C1.2 appears to be working well, and should not now be altered. If there is any information suggesting that there is a problem, then it should be continued as a temporary amendment.

AMENDMENTS RELATING TO DRUG OFFENSE GUIDELINES

APPROACH 1

This approach, which includes proposed amendments 33 through 42, is not recommended because of the extreme changes involved, and without supporting information, such as the Commission's report to Congress on the 100 to 1 ratio between cocaine and cocaine base. Additionally, there have been some recent amendments promulgated which may ameliorate the problems with the drug guidelines, but they haven't been in effect long enough to measure their effectiveness.

Notwithstanding the above, some of the proposed amendments do beg comments, if only for future consideration by the Commission. It should be kept in mind, however, that these comments are generally based only on perceived concerns of some probation officers.

RECOMMENDATION

33. There seems to be no good reason put forward by the Sentencing Commission why the guideline ranges should necessarily include any mandatory minimum sentence. The Sentencing Commission was charged by Congress to independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of Title 18, United States Code. If the Commission's studies show that a person with no criminal history, who is convicted of distributing 1 kilogram of heroin, should receive a sentence of between 70 and 87 months, then the guideline range should reflect that. U.S.S.G. § 5G1.1 would, of course, supersede the initial range, stating that any statutorily required minimum sentence must be imposed.

Having stated the above, it is recommended that if one option is to be chosen, Option C would be favored. This option would provide a guideline range of 70 to 87 months for the defendant described above, after adjusting for a four level role increase and a three level decrease for acceptance of responsibility. It would produce a sentence, however, of 120 months due to the statutorily required minimum sentence.

RECOMMENDATION

34. Because of several areas of concern, such as the application of substantial assistance departures for high level dealers, the impact of drug quantity should be limited for those defendants qualifying for a mitigating role adjustment. An offense level of no more than 28 should apply to those qualifying defendants.

RECOMMENDATION

37. Since there seems to be no good reason to use a one plant to one kilogram ratio, and there seems to be considerable reason to use 100 grams per plant, no matter how many plants are involved, detaching the one kilogram equivalent for one marijuana plant in cases of over 50 plants is desirable.

RECOMMENDATION

38. We have been very concerned about the use of the 100 to 1 ratio for cocaine to cocaine base. It is believed that the ratio should be changed, however a new ratio could not be decided upon without at least first reviewing the Commission's report to Congress.

RECOMMENDATION

40. There have been no significant problems noted with not using purity. U.S.S.G. § 2D1.1, comment. (n.9), which now provides for an upward departure for unusually high purity, is sufficient and allows the court to retain some discretion. It would be suggested that application note 9 be amended to reflect the appropriateness of a downward departure in those cases where the purity is unusually low.

RECOMMENDATION

APPROACH 2

Approach 2 is also not recommended. Although at first glance this approach appeared desirable, further study revealed what seems to be gross problems.

43. Under either option, no matter what base offense level is chosen, a defendant with a large amount of drugs will generally have the same or slightly higher guideline range than he would under the current drug guidelines. However, a defendant with a small amount of drugs will have a significantly higher guideline range, for no apparent good reason.

For example, compare defendant A who was involved in a conspiracy extending over six months, with defendant B who was arrested after one sale to an undercover agent. Further suppose that defendant A had five grams of cocaine base over the period of the conspiracy, and defendant B had five grams of cocaine powder on the one occasion; a base offense level of 26 applies to both; both are in Criminal History Category I; and both receive a three level adjustment for acceptance of responsibility.

Defendant A, under the current guidelines, would have a range of 46 to 57 months, but a statutorily required minimum sentence of 60 months. Under option 1 he would have a range of 57 to 71 months (60 to 71 months because of the statutorily required minimum sentence). Option 2 would result in the same range as under the current guidelines.

Defendant B, for whom no statutorily required minimum sentence applies, would have a range of 6 to 12 months under the current guidelines. The use of either option however, would result in a range of 46 to 57 months.

RECOMMENDATION

46. This proposed amendment to § 5G1.3 does not simplify application of this guideline, nor does it appear to sufficiently increase the court's discretion. It remains complicated, confusing and difficult to understand. The Commission should simplify § 5G1.3(c), the most problematic section, by stating that the sentencing court may impose the sentence for the instant offense to run concurrently or consecutively.

My name is Alexa Freeman. I am a graduate law student working on a Doctor of Science of Law degree at the Yale Law School. Before embarking on this degree, I practiced law for 10 years, most recently at the National Prison Project of the American Civil Liberties Union. My work at the National Prison Project gave me a great deal of familiarity with sentencing issues. While at Yale, I have been evaluating the impact of the federal sentencing guidelines on the sentencing of civil rights crimes. The staff at the Sentencing Commission have been extremely helpful to me in providing needed information in this endeavor. I am grateful for all the assistance I have received. I mention this because I do not want my comments to be construed as a criticism of the staff here. Rather, my comments go toward the Commission's public information policies.

In my research, I have attempted both a quantitative and qualitative analysis of the sentences police and other law enforcement officers receive when they are convicted of the civil rights crime of use of excessive force. These cases are prosecuted under 18 U.S.C. §242 which makes it a crime to interfere with civil rights under color of law. When public officials act in concert with each other or with private persons, they may also be charged under 18 U.S.C. §241 which outlaws conspiracy to interfere with civil rights. Under the current guideline scheme, these crimes are sentenced under guideline §§2H1.1 (§241) and 2H1.4 (§242).

These guidelines are extremely important. Although the number of cases is relatively small compared to other federal crimes, civil rights violations are significant beyond their numbers. As evidenced by the Rodney King case, civil rights crimes can carry enormous symbolic weight. Sentencing decisions by courts communicate to the public how our society views civil rights. Sentences that are too lenient send a message that civil rights crimes are not taken seriously. On the other hand, if the guidelines are too stringent, courts might depart, thus undermining the important purposes of sentencing reform of achieving fairness and rationality.

For these reasons, I would hope that the Sentencing Commission would welcome educated comment on proposals which affect these civil rights guidelines. But unfortunately, due to the Commission's public information policies, I have been unable to obtain the data necessary to make as thorough an analysis as possible of sentences given in law enforcement excessive force cases.

