priorities. Unless demand for drugs is reduced, the lure of the drug trade will continue to attract young entrepreneurs seeking to make quick profits.

B. Expand drug treatment within the criminal justice system. Criminal justice personnel throughout the country uniformly cite the need for expanded treatment options. New programs such as drug courts and prosecutorial diversion to treatment have met with widespread professional and community support. With the exception of treatment in prison, efforts to expand funding for drug courts and other treatment options have been folded into block grant funding where they are not likely to receive a high level of support.

C. Provide treatment programs which address the multiple and specific needs of women. Despite the fact that women involved with the criminal justice system are more likely than men to use drugs, and use more serious drugs, existing treatment models have not always been designed to incorporate the particular circumstances and multiple needs of women. Programs that accommodate children and address the range of economic, social and psychological stressors that contribute to substance abuse and drug-related crime among women should be developed and made available to women.

D. Promote a renewed dialogue on drug policy. While drug policy discussions of the 1980s were often heated and contentious, they nonetheless served to explore the range of options available to respond to substance abuse. Little such discussion exists today, as seen by the low priority given by the Justice Department to its 1994 report on mandatory sentencing or the disciplining of former Surgeon General Joycelyn Elders for advocating a discussion of drug policy. It is unconscionable to inhibit a broad discussion of a range of policy alternatives, particularly as we continue to be confronted by the tragic consequences of current policies.

2. Sentencing Options.

A long-term goal clearly should be to reduce crime and the numbers of people entering the criminal justice system. An intermediate strategy, though, could reduce the severity of criminal justice control without compromising public safety by creating a broader array of sentencing options for non-violent offenders who would otherwise be sentenced to prison.

Criminologist Joan Petersilia has estimated the potential for this type of a strategy in California.[75] She concludes that as many as a quarter of offenders sentenced to prison in that state could be appropriate candidates for structured alternatives. This group consists of offenders who are being sent to prison for technical violations of probation and parole, minor drug use, and nonviolent property offenses, and who currently serve four to eight months in prison. Diverting such offenders would enable corrections officials to reallocate 17-20 percent of their budget to community-based treatment, supervision, and other programs.

3. Sentencing Policies.

A variety of sentencing policies adopted nationally since 1980 have exacerbated the problems faced by women and minorities in the criminal justice system. The injustices caused by mandatory sentencing and its failure to have an impact on crime have been well documented. Of particular concern here is the disparity in sentencing between crack cocaine and powder cocaine that is present in the federal courts and many states. In addition to the racial disparities that have been demonstrated, eliminating this disparity in the federal system would lead to a long-term reduction of about 15,000 person-years in the federal prisons.[76]

While sentencing guidelines systems have been adopted with a goal of reducing sentencing disparity, their "gender-neutral" policies have often worked to the disadvantage of women. Factors which are often directly relevant to women -- child care responsibilities, histories of abuse, etc. -- are often not considered to be relevant at sentencing. While reduction of sentencing disparity is a laudatory goal, so is an individualized approach to sentencing that incorporates an analysis of offender responsibility and appropriate sentencing options.

4. Legislative Racial/Ethnic Impact Statements.

In recent years the federal government and some state legislatures have adopted policies requiring a fiscal impact statement prior to consideration of any sentencing legislation in an effort to help legislators assess the long-term costs of any changes.

Similarly, legislatures should be required to prepare racial/ethnic impact statements for any sentencing policy legislation and to consider any adverse or unanticipated consequences that would affect minorities disproportionately. If a proposed policy were shown to have this type of impact, then policymakers would be free to decide if the impact was warranted or if an alternative policy might accomplish the same objective without creating such a disparity. Had such a policy been in effect in the 1980s when Congress enacted crack cocaine legislation, perhaps current penalties would be less severe.

5. Long-range Crime Control Policies and Strategies.

Criminal justice policy is often short-sighted and formulated in response to emotional appeals. The political power of the crime issue, the media sensationalism around atypical crimes, and the persistence of high crime rates join to limit discussion and planning. Unfortunately, we have seen the consequences of more than two decades of heavy investment in the criminal justice system to the detriment of other social programs.

Those who suggest that high rates of crime and drug abuse demand immediate solutions need only look back a decade to the inception of the current "drug war." Despite an enormous increase in the number of drug offenders in prison since then, little progress can be claimed for the law enforcement approach. Had a different set of choices been made at that time, the country might have been the beneficiary of more humane and effective solutions.

CONCLUSION

> "I came here to make a better America. And, by the way we measure a better America, it is better. There are more people working than on the day I took office. There are more people in prison cells than on the day I took office...." [emphasis added]
>
> -- *Democratic political consultant James Carville, suggesting Clinton campaign themes for 1996. The New Yorker, April 3, 1995.*

> "I wonder if because it is blacks getting shot down, because it is blacks who are going to jail in massive numbers, whether we -- the total we, black and white -- care as much? If we started to put white America in jail at the same rate that we're putting black America in jail, I wonder whether our collective feelings would be the same, or would we be putting pressure on the president and our elected officials not to lock up America, but to save America?"
>
> -- *Former Atlanta Police Chief Eldrin Bell. Legal Times, October 10, 1994.*

If the goal of public policy in recent years had been to incarcerate record numbers of black Americans, then that policy would have been a tremendous success. But if the goal was to make our streets safer and to build strong families and communities, then public policy has been a dramatic failure.

Former Police Chief Bell's question is the appropriate place to begin our discussion of public policy. If nearly one in three young white men were under some form of criminal justice control, how would the nation react?