To some extent, the lack of adequate data is the result of a small civil rights data base to begin with. This is particularly true for data on pre-guideline sentencing practices for these cases because no agency was responsible for compiling this information. However, it should be possible for members of the public to obtain information derived from public court records on post-guideline sentencing practices from the Sentencing Commission. Under the Sentencing Reform Act the courts are

required to submit sentencing data to the Commission, and the Commission is charged with the tasks of collecting, analyzing and disseminating sentencing information. Yet the only data sources available to the public are the relatively general information provided in the Commission's Annual Reports or the raw data that the Commission sends to Ann Arbor, Michigan in a data base format that only computer experts can make use of.

For example, the Commission does not provide basic data about all of the sentences imposed since the guidelines took effect in cases of law enforcement brutality. Nor does it supply a breakdown of relevant factors in each case so sentenced, such the underlying conduct, whether the victim died, the number of counts, and sentencing departures. These facts easily could be provided to the public without disclosing confidential information from pre-sentence reports. Thus, one purpose for commenting here today is to make a plea that the data analyses that expert Commission staff conduct of public information be made available to the public. I am told that one obstacle to disclosure is an agreement that was made between the Commission and the Federal Judicial Conference. To the extent that this agreement is the reason why the public is not given access to basic case information and staff research, I urge you to revisit this aspect of the agreement.

In addition, the information that the public was provided in the notice in the Federal Register for today's hearing on the proposed amendments to the civil rights guidelines was inadequate

to evaluate whether the amendments are a good idea. I assume that Commission staff have done extensive statistical and qualitative analyses of civil rights sentences and that this staff research is the basis upon which the proposed amendments have been made. However, this information is not available to the public. We must then resort to educated guesses as to why the Commission is considering this change.

The practice of not sharing with the public the basis for the Commission's proposed action goes back to the initial enactment of the guidelines. For example, I have tried to determine why the first Commission enacted the civil rights guidelines that it did. I reviewed all the minutes of Commission meetings since the Commission was first appointed, went through old testimony stored in boxes in the basement, read all the Commission's reports, talked with current and former staff, and interviewed former Commissioners. Despite these efforts, the Commission's decision-making process at that time remains largely a mystery to me due to an insufficient record.

Similarly, the information that is made public does not reveal the basis for the Commission's current proposal to amend the civil rights guidelines. As a result, even though I am a student of civil rights sentencing and would like to be able to offer insights on the proposal before you, I am unable to provide you with substantive comments because there is not an adequate information base available to the public.

I urge that the Commission make its research available to the public and allow us to learn not simply what you are doing, but also why you are doing it. By taking this step, the Commission will benefit from more informed commentary on its actions.

Thank you for the opportunity to testify today.

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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March 22, 1995

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

Dear Chairman Conaboy,

On behalf of the Probation Officers Advisory Group, I thank you for the opportunity to appear before the Commission and to present the views of probation officers. It is enormously gratifying to officers all over the country to know that their voices are being heard.

As I outlined in my introductory remarks, the Advisory Group polled the field on the Drug Amendment only. We received one response from each district that best represented the opinion of the district as a whole. Thus, sometimes a district had 10 officers working on a single response. If they could not agree on a response, or had no opinion about an issue, they left the question blank. We received responses from 69 districts representing all 11 Circuits and the DC Circuit (hereinafter referred to as 12 Circuits). We estimated that approximately 350 probation officers nationwide participated in the Drug Survey. The results are appended to this letter as Appendix 1.

The Crime Bill survey was handled in a different manner. Only the Circuit Representatives from the Advisory Group participated. We received responses from 14 members of our Group. The results are appended to this letter as Appendix 2.

The following is a summary of our recommendations:

Drug Survey Results

Amend. 35(A) Pg.54[1]	Favor proposed amendments to 3B1.1 (a),(b),(c) (Aggravating Role). 85.3%[2]
Amend. 35(B) Pg.55-56	Revises 3B1.2 (Mitigating Role). Introductory commentary to Chap.3, Part B 89.4%
Amend. 36 Pg.60-62	Favor enhancements to §§2D1.1,11 to address firearm, dangerous weapon, or serious bodily injury. 88%
Amend. 37 Pg.64	Favor detaching one kilogram equivalent for marijuana plants in excess of 50. Instead, 100 grams per. 94%
Amend. 38 Pg. 65	Favor changing the 100 - 1 ratio of cocaine base to cocaine to reflect actual relationship. 92.4%
Amend. 39 Pg. 66	Respondents prefer Option 1 to Option 2. 94%
Amend. 41 Pg. 76	Favor counting number of pills rather than measuring weight. 96%
Amend. 42 Pg 80-83	Favor certain of the twelve miscellaneous issues as follows: 1 - 95%; 3 - 95.5%; 4 - 98.4%; 5 - 98.4%; 6 - 95.6%; 7 - 95.6%; 11 - 85%; 12 - 98.4%
Amend. 43 Pg.89	Favor offense level enhancements for use and type of firearm, bodily injury, role, and # of participants. 90%
Amend. 43 Pg.91	Favor definition of "leader" or "organizer" set out in App.N.5. 91.8%
Amend. 43 Pg.91	Favor definition of "manager" and "supervisor" set out in App N.6. 92%

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[1] Page numbers refer to the page in the reader friendly version of Commission Amendment Proposals for 1995.

[2] Percentages represent percent of districts in favor.

Amend. 43 Pg.92 Favor definition of "peripheral" set out in App.N.7. 90.3%

Role Adjustments

As discussed during our meeting with the commission, the Group treated the role adjustments as a separate, albeit integral, issue. Tommy Whiteside, 4th Circuit representative chaired the focus group on role and submits the following statement:

The proposed amendments for the 1995 amendment cycle at 35(A), 35(B), and 36 pertain to role adjustments in Chapter 3. A proposal at Amendment 43, Option 1 also contains provisions that address role in drug cases. The probation officers, at the request of the Criminal Law Committee, re-calculated the role adjustments using the 1995 proposals on some forty-five (45) defendants. Thirty-one (31) of these defendants were drug cases and fourteen (14) were fraud cases. The ten (10) districts that participated are: SD/Indiana, Nevada, ED/New York, ED/Michigan, Minnesota, CD/California, ND/Florida, Colorado, Massachusetts, and South Carolina.