We can only speculate, of course, but there are some historical examples to inform us. In the 1960s and 1970s, for example, the country experienced substantial changes in both marijuana use and public policy regarding its use. As white middle class Americans began to use marijuana in large numbers, public attitudes and policy changed, generally becoming much more tolerant. In some jurisdictions, personal possession of marijuana was either decriminalized or essentially ignored by the police. Nothing about the drug itself had changed, only the composition of the "offenders" using it.

The intent of this report has not been to deny the reality of crime or the harm it imposes on all our communities. We are also not unaware of the individual's responsibility to

respect the reasonable norms of a society. What we have been concerned with, though, are the broader social forces and criminal justice policies that have served to marginalize increasing numbers of African Americans and to impose severe constraints on their life prospects.

Rescuing a generation of young black men and women from the various social ills that confront them will not be easy, quick, or accomplished without many pitfalls along the way. But if the task is to be eventually completed it would behoove us to learn from the mistakes of recent years and to begin implementing a strategy that will insure that the next generation of children will face a future filled with greater opportunity and promise.

NOTES

1. Marc Mauer, "Young Black Men and the Criminal Justice System: A Growing National Problem," The Sentencing Project, February 1990.

2. Data are based on estimates derived from reports of the Bureau of Justice Statistics on corrections populations, and population data from the Bureau of the Census. Because data on race, sex, and age were not available for all components of the criminal justice system, the total rates of control should not be considered exact, but rather reasonable estimates of the population within each category. See "Methodology" section for a discussion of this process and the assumptions used in the calculations.

3. Robert Tillman, "The Size of the 'Criminal Population': The Prevalence and Incidence of Adult Arrests," Criminology, Vol. 25, No. 3, August 1987.

4. John J. Donohue III and Peter Siegelman, "Is the United States at the Optimal Rate of Crime?" Northwestern University School of Law, October 24, 1994 draft, p. 22.

5. Kids Count Data Book, The Annie E. Casey Foundation, 1995, p. 6.

6. Douglas S. Massey and Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass, Harvard University Press, 1993.

7. Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America, Oxford University Press, 1995, p. 49.

8. Alfred Blumstein, "Racial Disproportionality of U.S. Prison Populations Revisited," University of Colorado Law Review, Vol. 64, No. 3, 1993.

9. Tonry, p. 49

10. Understanding and Preventing Violence, National Research Council, Washington, 1993.

11. See, for example, Martin Killias, Andre Kuhn, and Simone Ronez, "Sentencing in Switzerland," Overcrowded Times, June 1995.

12. "Drugs and Crime Facts, 1990," Bureau of Justice Statistics, 1991.

13. FBI, Uniform Crime Reports, various years.

14. As a *household* survey of drug abuse, the NIDA data do not include institutionalized persons, homeless people not living in a shelter, and people with less stable residences generally. Therefore, low-income African Americans may be undercounted in these surveys.

15. James P. Lynch and William J. Sabol, "The Use of Coercive Social Control and Changes in the Race and Class Composition of U.S. Prison Populations," paper presented at the American Society of Criminology, November 9, 1994.

16. Dan Weikel, "War on Crack Targets Minorities Over Whites," Los Angeles Times, May 21, 1995.

17. Allen J. Beck and Peter M. Brien, "Trends in U.S. Correctional Populations: Recent Findings from the Bureau of Justice Statistics," in Kenneth C. Haas and Geoffrey P. Alpert, The Dilemmas of Corrections, Waveland Press, 1995.

18. United States Sentencing Commission, Cocaine and Federal Sentencing Policy, February 1995, pp. 129-134.

19. Ibid., p. 156.

20. Ibid., p. 175.

21. Since Hispanics as an ethnic group can be of any race, there is a slight overlap between African-Americans and Hispanics. The Census Bureau reports that in the overall population, about 6% of Hispanics are identified as African-American. Assuming a similar proportion among drug offenders would reduce the total by about 1%.

22. Tonry, p. 39.

23. Beck and Brien, p. 55.

24. FBI, Crime in the United States 1993, Uniform Crime Reports.

25. Alfred Blumstein, "Youth Violence, Guns and the Illicit-Drug Industry," H. John Heinz III School of Public Policy and Management, July 1994.

26. United States Sentencing Commission, pp. 122-123.

27. Peter Reuter, Robert MacCoun, and Patrick Murphy, "Money from Crime: A Study of the Economics of Drug Dealing in Washington, D.C.," RAND, June 1990.

28. Samuel L. Myers, Jr., "Crime, Entrepreneurship, and Labor Force Withdrawal," Contemporary Policy Issues, Vol. X, No. 2, April 1992.

29. Ibid., p. 96.

30. John M. Hagedorn, "Homeboys, Dope Fiends, Legits, and New Jacks," Criminology, Vol. 32, No. 2, May 1994.

31. Ibid., p. 209.

32. Reuter et al., p. xiii.

33. Ibid.

34. Hagedorn, p. 215

35. Hagedorn, p. 216

36. These issues are explored in an insightful paper by Joan Moore, "How Has Increased Incarceration Affected Inner-City Communities," prepared for a conference on the "Unintended Consequences of Incarceration," sponsored by the Vera Institute of Justice, June 19-21, 1995.

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38. National Institute of Justice, 1993 Drug Use Forecasting, Annual Report, 1994.

39. FBI, Uniform Crime Reports 1991.

40. Bureau of Justice Statistics, "Survey of State Prison Inmates, 1991," March 1993.

41. Bureau of Justice Statistics, "Women in Prison", 1994.

42. Barbara Bloom, Meda Chesney-Lind, and Barbara Owen, "Women in California Prisons: The Hidden Victims of the War on Drugs," Center for Juvenile and Criminal Justice, 1994.

43. Darrell Steffensmeier, et al., "Gender and Imprisonment Decisions," Criminology, Vol. 31, No. 3, 1993; Kathleen Daly, Gender, Crime and Punishment, Yale University Press, 1994.

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46. Department of Justice, "An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories," February 4, 1994.

47. Raeder

48. Lisa Maher and R. Curtis, "Women on the Edge of Crime: Crack Cocaine and the Changing Contexts of Street-level Sex Work in New York City," Crime, Law and Social Change, Vol. 18, 1992.

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58. Jean Wellisch, Michael L. Prendergast, and M. Douglas Anglin, "Drug-Abusing Women Offenders: Results of a National Survey," National Institute of Justice, 1994.

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62. Dr. Denise Johnston, "Report No. 13: Effects of Parental Incarceration", The Center For Children of Incarcerated Parents, Pacific Oaks College, 1993.

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65. "Accommodating Prison Population Growth," Legislative Analyst's Office, Sacramento, January 6, 1995.

66. Peter Baker and Donald P. Baker, "Va. Prisons Swamped by Inmate Rise," Washington Post, February 20, 1995.

67. Amanda Wunder, "Prison Population Projections," Corrections Compendium, March 1995.

68. Lawrence A. Greenfeld, "Prison Sentences and Time Served for Violence," Bureau of Justice Statistics, April 1995.

69. Marc Mauer, "A Crime Bill to Bust Budgets," State Government News, April 1995.

70. "Malcolm Gladwell, "Baby Boom's Urban Cradle Braces for Future Rocked by Crime," 11 Washington Post, February 26, 1994.

71. Vincent Schiraldi with Michael Godfrey, "Racial Disparities in the Charging of Los Angeles County's Third 'Strike' Cases," Center on Juvenile and Criminal Justice, October 1994.

72. National Drug Control Strategy, Office of National Drug Control Policy, February 1995, pp., 38-39.

73. "Treatment: Effective (But Unpopular) Weapon Against Drugs," RAND Research Review, Spring 1995.

74. Sheryl Stolberg, "Study Shows Drug Abuse Programs Are Cost-Effective," Los Angeles Times, August 29, 1994.

75. Joan Petersilia, "How California Could Divert Nonviolent Prisoners to Intermediate Sanctions," Overcrowded Times, June 1995.

76. Letter from Richard Conaboy, Chair, U.S. Sentencing Commission, to Senator Orrin Hatch, May 1, 1995.

METHODOLOGY

Data for this report were generated using statistics provided by the Bureau of Justice Statistics (BJS), and using a similar methodology to that of our 1990 report, "Young Black Men and the Criminal Justice System: A Growing National Problem."

Total prison and jail populations were taken from BJS reports for mid-year 1994. The most recent data for probation and parole populations are for year-end 1994.

To obtain estimates of the number of each demographic group in the age range 20-29 under criminal justice supervision we used the 1992 BJS figures for state and federal inmates (Correctional Populations in the United States, 1992), and for the jail population, data from the 1989 inmate survey. Probation and parole data for 1994 were used for gender distribution, and for 1992 for racial breakdowns (due to problems with the 1994 data). Since no age distribution was available for probationers and parolees, we used proportions of each demographic group in prison or jail for the age range 20-29 as an estimate of the probation and parole age distributions as well. We view this as a conservative estimate for the following reason: the median prison inmate (representing about two-thirds of the total inmate population) is about 30 years old and the median jail inmate is in the late 20s; probationers are likely to be younger on average than inmates, and parolees older, but probationers far outnumber parolees.

These data were used to produce the following estimates of the proportion of the criminal justice population for each demographic group that was in the 20-29 age range: white males - 41.5%; African American males - 45.5%; Hispanic males - 47.8%; white females - 43.2%; African American females - 47%; Hispanic females - 46.8%. Data for Native Americans, Asian Americans and other groups are too small to allow for meaningful analysis.

After estimating the total number of persons under criminal justice supervision, we calculated the average rate of increase for the period 1989-94 (5.3%) and used this figure to estimate the 1995 total criminal justice population. Since African American males in the age group 20-29 represented 15.3% of the total criminal justice population in 1994, we used this proportion for 1995 as well to estimate the number of young African American males in the criminal justice system. Then, using Census Bureau estimates, we derived a criminal justice control rate for 1995. Since the estimated number of African American males in this age group declined slightly from 1994 to 1995, it is possible that the proportion of 15.3% represents a slight overcount. It is unlikely, though, to be of any significant magnitude.

Data for Hispanics are somewhat unreliable and should be interpreted with caution. For state and federal inmates, we utilized inmate self-report data for 1991 on ethnicity. The jail data rely on the 1989 inmate survey. The most current figures for the Hispanic proportion of the probation caseload are 7% for 1992 and 9% for 1994. These are almost certainly low figures, though, since the figures for prior years are significantly higher. Much of the difference can be explained by the absence of 1992 data on ethnicity from Texas, a state with a high proportion of Hispanics on probation and one which had previously reported these figures. In order to account for this, we estimated the number of Hispanics on probation in Texas for 1992 using the proportion for 1990 (the most immediate prior figure), and therefore derived a national figure of 12.4%. We also note that the complete absence of reporting on ethnicity of probationers in California and the large fluctuations in the Florida data from year to year, two states with large numbers of Hispanics, make these figures less reliable than for racial groups.