Secondly, a survey was prepared and sent to probation officers in each circuit inviting comment on the proposed changes. Approximately three hundred fifty (350) probation officers responded. The results of our inquiries found that the role amendments did enhance the probation officer's ability to decide whether or not a defendant should receive a role adjustment. However, in testing the new role guidelines, we found that no more defendants received aggravating role while a substantial greater number of defendants received mitigating role and specifically minor role. Four (4) districts reported more minor role defendants using the new amendments. Six (6) out of ten (10) districts reporting said the changes to role can be further improved.

The following are the results of our survey on each of the new role amendment proposals.

Amendment 35(A)

Eighty-five percent (85%) of respondents favored the amendments to the guideline at 3B1.1(a)(b) and (c). Removing the phrase "a criminal activity" and "or was otherwise extensive" simplifies the wording of the guideline. Adding the language "at least four other participants" will enhance the ease of the training and application of this guideline. Seventy-four percent (74%) of respondents found the change to the commentary at Application Note 1 to be beneficial. This section suggests upward departure for certain defendants who are not criminally responsible due to age, lack of knowledge, or mental deficiency.

Sixty-seven percent (67%) of the probation officers found the change to Application Note 3 to be beneficial. This amendment directs that no aggravating role enhancement be given to a defendant who would have merited a minor or minimal adjustment but for the supervision of other mitigating role participants.

Eighty-nine percent (89%) of the probation officers favored the changes to the introductory commentary of Part B, Role in the Offense.

Sixty-four percent (64%) of the probation officers favored the changes to Mitigating Role; however, we are concerned about the length of the commentary and the addition of numerous other factors which either prohibit or serve as prerequisites to a role adjustment. As noted previously, probation officers found that more defendants received minor role as a result of the new commentary, but the Advisory Group does not think that the changes simplify the guideline. The proposed change to the guideline and the additional factors to be considered for mitigating role may result in lengthier sentencing hearings and less discretion for the judges.

Ninety-two percent (92%) of the probation officers favored that section of Amendment 43, Option 1 which addresses the descriptive terms of organizer, leader, manager, and supervisor. These terms categorize persons who fall into the more culpable roles of drug cases and expand upon terms such as courier to which probation officers are already accustomed.

In summary, the probation officers are receptive to most of the proposed changes to the role guidelines, but we do think that some of the commentary could be briefer and possibly improved upon. Role is one of the more complex areas in guideline sentencing, but also one of the most important. We congratulate the United States Sentencing Commission for such a thorough effort in dealing with this issue and we think that the direction that has been taken is appropriate. We will be happy to provide any assistance to the Commission toward any further changes to the role guidelines.

The Crime Bill

Nancy Reims, 9th Circuit representative who headed up the effort on amendments resulting from the Crime Bill submitted the following:

Our comments on the proposed amendments relating to the Violent Crime Control and Enforcement Act of 1994 will be limited to those amendments where there was an agreement of 70% or more of the Probation Officers Advisory Group.

Amendment 2 - Minor Assault

We do not believe that Guideline 2A2.3(a)(1) provides an adequate

penalty for the new offense at 18 USC §113(a)(7): Minor assault against a person under age 16 resulting in substantial bodily injury. Furthermore, we would prefer the addition of a specific offense characteristic at Guideline 2A2.3 for either bodily injury or for a conviction under 18 USC §113(a)(7), as opposed to inserting "bodily injury" in place of "physical contact" at Guideline 2A2.3(a)(1).

Amendment 6 - Death of Victim

The Crime Bill increases the penalty for various offenses resulting in the death of a victim. Our group prefers the option which amends the underlying offense guideline to add a cross reference to Chapter 2 Part A if there is a preponderance of evidence that death resulted from the offense, consistent with Guideline 1B1.3: Relevant Conduct. In that it is not clear what the standard of proof will be for the imposition of the new statutory penalties, we see no reason to change the preponderance of evidence standard for sentencing at this time.

Amendment 10(A) - Possession of Controlled Substance in Prison

The Crime Bill has amended 18 USC §1791 to provide four different maximum penalties depending on the type of controlled substance. We unanimously agree that the cross reference at Guideline 2P1.2, which is two levels plus the offense level for the drug guideline, 2D1.1, should be expanded to apply to all drug trafficking offenses under 18 USC §1791. We also believe that the minimum offense level of 26 in the cross reference should be applied to methamphetamine offenses to reflect that such offenses now have the same 20 year statutory maximum penalty as the other controlled substance distribution offenses to which this cross reference applies.

Amendment 10(B) - Simple Possession and Distribution of Controlled Substances in Prison or Detention Facility in Violation of 21 USC §844 and 21 USC §841

With respect to the directive that the United States Sentencing Commission provide an adequate enhancement for simple possession of a controlled substance (21 USC §844) and distribution of a controlled substance in prison (21 USC §841), we believe that a two level enhancement would be appropriate for the simple possession offense.

Amendment 11 - Drug Trafficking in Protected Locations

We believe that the present enhancement for drug trafficking in protected locations found at Guideline 2D1.2 provides an appropriate enhancement for a defendant convicted of 18 USC §860.

Amendment 12 - Domestic Chemical Diversion Act of 1993

Our group is in favor of this amendment which conforms Guidelines 2D1.11 and 2D1.1 to sections of this Act.

Amendment 14 - Civil Rights and Hate Crimes

Included in this three-part amendment is the consolidation of the present civil rights guidelines into one guideline at 2H1.1, which would provide for a default offense level for conspiracies involving individual rights. We recommend the option which provides for a default level of 10 for the conspiracy. This would be consistent with the default level for substantive civil rights offenses involving force or threat of force and four levels higher than the offense level for substantive offenses not involving force or threats of force. We also choose the option proposed by the Sentencing Commission, amending Guideline 3A1.1 to add a three-level enhancement for hate crimes, committed by persons who are not public officials, and amending Guideline 2H1.1 to include an enhancement for non-hate crimes, committed under color of law, of either 2, 3, or 4 levels above the offense level for the underlying offense.

Amendment 19 - Possession of Firearm by Prohibited Person

The Commission has been directed to appropriately enhance penalties for persons convicted of 28 USC §922(g) who have one or two prior convictions for a "violent felony" or a "serious drug offense," as set forth in 18 USC §924(e)(2)(A). We are of the opinion that the current offense level at Guideline 2K2.1 should not be increased. We also recommend that the definitions and the counting of prior convictions at Guidelines 2K2.1 and 4B1.1 be the same.