The overall rates of criminal justice control include a small degree of overlap. The most significant instance of this involves individuals on probation or parole who are jailed for a new offense and remain on probation or parole caseloads for a period of time while incarcerated. BJS has derived estimates of this doublecounting as ranging from 3.4% - 10.8%, with the higher figure being described as "an extreme assumption." Offsetting this, we note that in our examination of criminal justice control rates we have not attempted to account for persons awaiting trial but not incarcerated in jail. These persons are clearly under criminal justice control and often subject to supervision as extensive as probationers.

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Estimated costs of criminal justice control were obtained by using the BJS estimate of the annual cost of incarceration for jail inmates for 1993 ($14,667) and 1994 estimates published by the Criminal Justice Institute for prisons ($19,119), probation ($850), and parole ($1080). No distinction is made here between capital and operating costs of incarceration.

Data for Table 4 (Hispanic Inmates in State and Federal Prisons) are taken from Correctional Populations in the United States, 1992. Data for Table 5 (Drug Offenders in Prison and Jail) are derived from BJS estimates of drug offenders in state prisons for 1993 and jails for 1989, along with Department of Justice estimates for federal prisons for 1993. Overall state prison figures are jurisdiction totals, and therefore do not account for a slight overlap of state prisoners held in local jails. Data for Table 6 (Sentences to State Prison for Drug Possession, 1992) are taken from the BJS report, "National Corrections Reporting Program 1992." Data for Table 7 (State Prisoners Incarcerated for Drug Offenses) are taken from state prisoner data for 1986 and 1991 from the Bureau of Justice Statistics. Data for Figure 1 (African Americans and Drug Possession) are derived from the National Institute on Drug Abuse, the Uniform Crime Reports and BJS reports on felony sentencing and corrections for 1992.

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[1847]

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March 6, 1996

United States Sentencing Commission
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Washington, D.C. 20002-8002
Attn: Public Information

Re: Proposed Amendments to Sentencing Guidelines

Dear Sir/Madam:

On January 2, 1996, the United States Sentencing Commission (the Commission) announced in the Federal Register several proposed revisions to the federal Sentencing Guidelines, including amendments to Sections 2N2.1 and 2F1.1 governing the manner in which individuals and corporations are treated following convictions under the Federal Food, Drug, and Cosmetic Act, Poultry Products Inspection Act, and Federal Meat Inspection Act.[1] The Snack Food Association (SFA), a national not-for-profit trade association whose members produce a wide variety of snack food products, has strong reservations about the proposed amendments to Sections 2N2.1 and 2F1.1 and welcomes this opportunity to comment.

SUMMARY

The Sentencing Guidelines already provide stiff sanctions -- in the form of imprisonment and fines -- for violations of the nation's food and drug laws. The proposed amendments to Sections 2N2.1 and 2F1.1 would treat all violations of these statutes as cases involving fraud, severely limiting the ability of federal prosecutors and courts to respond appropriately to the broad spectrum of conduct punishable under these laws.

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[1] 61 Fed. Reg. 79-83 (Jan. 2, 1996).

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BACKGROUND

Sentences in criminal cases involving violations of statutes and regulations dealing with any food, drug, biological product, device, cosmetic or agricultural product currently are governed by U.S.S.G. Section 2N2.1.[2] That section provides for a "base offense level" of six, assuming that the underlying regulatory offense involves "knowing or reckless" conduct.[3] In the event of a merely negligent violation of a statute or regulation, the Guidelines permit a sentencing court discretion to grant a "downward departure" in order to more appropriately match a defendant's conduct and sentence.

In particularly egregious cases in which the regulatory violation involves fraud, Section 2N2.1 requires application of U.S.S.G. Section 2F1.1, which governs crimes involving fraud and deceit. That section similarly begins with a base offense level of six, but provides for significant increases in offense level -- and, by extension, the possible range of any fine and/or jail term imposed -- based upon the amount of "loss" occasioned by a defendant's conduct.

DISCUSSION

Under the proposed amendments, Section 2N2.1 would be deleted in its entirety, and all food, drug, and related regulatory offenses, including violations by corporations and other organizations, would be sentenced under Section 2F1.1. Although an allowance would be made for an upward departure in a case involving conscious or reckless risk of serious bodily injury, the proposed commentary makes no reference to the appropriateness of a downward departure, even in cases involving mere negligence. This change would have a dramatic impact on the severity of sentences imposed in food and drug cases.

Laws governing foods, drugs, and cosmetics are characterized as "public welfare" statutes and, as such, the government need not prove awareness of

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2 Chapter 2 of the Guidelines governs sentences for individuals. Chapter 8, in turn, sets forth the Organizational Sentencing Guidelines, pursuant to which a corporate offense level and, by extension, base fine, are determined. Food, drug, and agricultural products were, however, specifically excluded from the 1991 amendments which added the organizational guidelines. As a result, fines for organizations convicted of offenses covered by Section 2N2.1 continue to be governed by pre-*Guidelines* law.

3 See U.S.S.G. Section 2N2.1 (Application Note 1).

wrongdoing. Mere proof that "the defendant has, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of and that he failed to do so" is sufficient.[4] Grouping all violations of the food and drug laws under Section 2F1.1 would deprive federal prosecutors and sentencing judges of the flexibility they need to fashion appropriate sentences in those cases where the defendant's violative conduct amounts to no more than simple negligence or oversight.