Amendment 20 - Stolen Firearms and Explosives

To address the disparity and penalties between Guidelines 2B1.1 and 2K2.1 when calculating the offense level for stolen firearms and explosive offenses, we prefer amending Guideline 2B1.1 to include a cross reference to Guideline 2K2.1, as opposed to amending 2B1.1 to recommend an upward departure.

Amendment 21 - Conspiracies to Commit 18 USC §924(c) and §844(h)

The Crime Bill adds the violations of 18 USC §924(n) and §844(m) to provide for penalties when conspiring to commit violations of 18 USC §924(c) and §844(h). Our group is in favor of the Sentencing Commission's amendment which would reference in the Statutory Index a conspiracy to violate 18 USC §924(c) under 18 USC §371 to Guideline 2K2.1, which would provide for an offense level of at least 18. Violations of 18 USC §924(n) and §844(m) would be referenced to Guidelines 2K2.2 and 2K1.3, respectively.

Amendment 22 - Failing to Depart and Re-entry Offenses

The Crime Bill alters penalties for 8 USC §1252(e) and §1326(b), failing to depart and re-entering the United States, respectively. Our group believes that the current offense level for re-entry after a conviction for a felony or aggravated felony is appropriate. However, we recommend that the offense level currently applicable for re-entry after deportation for a felony should also be applied to re-entry after deportation for three (3) misdemeanors involving either drugs or crimes against a person.

Amendment 24 - Terrorism

Our group believes that Policy Statement 5K2.15 provides an appropriate enhancement for any felony that involves or is intended to promote international terrorism. Furthermore, we are not in favor of an amendment to Guideline 4B1.1 to enhance the sentences of such defendants under this section as if they were career offenders.

Amendment 26 - Criminal Street Gangs

We would prefer a departure policy statement in Chapter 5 Part K which would indicate that the Court may increase the sentence above the authorized guideline range if the sentence enhancement contained in 18 USC §521 is determined to apply.

Amendment 27(A) - Elderly Victims

Our group is of the opinion that the guidelines provide sufficiently stringent punishment for defendants convicted of a crime of violence against an elderly victim.

Amendment 27(C) - Elderly Victims

We do not believe that Guideline 3A1.1 should be amended to require an upward adjustment in the offense level if the offense involved victims older or younger than designated threshold ages. Furthermore, we recommend against different provisions concerning vulnerable victims in telemarketing fraud versus other types of fraud offenses.

Amendment 31 - Supervised Release

Our group recommends that the outdated statutory references in Policy Statements should be eliminated to conform with the new statutory provisions allowing the re-imposition of supervised release after revocation. We are also in favor of adding commentary reflecting the statutory exception from mandatory revocation if an offender fails a drug test, and eliminating outdated statutory references.

Amendment 32 - Amendments to Appendix A and Guidelines Titles

The Probation Officers Advisory Group is in favor of the proposed amendments which would conform with the revisions in existing statutes.

U.S.S.G. § 5G1.3(c)

As discussed during our meeting, Fred Tryles, 6th Circuit representative reported that the Advisory Group supports the Criminal Law Committee's first proposal for simplification of § 5G1.3(c). We would add that this particular proposal is the one submitted by the Probation Officers Group for the 1994 amendment cycle.

Money Laundering (Amendment 44) Page 98

The Probation Officers Group was in favor of this amendment two years ago and are still committed to it. The amendment adequately provides for increased punishment for money laundering. By keying the laundering offense to the underlying offense, it assures that a more serious underlying offense will be adequately punished and not plea bargained away. Likewise, a less serious underlying offense receives an appropriately greater punishment by virtue of including the money laundering counts.

Supervised Release (Amendment 45) Page 102

Although our Group did not poll the field on this amendment, we discussed the issue as well as the Criminal Law Committee's more specific proposal at our meeting on March 13th. The Advisory Group endorses the Criminal Law Committee's proposal not to require supervised release in every case. This we believe will sensitize the court as well as presentence writers and supervision officers to the statutory purposes of supervised release. This would be accomplished by the presentence writer recommending supervised release be imposed and justifying the recommendation. Such procedure is in contrast to the present blind mandate. The amendment also provides a vehicle for eliminating the relatively few offenders from the supervision roles who are not a threat to recidivate and who derive no benefit from the probation service.

We are happy to answer any questions you may have about these recommendations. Please don't hesitate to call on us. We look forward to our next meeting.

Very Truly Yours,

Francesca D. Bowman

Francesca D. Bowman, Chair

APPENDIX 1

Results of Survey on Two Drug Guideline Approaches Proposed for 1995 Amendment Cycle

Date: March 7, 1995

District respondents: 69 districts from 12 circuits

Number of Officers participating in this project: 350 +

The survey was completed with the following instructions to each district representative:

Date:_____

District:_____

District Representative Name:_____

Number of Officers participating in this project:_____

Instructions

Please answer the following questions using the reader-friendly version of the Proposed Amendments for 1995 issued by the Sentencing Commission. Each Chief Probation Officer has received a copy and every Circuit Representative has one. It is not possible to answer these questions without the benefit of the Commission's document. It would also be helpful to have the latest edition of the Guidelines Manual at hand.

It is quite possible that your district has not had experience with some of the issues involved in this survey. If your district has no opinion on a particular issue, please leave it blank. The Probation Officers Advisory Group represents your survey input to the Commission as informed opinions. The Commission and the Criminal Law Committee take our opinion very seriously. Much of the System's credibility is due to your diligence in providing input into these surveys. While we are very aware that the investment of your time is great, the results are always to your benefit and the System's.

Thank you in advance for your continued hard work and thoughtful remarks.

Survey on Two Drug Guideline Approaches

Approach 1

Amendment 33. If the Commission were to compress the drug quantity tables, which option do you prefer?

Option A	12	% 20.3%
Option B	33	56%
Option C	14	23.7%

TOTAL 59

I think the drug tables are just fine the way they are.

Agree with this statement	18	% 39.1%
Disagree	28	60.9%

TOTAL 46

Comments:

MD/NC "Option B appears to address the ring leader more appropriately..."

WD/TX: "Option B appears to be the one that conforms most to the legislative history of the Anti-Drug Abuse Act of 1986 and the Crime Control Act (1994). This option along with the 'safety valve' provision appears most appropriate."

8th Circuit: Option B might "cause everybody to bargain for mitigating role."

Colorado: "Option C is problematic because...it appears to conflict with the Congressional instruction in the 1994 Crime Bill."

Wyoming: "Drug penalties are too harsh."

Utah: "...departure authority would be more appropriate. Often role is inadequately considered, as is quality of the substance."

7th Circuit: "An adjustment should be made in consideration of the noted thoughts of Congress in synopsis of amendment."

Amendment 34. Is the Commission's proposed cap of level 28 (78 - 97 months) on defendants who qualify for mitigating role adequate to meet the purposes of sentencing?

Yes 47 % 69.1%

No 21 30.9%

TOTAL 68

The following level is more appropriate:

Level: **22 (2); 24(2); 25(1); 26(2); 30(3); 32(3); no cap (1)**

Additional Issue for Comment: Should there be a different cap for defendants convicted of distributing drugs of a different type than those described?

Yes 10 Level 22 is appropriate 18%

Yes, but level 22 is inappropriate 1

Level 30 (1) is more appropriate.

No, Level 28 is appropriate for all drugs. 44 78%

TOTAL 56

I think Application Note 16 is adequate as it is in the current guideline manual.

Agree with this statement 30 46%

Disagree 35 54%

TOTAL 65

AMENDMENT 35(A) (Refer to pages 54-60 of Proposed Guideline Amendments)

It is proposed that 3B1.1 (Aggravating Role) be changed to make the aggravating role adjustments more a matter of direct supervision. The term "otherwise extensive" would be eliminated. The proposed changes are as follows:

3B1.1(a) The 4-level increase would be given if the defendant was an organizer or leader of "the offense and the offense involved at least four (4) participants."

3B1.1(b) The 3-level increase would be given if the defendant was a manager or supervisor (but not an organizer or leader) "of at least four (4) other participants in the offense."

3B1.1(c) A 2-level increase would be given if the defendant was an organizer, leader, manager, or supervisor "of at least one (1) other participant in the offense."

Question #1

I favor the proposed amendments to 3B1.1 (Aggravating Role).
58 yes % 85.3% 10 no 14.7%

TOTAL 68

Comments:
SD/TX "Current 3B1.1 (Agg Role) has weathered test of time. Proposed changes are unnecessary and cumbersome."

7th Circuit "Makes things more clear and less opportunity for 'gray areas' (a) and (b) need consistent wording re: 4 other participants. Proposal appears equitable and clear. Eliminate 'otherwise extensive'."

Colorado "Clear, easily understood and helpful.

Wyoming "Would like to see the 'otherwise extensive' language kept..."

Utah "We must still address the difficulty of identifying 'participants.' We rarely have information relative to participants outside of that provided by the defendant...Does quantity and quality of substance transported by courier identify level of trust, proximity to the 'top'."

Kansas "Makes the guideline less ambiguous."

9th Circuit "Three districts do not want 'otherwise extensive' language deleted because needed to address seriousness of some conspiracies. If treated as a departure will increase disparity because similar fact patterns won't always result in a departure."

6th Circuit There was general agreement in favor the amendment, but some wanted to eliminate 'otherwise extensive' language as vague while another comment disagreed with that proposal.

DC Circuit "Much discussion as to 'otherwise extensive' should remain, e.g. when defendant commits act alone, uses banks."

It is proposed that Application Note 1 of the Commentary to 3B1.1 (Aggravating Role) be amended by inserting the following additional paragraph at the end.

> "In an unusual case, a person may be recruited by a criminally responsible participant for a significant role in the offense (i.e., a role that is typically held by a criminally responsible participant), etc...but the person recruited may not be criminally responsible because the person recruited (1) is unaware that an offense is being committed, (2) has not yet reached the age of criminally responsibility, or (3) has a mental deficiency or condition that negates criminal responsibility. In such a case, an upward departure to the offense level that would have applied had such person been a criminally responsible participant may be warranted. For example, a person hired by a defendant to solicit money for a charitable organization who was unaware that the charitable organization was fraudulent, a person duped by a defendant into driving the get-away car from a bank robbery who was unaware that a robbery was being committed, or a child recruited by a defendant to assist in a theft would meet the criteria for the application of this provision."
>
> It is proposed that Application Note 2 to the Commentary at 3B1.1 (Aggravating Role) be amended by inserting the following additional paragraph at the end.
>
> "A manager or supervisor means a person who managed or supervised another participant, whether directly or indirectly."

Question #2(a)

I favor the proposed amendments to the Commentary of Application Notes 1 & 2 to 3B1.1 (Aggravating Role).

52 yes **74.3 %** **18** no **25.7%**

TOTAL 70

It is further proposed that the Commentary to 3B1.1 (Aggravating Role) be amended by deleting the current Note 3 and inserting the following:

> "In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor or minimal role participants, do not apply an adjustment from 3B1.1 (Aggravating Role). For example, an increase for an aggravating role would not be appropriate for a defendant whose only function was to off load a large

shipment of marijuana and who supervised other off loaders of that shipment. Instead, consider this factor in determining the appropriate reduction, if any, under 3B1.2 (Mitigating Role)." For example, in the case of a defendant who would have merited a reduction for a minimal role but for his or her supervision of other minimal role participants, a reduction for a minor, rather than minimal, role might be appropriate. In the case of a defendant who would have merited a reduction for a minor role, but for his or her supervision of other minimal - or minor - role participants, no reduction for role in the offense might be appropriate.

The interaction of 3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from 3B1.1 is applied, an adjustment from 3B1.2 may not be applied.

Question #2(b)

I favor the proposed amendment to the Commentary at Application Note 3 of 3B1.1 (Aggravating Role).

44 yes **66.6 %** **22** no **33.3 %**

TOTAL 66

AMENDMENT 35B

This proposed amendment revises 3B1.2 (Mitigating Role) and the introductory commentary to Chapter 3, Part B (Role in the Offense) to provide clearer definitions of the circumstances under which a defendant qualifies for a mitigating role reduction. In addition 3B1.4 is deleted as unnecessary.