The fact that enhanced penalties are already available in food and drug cases involving fraud further underscores the inadvisability of the proposed amendments. Current Section 2N2.1 imposes a flat base offense level for any regulatory violation but permits prosecutors to seek enhanced penalties under Section 2F1.1 for cases involving fraud or where the regulatory violations are part of a pervasive scheme. The proposed amendments, therefore, would have little, if any, impact on sentences in cases in which the conduct involved would have been charged as fraud or otherwise triggered application of Section 2F1.1. Instead, by making fraud the rule rather than the exception, the amendments would substantially increase the penalties in cases that otherwise do not warrant severe punishment.[5]

In sum, the proposed amendments would brand all violations pertaining to food, drugs, and agricultural products as fraud, eliminating any distinction between negligent, purposeful, and fraudulent acts, and impose, in cases involving mere negligence, penalties previously reserved for intentional and fraudulent conduct. SFA strongly opposes the proposed amendments to Sections 2N2.1 and 2F1.1 of the Guidelines for these reasons and urges the Commission to delete these provisions from any recommendations submitted to Congress. If the Commission nevertheless elects to submit the proposed changes for Congressional consideration, SFA urges the Commission to include commentary that would allow prosecutors and judges more discretion in sentencing purely negligent regulatory violations.

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4 United States v. Park, 421 U.S. 658, 673-74 (1975). See also United States v. Dotterweich, 320 U.S. 277 (1943).

5 For example, in a case involving distribution of adulterated meat where the amount of "loss" exceeds $500,000, application of Section 2F1.1 would result in a base offense level, before adjustment, of not less than 16, subjecting a first-time offender to a minimum of 21 months incarceration. Currently, under Section 2N2.1, the base level for such a violation is six, with a corresponding sentencing range of 0 to 6 months. A first-time offender, moreover, would be eligible for a sentence of probation.

SFA appreciates this opportunity to submit comments on this highly important issue and would be happy to provide any additional assistance the Commission may require in preparing its recommendations to Congress.

Sincerely,

James W. Shufelt
President

[1887]

029-96

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March 14, 1996

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Attention: Public Information

RE: Comment on Proposed Guideline Amendments

To the Commissioners:

I am submitting this letter of comment in response to the Commission's Federal Register notice of January 2, 1996, 61 Fed. Reg. 79, with specific reference to the proposed Guideline amendments concerning food and drug offenses, id. at 83. I believe that these proposed amendments are unwise in the extreme, inconsistent with some of the central features of the federal Guidelines system as it has been known since its original promulgation in 1987, and potentially disruptive to the fair administration of criminal justice in the federal courts. Accordingly, I recommend that the proposed amendments be withdrawn pending further study by the Commission and its staff, which obviously has failed to consider some of the broad-ranging implications of this proposal.

My interest in this matter is two-fold. First, the amendments in question were brought to my attention quite recently by the Pharmaceutical Research and Manufacturers of America ("PhRMA"), which engaged me, as an expert in sentencing law and policy, to analyze and comment to you on the proposed amendment.[1] Second, I have a longstanding interest in the success of the Commission's work, having served as Deputy Chief Counsel (1987-88) and Consulting Counsel (1988-89) to the Commission, in both capacities primarily engaged in the development of sentencing guidelines for

[1]Although I am to receive my ordinary hourly consulting fee for this work, no one associated with PhRMA has suggested the substance of my comments or reviewed or approved the contents of this letter. Therefore, I am not "representing" PhRMA in the usual use, and my comments do not necessarily represent the views of PhRMA or any of its members. I have no other affiliation with PhRMA, and have done no other work for them.

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organizations and white-collar offenses, and, as an academic,[2] having published several papers on federal sentencing law and policy and substantive criminal law, with the same emphases.[3]

As a participant in and observer of the Commission's process for some years now, I am not unmindful of the complexities involved in developing and refining sentencing guidelines, which I believe has a subtlety unmatched by almost any other aspect of governmental policymaking, given the variety of different actors who are affected by sentencing guidelines in different ways--including prosecutors, judges, probation officers, defendants, and potential defendants--which includes all of us in some capacity. Furthermore, the Commission itself must walk a tightrope narrowly drawn by the Commission's unique position within the governmental structure and its delicate mandate to develop sentencing policy without encroaching upon legislative or substantive legal policy, surrounded by potential critics from the Executive, the Congress, the courts, the legal community, regulated industries, and the public at large. Accordingly, I am quite aware of how much easier it is to be an external critic than an internal guidelines-maker, and my critical comments should be taken in this light.

Notwithstanding my empathy for the Commission's difficult situation, I believe that the Commission is slipping off of its tightrope in this particular instance, and it should catch itself before it falls into the void. This proposed amendment not only is unjustified on its own narrow terms, but also is likely to have very profound consequences for all guidelines sentencing that the Commission does not appear even to perceive, much less to have considered adequately.

As I understand the Federal Register notice, the proposal is to withdraw the current food and drug offense guideline, §2N2.1, and henceforth to sentence all offenses formerly covered by that guideline under §2F1.1, as if they were all offenses involving fraud or deceit. The only amendment proposed to §2F1.1 to accommodate its new coverage would be a guided upward departure suggested by the application notes in cases where "a large number of persons" were affected by a risk of serious bodily injury. In addition, the notice proposes to add food and drug offenses to the organizational sentencing guidelines of current Chapter 8, which as promulgated in 1991 excluded those offenses from its coverage. Finally, the notice seeks comment on an entirely new concept of using gain rather than loss as a measure of offense severity "when the essence of the offense is fraud against regulatory authorities with no economic loss." This last point does not appear explicitly to

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[2] Currently, I am Professor of Law and Associate Dean for Academic Affairs at the George Mason University School of Law. Of course, my comments here also do not represent the policy or views of George Mason University or the School of Law.

[3] Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 Am. Crim. L. Rev. 513-604 (1989); Jeffrey S. Parker & Michael K. Block, *the Sentencing Commission, P.M. (Post-*Mistretta*): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289-329 (1989); Jeffrey S. Parker, *Rules Without . . . : Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 Wash. U.L.Q. 397-442 (1993); Jeffrey S. Parker, *The Economics of Mens Rea*, 79 Va. L. Rev. 741-811 (1993).

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be limited to food and drug offenses only.

The announced basis for the proposal is the February 1995 Final Report of the Commission Staff's Food and Drug Working Group (hereinafter the "Staff Report"). I recently have reviewed the Staff Report, and I must say that I am surprised to find it cited as the basis for the proposed amendment, as that Report does not recommend--nor even contemplate--the principal action now proposed by the Commission, which is to abolish §2N2.1 in its entirety. Rather, the Staff Report had raised the question of consistency in the application of a pre-existing cross-reference between §2N2.1 and §2F1.1. Even on its own terms, I believe that the Staff Report is based upon an unwarranted inference from the case files. But in any event, it focuses on a very different consideration from the radical measure now proposed in the Commission's notice.[4]

A. Abolition of § 2N2.1

Focusing first on the principal proposal to abolish §2N2.1, I see three major objections, all of which create serious problems of either substantive legal policy or consistent sentencing policy, or both, as that proposal would: (1) obliterate important culpability distinctions both within the underlying food and drug statutes and between those statutes and the very different statutes currently covered by the fraud guideline; (2) undermine a basic feature of the sentencing guidelines overall as being primarily a "charge offense" rather than a "real offense" sentencing system; and (3) deviate fundamentally from the guidelines' overall approach to regulatory offenses. These would all be profound changes to the federal sentencing guidelines' structure as it has existed since 1987, and yet none of them is even recognized as a consequence of the proposal in either the Staff Report or the Commission's notice.

1. Culpability Distinctions. There appears to be no recognition by the Staff Report that the principal statutes now covered by §2N2.1 do not require *any* proof of mens rea or criminal culpability in the usual sense for a conviction. In fact, they are the leading examples of "strict liability" criminal offenses. By the general standards of criminal law, they are not "crimes" at all;[5] and they are often

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[4] Aside from the Staff Report, the only other background of which I am aware is a meeting that was held in February 1996 between Commission staff members and Messrs. John Fleder and James Fletcher, representing pharmaceutical and food industry groups, at which the staff is said to have indicated that the proposal was a "simplification" measure based in part on the small number of sentencings each year under §2N2.1. I discount that information somewhat, given that I have received it informally and it does not appear in a Commission or staff document. It is troubling, however, that such a rationale should be suggested, even informally, as it is obviously fallacious: a small volume of sentencings tells us virtually nothing about the usefulness of a particular guideline. For example, there are very few homicide prosecutions in the federal courts, but no one would rely upon that fact as a basis for abolishing the homicide guidelines.

[5] For example, the American Law Institute's Model Penal Code, which has been widely emulated in state criminal codes and also used as a model for federal criminal code reform over the

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referred to as "public welfare offenses"[6] or "regulatory offenses"--terms that are used in contradistinction to "true" crime, based upon a finding of moral culpability.[7]

More significantly for present purposes, the entire rationale for accepting such "public welfare offenses" into our federal criminal law rests heavily on the assumption that "public welfare offenses" would involve relatively low and non-stigmatizing penalties, generally modest monetary fines based upon misdemeanor conviction, rather than imprisonment and the "infamy" associated with felony conviction.[8] The distinction can be seen by comparing the two leading Supreme Court cases on each side of the divide, *United States v. Dotterweich,* 320 U.S. 277 (1943), which recognized the "public welfare offense" category specifically in the context of 21 U.S.C. § 331--one of the principal statutes now covered by Guideline §2N2.1--and *Morissette v. United States,* 342 U.S. 246 (1952), which refused to extend the *Dotterweich* analysis to a statute prohibiting theft of government property--an offense that is cognate with the statutes now covered by Guideline §2F1.1. Justice Jackson's opinion for the Court in *Morissette* is one of the most famous statements of the rationale for the requirement of mens rea for a criminal conviction:

> "[T]hat an injury can amount to crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . .
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> * * *
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> "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved,

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years, makes what the Code's comments describe as "a frontal attack on absolute or strict liability in the penal law," *Model Penal Code and Commentaries* § 2.05, Comment 1. Under the Model Penal Code, strict liability offenses are defined as "violations," which are not "crimes." *Id.* § 2.05.

[6] *See* Francis B. Sayre, *Public Welfare Offenses,* 33 Colum. L. Rev. 55 (1933).

[7] Supreme Court has endorsed this distinction. *Liparota v. United States,* 471 U.S. 419, 433 (1985).

[8] This point is developed in depth, together with the associated moral and economic objections to strict liability in crime, by my 1993 article entitled *The Economics of Mens Rea,* 79 Va. L. Rev. 741, 785-804 (1993). Since that article, the Supreme Court has decided *Staples v. United States,* -- U.S. --, 114 S. Ct. 1793 (1994), which reaffirms the traditional presumption that all elements of all crimes require proof of criminal mens rea, unless a contrary indication plainly appears on the face of the legislation.

the infamy is that of a felony, which, says Maitland, is '. . . as bad a word as you can give to man or thing.'"[9]

Thus, as the general principles are laid down by the Supreme Court, whether strict liability will be accepted as an adequate basis for criminal conviction depends in part upon the level and type of penalty imposed.[10] Partly because of the relatively low and non-stigmatizing nature of the penalty for "regulatory" offenses, *Dotterweich*--as further developed in the later Supreme Court decision in *United States v. Park*, 421 U.S. 658 (1975)--accepted the reduced culpability standard of "responsible relation" to the violation in question. Even this standard does not completely dispense with all concept of fault, and its precise scope remains a subject of dispute in the lower federal courts.[11] But it is the lowest standard of culpability that has ever been accepted in federal criminal law.