The proposed change to Part B (Role in the Offense, Introductory Commentary) is as follows:

"For 3B1.1 (Aggravating Role) or 3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended. When an offense has only one participant, neither 3B1.1 nor 3B1.2 will apply. In some cases, some participants may warrant an upward adjustment under 3B1.1, other participants may warrant a downward adjustment under 3B1.2, and still other participants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply to offenses committed by any number of participants."

Sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) authorize etc..."

Question #3

I favor the proposed amendment to the introductory commentary of Part B, Role in the Offense.

59 yes 89.4% 7 no 10.6 %

TOTAL 66

Comments:

3rd Circuit
A cautionary note: "One of those who said 'yes' related that they understood the commentary, but others in the group found it confusing."

1st Circuit
Puerto Rico "This amendment would greatly assist in the interpretation and application of this adjustment. Many times it has become an issue whether a defendant charged by himself and with no co-participants is eligible for an adjustment for mitigating role. This is especially true in the case of 'mules' (drug couriers) whose participation cannot be compared to any other person and who have consistently argued that their roles should automatically be considered minor and in some cases, minimal. It would be very helpful if the commentaries address this issue, since the examples in the present commentary do not really convey the Commission's true intent...The proposed amendment clarifies the appropriate application of this adjustment."

7th Circuit
"Role has been a troublesome area for some time. Additional commentary can only help everyone in making guideline application. Defendant E should only be accountable for amount of drugs he bought from A. Thus, his offense level may be less than other defendants."

10th Circuit
Colorado "Very easy to understand."

Utah "[Regarding the references to 'participants'], identified how? By whom? Could possibly be simplified [introductory commentary]."

4th Circuit
MD/NC "Rather lengthy, but it covers role adjustments adequately."

11th Circuit
MD/GA "Although 1B1.3 addresses that relevant conduct is to be considered when applying Chapter 3 adjustments, the reference to 1B1.3 in the proposed amendment application will be more beneficial when addressing contested issues."

6th Circuit
"Provides much needed clarification."

5th Circuit
ED/TX "Proposed amendment to introductory commentary...provides more discretion in sentencing recommendations to the court."

9th Circuit
"May be helpful to new officers...Current commentary consists of two short paragraphs to be replaced by 5 paragraphs. Too long."

Amendment 35(B) further proposes to change 3B1.2 (Mitigating Role) by deleting the terms "in any criminal activity" where it appears and also eliminating "in cases falling between (a) and (b), decrease by 3-levels." The first three application notes of the Commentary to 3B1.2 (Mitigating Role) are deleted and the current Application Note 4 is retained and renumbered as Application Note 7.

Question #4

I favor the proposed changes to the Commentary of 3B1.2 (Mitigating Role).

40 yes 63.6 % 22 no 36.6%

TOTAL 62

Amendment 36. This amendment provides two options for enhancing the weight given to drug dealers who use firearms and the consequences of that use. There is an added provision for enhancement of organizers and leaders of very large scale offenses, for example, involving at least ten other participants.

After reading the proposed changes to §§ 2D1.1 and 2D1.11 in conjunction with the guideline manual, do you believe these enhancements are necessary to address cases when a firearm or dangerous weapon or when there is serious bodily injury of the type not covered by § 2D1.1(a)(1) or (2).

Yes 59 88 %

No 8 12 %

TOTAL 67

Should the minimum resulting offense levels be raised? That is, the levels (A) 20 and (b) 18.

Yes	29	44.6 %
No	36	55.4 %
TOTAL	65	

Should the minimum resulting offense levels be lowered?

Yes	8	15.4 %
No	54	84.6 %
TOTAL	62	

Option 1: Aggravating Role specific offense characteristic increase of 5 levels.

Option 2. Aggravating Role as an application note provides for a sentence towards the upper limit of the guideline range.

Prefer Option 1	33	55 %
Prefer Option 2	27	45 %
TOTAL	60	

Additional Issue for Comment: as an alternative to the above enhancements for firearms and resultant injury, the Practitioners' Group offers another option. Note that specific offense characteristics in 2 (A),(B),(C) are in addition to the specific offense characteristics of 1 (A), (B), (C) and (D).

Which proposal best meets the needs of the Guidelines:

Commission's Proposal	35	61.4 %
Practitioners Proposal	22	38.6 %
TOTAL	57	

Comments:

1st Circuit
D/MA "I think the proposal is too complicated. Nevertheless, that proposal at least provides for the situation (1)(A) where a weapon was possessed with no other consequence, which the commission's

proposal does not take into account."

8th Circuit
"Good idea - but most defendants are also charged with 924(c)..."

9th Circuit
"Add a commentary for departure."

6th Circuit
"Would 2D1.1(b)(1)(A) apply even if convicted of 18 924(c)?"

10th Circuit
Colorado "Option 2 was picked because the sanctions would be more proportional across the Sentencing Table. Officers would like to see the Practitioner's proposal put in a form similar to § 2B3.1."

Wyoming "Practitioner's proposal: What do you mean by 'actually possess' versus 'possessed'? The Commission's proposal is simpler -- less litigation."

Utah "In answer to second question, I would hope that the majority of these are charged under 924(c). Maybe an enhancement for injury should apply to 924(c)/ 2K2.4. Regarding Option 1, Maybe a scale of 1 - 5. Regarding Option 2, No parameter established for how much departure."

7th Circuit
"Possession of a firearm should be defined. What is possession. Commission's proposal more straightforward."

Amendment 37. This amendment would detach the one kilogram equivalent for one marijuana plant in cases of over 50 marijuana plants. Instead, it would count all marijuana plants as equivalent to 100 grams of marijuana as they are presently counted in cases of less than 50 plants.

I agree with this initiative 62 94 %

I disagree with this initiative 4 6 %

TOTAL 66

Comments:

7TH Circuit: "Good, use one scale."

8th Circuit: "Why not weigh the plants minus dirt, planting material, etc. - a much more reasonable approach."

6th Circuit: "We should be consistent and more realistic."

9th Circuit: "One district also thought it should be retroactive."

Colorado: "This is more realistic and fair."

Utah: "This will eliminate the charging manipulation we are seeing."

1st Circuit
Puerto Rico: "It makes more sense if all plants are counted the same way regardless the amount confiscated. If the commission intends to penalize large production, it should add other enhancements that would address this issue fairly. As it is right nor, the discrepancy in sentences involving more or less the same amount of plants is huge."

Amendment 38. Issue for Comment: The commission's use of the 100 to 1 ratio for cocaine to cocaine base has been criticized as unrealistic, albeit a reflection of the statutory mandatory minimums. Do you think the ratio should be changed to more closely reflect the actual relationship of cocaine to cocaine base?

Yes 61 92.4 %

No 5 7.6 %

TOTAL 66

If yes, should the ratio be:

1 to 1 22 38 %

2 to 1 6 10 %

5 to 1 4 6.8 %

10 to 1 11 19 %

20 to 1 7 14 %

Other 50 to 1 (5) 8% and 3 Others 5.1 % (please indicate)

TOTAL 58

Comments:

It is noteworthy that the twelve officers from the District of Columbia who participated in this survey unanimously agreed that the ratio should be 1 to 1. Officers from other urban areas in the Third Circuit and Second Circuit where "crack" is a problem agree that it should be 1 to 1 or 2 to 1. In SD/NY where 17 officers responded, the overwhelming majority recommended 20 to 1 or 10 to 1.

10th Circuit
Colorado "A one to one ratio would eliminate racial bias, whether perceived or actual."

Wyoming "The ratio should be the actual relationship - I don't know what that ratio is, it appears to be very political."

Utah "This appears to be a question for a physician or a chemist. Although cocaine is required to make crack, crack is far more dangerous. Who can say how much?"

9th Circuit
"Two districts believed ratio should be based on guidance from research (i.e., chemist)."

8th Circuit
"Ratio should be based on scientific evidence and actual relationship" (a different opinion from another district) "I believe crack is far more damaging to society. It involves more violence and targets disadvantaged of our population. Ratio should be left alone" (another opinion from another district) "Lower ratios do not properly reflect the differences in these two substances, though the current formula is excessive. This needs a study to help make an informed decision..."

7th Circuit
"Two were unable to give ratio until reasoning determined to support given ratio. 100 to 1, however, is too high."

5th Circuit
SD.TX "Most thought ratio...should be changed but did not know what it should be."

ED/TX "There is no difference between the two. While some argue that smoking cocaine base is more damaging than sniffing cocaine powder, neither is more damaging than injecting cocaine."

2nd Circuit
Connecticut "If the ratio is changed to 1:1, the Commission may want to consider adding a 2 or 4 level enhancement under the Specific Offense Characteristics to account in some way for the increased addictive nature of "crack". The Commission should also delete its current definition of crack as cocaine base. "Crack" is a street name for rock cocaine. Reference to cocaine base creates an opening for unnecessary semantic arguments."

1st Circuit
Puerto Rico Agrees the ratio should be changed because "it's unrealistic because with a kilogram of cocaine, drug traffickers might produce several kilograms of cocaine base." and "The guidelines are penalizing more severely drug users who mainly possess cocaine base instead of drug traffickers who supply the cocaine."

Amendment 39. This amendment proposes measuring the scale of an ongoing drug distribution by adding up the largest amount over a

given period of time and applying the guidelines to that amount. This is known as the "snapshot" approach and is consistent with the way in which DEA investigators at the time of the enabling mandatory minimum legislation classified schemes using a 30 day period.

I agree with this general idea 31 46.3 %

I disagree with this general idea 36 53.7 %

TOTAL 67

Option 1

"If the offense involved a number of transactions over a period of (choose one):

12 months 23 52.2 % 30 days 7 15.9 %

180 days 10 22.7 % other 90 days (2); 60 days (1) and 1 other 9%

TOTAL 44

the offense level from the Drug Quantity Table shall be based on the quantity of controlled substances with which the defendant was involved in any continuous (choose one):

12 month 18 42.8 % 30 day 8 19 %

180 day 12 28.6 % other 90 days (2); 60days (1) and 1 other 9.5 %

TOTAL 42

period during the course of the offense, using the quantity from the time period that results in the greatest offense level."

Option 2. If the offense involved a number of transactions over a period of time, the offense level from the Drug Quantity Table is determined by the quantity of the highest **single** transaction.

I prefer Option 1 45 94 %

I prefer Option 2 3 6 %

TOTAL 48

Comments:

Although the reported total numbers of district responding to the specific question of preference for option 1 or 2 is only 48, several other districts expressed a dislike for either option and thus declined to answer. Even those who expressed a preference for Option 1 had reservations about the entire approach.

9th Circuit "Deal with the actual behavior. Proposal will increase attorney arguments." another comment "One district felt time limits are too constraining and 2 others said 'snapshot' not workable -- prefer 'relevant conduct' approach."

8th Circuit
"Please don't do this."

6th Circuit
"Option 2 would not reflect the seriousness of offense conduct in multiple transaction cases."

10th Circuit
Colorado "Officers felt that the DEA would manipulate the drug quantities regardless of the time period of the 'snapshot.' Officers also felt that if the DEA is limited in their time frame for investigations, the most culpable people may not be caught. If the USSC does decide to incorporate the 'snapshot,' officers would like the time period to be 12 months."

Utah "What is cost effective in terms of an investigation? Is it practical to continue monitoring known activity? For how long?"

4th Circuit
MD/NC "These options do not appear to give the true amount of drugs a defendant or defendants are involved with during the offense."

5th Circuit
SD/TX "Neither option is appropriate. The amendment would fail to capture or distinguish the larger trafficker from others."

ED/TX "Both options minimize the seriousness of large scale operations. the 'snapshot' approach would appear to under represent the extent individuals are involved in conspiracies or substantive offenses for periods of 12 months. Defendants who have been involved in the distribution of drugs for more than 12 months often hold at least managerial or supervisory roles...a defendant who is involved in a 3-year drug conspiracy will be sentenced based only on his activities for a 12 month period, probably under representing the harm he has committed."

"If a defendant's offense level is determined using the quantity of drugs during the specified period..., must not his role adjustment

also be based on the number of persons managed or supervised during that same period? If so, his role may be under represented because there may be individuals he supervised prior to or after the specified period of time which are not considered. If not limiting the time span for assessment of role, the defendant could be held accountable for supervising persons that had no involvement in the quantity of drugs used for sentencing."