In contrast, most of the statutes now covered by Guideline §2F1.1 are at the completely opposite end of the culpability spectrum; they require, as a prerequisite to conviction, proof beyond a reasonable doubt of what is called in criminal law a "specific intent"--a purpose not only to engage in the prohibited conduct, but to bring about a forbidden result. In most of those statutes--certainly all of the leading federal criminal fraud statutes, such as the mail fraud, wire fraud, travel fraud, and conspiracy to defraud--the requisite mens rea is "intent to defraud," which is a type of specific intent, and specific intent is the *highest* culpability level known to our criminal law.[12] Unlike the "regulatory" offenses, these offenses are almost inevitably felony convictions carrying substantial statutory imprisonment sentences. They are also an outgrowth of the same background of the common law of larceny, as consolidated in modern criminal codes in the law of "theft."[13] Accordingly, they are essentially the same offense as was charged in *Morissette*.

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[9] 342 U.S. at 260.

[10] This was an explicit part of the Supreme Court's rationale in its recent address to the mens rea doctrine in *Staples v. United States*, --- U.S. ---, 114 S. Ct. 1793 (1994), in which the Court relied, *inter alia*, on the severity of the prescribed penalty in ruling that a conviction for possession of an automatic weapon required proof of the defendant's knowledge that he possessed a weapon of the prohibited characteristics, and not merely a dangerous device.

[11] *See generally* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193 (1991).

[12] *See* 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.5, at 315 (1986).

[13] At common law, there was no crime of "fraud," as distinguished from "larceny by trick." The crime of "false pretenses" was added by Parliamentary statute in 1757. In most modern criminal codes, the common law crime of larceny is merged with the statutory crimes of false pretenses and embezzlement to comprise the consolidated offense of "theft." *See* 2 W. LaFave & A. Scott, *Substantive Criminal Law* §§ 8.1, 8.8 (1986).

Therefore, to consolidate offenses now covered by Guideline §2N2.1 with those now covered by §2F1.1 is to mix apples and oranges; it is to treat the *most* culpable defendants under exactly the same standards as the *least* culpable ones, with nothing that I can see in the resulting guideline to distinguish between the two. In doing so, the Commission would be obliterating important distinctions in culpability that have formed the moral foundations of our criminal law, and thereby, in my judgment, the Commission would be overreaching its limited mandate to rationalize sentencing policy without disturbing substantive standards of criminal liability, which are matters for the Congress, not the Commission.

This would be true even under the general principles I have stated. But in this particular context, the Commission also would be overstepping the bounds of distinctions made by the Congress itself in the very statutes under consideration here, primarily 21 U.S.C. §§ 610 and 676 in the case of meat products, and 21 U.S.C. §§ 331 and 333 under the federal Food, Drug and Cosmetic Act. In both instances, the statutes draw a distinction between a misdemeanor violation --the paradigmatic "public welfare offense"--and a more serious felony violation, in part on precisely the same mens rea distinction of "intent to defraud." [14] That distinction--explicitly and specifically made by the Congress in the statutes in question--also would be obliterated by the consolidation of all offenses into the fraud guideline, which in may opinion would be a failure by the Commission to observe and apply the culpability and penalty distinctions made by the Congress, and therefore noncompliance with substantive statute law.

The specific statutory distinctions made by Congress provide an obvious and complete solution to the issue noted by the Staff Report (pages 12-13, 20, 22) of consistency in applying §2N2.1's pre-existing cross-reference to §2F1.1: that cross-reference should be applied only when the offense of conviction is the felony offense predicated on proof (or formal admission) or intent to defraud,[15] and not to the misdemeanor violations. This solution follows the substantive statute more closely, and also is more consistent with the overall "charge offense" approach of the guidelines (see Section A.2, below). Moreover, it would avoid the undoubtedly controversial--and arguably unconstitutional--practice of sentencing misdemeanants as if they were felons, without proof beyond reasonable doubt, by admissible evidence, that in fact they had the requisite culpability to be considered felons. That is an unnecessary constitutional problem that the Commission should not foment.

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[14] The Staff Report notes this feature in describing the underlying statutes (*see* Staff Report, at 3-5), but then strangely ignores the distinctions in the remainder of its report. With all due respect to the staff, one is left with the impression that the authors of the report did not know what "intent to defraud" means in criminal law.

[15] The other case of a felony conviction under these statutes is the repeat offender situation, which might call for a specific offense characteristic in §2N2.1, to the extent that the Commission determined that the matter was not adequately dealt with by the existing criminal history guidelines.

It appears from the Staff Report that the staff drew an undue inference from its examination of the reports of cases previously sentenced under §2N2.1. In a section of the Staff Report entitled "culpability," the staff purports to find that a high percentage of the cases "involved conduct that was purposeful or intentional" (page 9), and that this was based on "defendant admissions" (page 9). Apparently, this discussion is intended to suggest that most of the cases actually involved the higher level of culpability required for felony conviction. Even if this were true, it would not justify the abolition of the food and drug guideline, so long as there were even one case--or a potential case--of conviction without mens rea. But the staff's apparent conclusion does not follow form the data it examines, because the staff's analysis fails to distinguish "intent to defraud" from other forms of purposeful conduct, and, more importantly, it fails to account for the actual features of plea bargaining and guideline application in practice.