"Without a doubt, one of the critical factors affecting the availability and ultimate importation of marijuana is weather and other agricultural conditions. During hot and dry periods, the marijuana is of poor quality and usually not imported by large marijuana traffickers for fear that a poor product will lose them customers. A typical marijuana operation may import for three or four consecutive months and then cease operations due to weather or other agricultural factors. Also enforcement initiatives and seizures play a part in determining whether the distribution occurs over a continuous period of time. Using a 'snapshot' approach would likely not consistently capture or distinguish the larger marijuana trafficker from the mid-level traffickers."

"Although...legislative history of the mandatory sentencing provision seems consistent with the use of the 'snapshot' approach, there may be cases in which a defendant is involved in a lengthy conspiracy involving 5 or more kilos of cocaine, which statutorily requires a mandatory minimum sentence of 10 years. Assume it was determined that the largest quantity of cocaine attributed to the defendant during a specified period of time is 3 kilos. Given this scenario, absent any other adjustments, the 'snapshot' approach would produce a guideline range lower than the range for the mandatory 10 year term and under represent a defendant's harm."

Amendment 40. This amendment proposes calculating the drug quantity as the actual amount of pure controlled substance and not the total net weight of controlled substance presently used. This employs the method used by the Parole Commission of using the total net weight provided on the DEA form 7. Total net weight represents the total amount of 100% pure contrclled substance contained in the packet.

Two potential problems identified are increased litigation over purity assessments; handling cases in which no controlled substance was seized.

Do you approve of the Commission's pursuing the approach of holding defendants accountable for the actual amount of drugs, minus the carrier medium?

Yes 15 22.4 %

No 52 77.6 %

TOTAL 67

Do you believe this approach will reduce disparity?

Yes 12 18.5 %

No 53 81.5 %

TOTAL 65

Do you think the possibility of increased litigation over purity assessments outweighs the benefit of using the weight of the actual amount of substance distributed?

Yes 46 69.7 %

No 20 30.3 %

TOTAL 66

Do you think employing the rebuttable presumption amounts when there is no actual seizure will unduly increase litigation?

Yes 43 63.2 %

No 25 36.8 %

TOTAL 68

Do you agree with the amounts proposed in the rebuttable presumption?

Cocaine, cocaine base, "crack" and heroin at 75% pure when the amount is one kilogram or more.

Yes 26 44 % Other Percentage 90 (2)

No 33 56 %

TOTAL 59

In any other case, 50% purity for an amount of one kilogram or more.

Yes 23 40.3 % Other Percentage 75; 90

No 34 59.7 %

TOTAL 57

Additional Issue for Comment: Should the ratio of methamphetamine relative to other controlled substances be changed?

Yes 7 12 % if so, How Much? 1 to .5 kilos

No 51 88 %

TOTAL 58

Amendment 41. This amendment proposes simplifying the measuring process of Schedule I and II Depressants as well as Schedule II, IV, and V controlled substances, all substances that essentially come in pill form. The Commission proposes counting up the pills rather than the gross weight of the pill. The Commission reasons that gross weight bears little or no relationship to the pill's strength, since most pills are mostly filler. There is no statutory mandate to measure the gross weight of the pills as is presently the practice. The Commission presently employs the method of adding up the pills for anabolic steroids.

Do you agree that the number of pills rather than the entire weight of the pill should be the appropriate measure of the weight?

Yes 66 96 % Other measure_____

No 3 4 %

TOTAL 69

Comments:

10th Circuit
Colorado "Easier and more fair."

Utah "'Quality/dose' seems to be an appropriate measurement for an controlled substance."

4th Circuit
ED/NC "If all pills are same purity."

1st Circuit
D/MA "Unfair to use the weight of pill when most of the weight is

usually harmless filler. Counting pills which are all the same strength is most equitable and precise measure and should cut down on confusion."

8th Circuit
This is a more consistent, equitable method of drug amount assessment...Seems like a more accurate measurement."

Amendment 42. Twelve miscellaneous issues pertaining to § 2D1.1.

(1) Addition of definitions of hashish and hashish oil.

Agree 61 95 % Disagree 3 5 %

TOTAL 64

(2) Clarification of Commission's intent in determining the treatment of marijuana that contains a sufficient amount of moisture to render it unusable.

Agree 56 82.4 % Disagree 12 17.6 %

TOTAL 68

(3) Addition of an application note that sets forth the definition of what constitutes a marijuana plant.

Agree 63 95.5 % Disagree 3 4.5 %

TOTAL 66

(4) Provision that applies equivalencies for 1) Khat, and 2) LAAM, levo-alpha-acetylmethadol.

Agree 61 98.4 % Disagree 1 1.6%

TOTAL 62

(5) Delete the distinction between d- and l-methamphetamine, a distinction that currently engender complexity in application.

Agree 65 98.4 % Disagree 1 1.6 %

TOTAL 66

(6) Clarification of the application note accompanying the specific offense characteristic of enhancement for weapon possession to state expressly that where a weapon present there is a rebuttable presumption that it is connected to the offense.

Agree 66 95.6 % Disagree 3 4.4 %

TOTAL 69

(7) Revision of application note involving negotiated quantities to provide that the negotiated quantity is used unless a larger amount results in the completed transaction, or the defendant establishes that he was not reasonably capably of producing the negotiated amount or otherwise did not intend to produce that amount.

Agree 66 95.6 % Disagree 3 4.4 %

TOTAL 69

(8) An application note to Relevant Conduct §1B1.3 to provide guidance for when a defendant actually transports or stores more drugs that he believed he was transporting or storing and that the larger amount was not reasonably foreseeable. This note provides guidance.

Agree 54 80.6 % Disagree 13 19.4 %

TOTAL 67

(9) This amendment addresses cases in which clandestine laboratories have not yet produced the drugs that they seek to manufacture and the attendant problem of calculating an amount of drugs intended to be produced.

This Commission proposes using 50% percent of the DEA's theoretical yield which is itself based on the theory that all the precursor chemicals on hand will be combined to produce a total possible yield. The Commission believes this to be an overestimation because in actuality, a laboratory can produce anywhere from 0 to 100 percent of the theoretical yield.

Is the Commission's proposed proxy of 50% of theoretical yield an appropriate measure?

Yes 46 71.8 % No 18 28.2 % Other Percentage 100(3); 75(1);66(1);25(1);50-100(1)

TOTAL 64

Should different percentages be developed for different controlled substances or manufacturing processes?

Yes 17 29.3 % No 41 70.7 %

TOTAL 58