As against the staff's finding of "purposeful or intentional conduct," I would say "purposeful or intentional" as to what? A defendant might "purposefully" intend to violate a regulatory reporting or recordkeeping requirement, and that feature might call for a distinction in sentencing, but it says nothing about the formation of a specific intent to defraud, which is required under the fraud statutes and should be required before applying the fraud guideline, as the fraud guideline is predicated upon the assumption of such an intent, which is not the same as a generalized finding of intentional or purposeful behavior.

More fundamentally, I believe that the staff overemphasizes the significance of "defendant admissions" of culpability, which are very probably artifacts of plea bargaining in the shadow of the existing guidelines. As the Staff Report also notes, nearly all of these sentencings were plea bargains. The application notes to existing §2N2.1 indicate that "[t]he guideline assumes knowing or reckless conduct" (Application Note 1); otherwise, a downward departure may be warranted. Similarly, here as throughout the guidelines, "acceptance of responsibility" earns the defendant a 2-level reduction, and conventionally requires an acknowledgement of "guilt" in some sense. Thus, the typical structure of plea bargains under this guideline is obvious: the defendant admits "guilt," and thereby both gets the 2-level reduction and protects the prosecution against a downward departure; while the prosecution contents itself with a misdemeanor conviction--albeit with culpability "admitted"--while at the same time avoiding the expense and difficulty of proving the violation at trial. Similarly, in the more severe case of a potential felony conviction, the same basic bargain can be made, which presumably should be at a higher sentencing level.

Under the existing guideline structure, there is no incremental penalty for "admitting" purposeful or knowing conduct, and indeed there may be a discount through "acceptance." Under these conditions, we should not be surprised to find a high incidence of "admission." But that may have little to do with reality--especially the reality of proof at trial--if the guidelines structure is changed. It is a truism of guidelines sentencing that if the guidelines structure is changed, then the pattern of charges, defenses, and "admissions" also changes.

I understand that the regulatory agencies, and especially the FDA, generally defer criminal enforcement until there has been a previous warning or some other indication that the conduct in question is deliberate. But that sensible enforcement policy is a far cry from what state of mind actually can be proved beyond a reasonable doubt at a criminal trial. Indeed, that distinction accounts

for the entire category of "public welfare offenses," for which strict proof of criminal mens rea is dispensed with, in exchange for low, nonstigmatizing penalties. If the current proposal is approved, the practical result may well be to deprive the FDA and other agencies of that enforcement option, by driving potential penalties so far out of proportion to *provable* liability as to dramatically raise the rate of trials. In any case, it will largely destroy any incentive for the enforcement authorities to distinguish misdemeanor from felony violations, as the Congress intended them to do.

2. The General Approach of "Charge" Offense Sentencing. As indicated in my discussion of the culpability distinctions made by Congress in the underlying food and drug statutes, the Commission's current proposal appears to be inconsistent with the overall approach of "charge offense" sentencing that has been a basic feature of the federal sentencing guidelines since they were first promulgated in 1987. As has been noted in Chapter 1, Part A of the Guidelines since their inception, one of the fundamental policy choices made by the Commission was between a "real offense" and a "charge offense" sentencing system. The Commission initially attempted a "real offense" system that totally separates sentencing factors from the elements of charging statutes, but ultimately abandoned that system as impracticable and potentially unfair. As the Guidelines continue to state, '[i]n the Commission's view, such a [real offense] system risked return to wide disparity in sentencing practice" (*id.* at 5). This is a particularly troublesome consequence, as one of the fundamental objectives of the Sentencing Reform Act of 1984, which established the Commission, was to reduce unwarranted disparities and restore fairness and certainty to the federal sentencing process.

To avoid frustrating that objective, the Commission turned to a "modified charge offense" system of sentencing guidelines. Necessarily, such a system entails some degree of complexity in distinguishing among the many charge offenses involved in the federal system and occasional ambiguities in selecting among applicable guidelines. As experience is accumulated under the guidelines, monitoring data will call the Commission's attention to unanticipated application ambiguities, and the natural reaction will be to add still more application notes and cross-references, resulting in an even more complex structure. At some point, attention will be drawn to the problem of complexity itself, and there will be a natural tendency to "cut through" the complexities of choosing applicable guidelines by consolidating a larger range of charging offenses under a smaller number of guideline sections. In the extreme, all applicability problems can be solved easily by having only one guideline for all offenses, but that would transform the guidelines back into a "real offense" system, and thus reverse the fundamental policy choice. Short of the extreme, all proposals to consolidate previously separate guideline sections have the same tendency to reverse the fundamental policy choice in a piecemeal fashion, essential through a process of erosion. The danger is that, in reviewing each of the "simplification" proposals separately, the Commission inadvertently may back into a fundamental reversal of policy without full consideration of the policy choice itself.

Something like this process may be occurring in the case of the current proposal, which provides a particularly good illustration of the loss of refinement that can occur with "simplification" for its own sake. As I have indicated above, the particular application issue of applying the pre-existing cross-reference between § 2N2.1 and §2F1.1 can be solved very simply by closer attention to the distinctions among charging offenses that already have been made by the Congress in the

underlying food and drug statutes themselves: all that is required is an application note clarifying that cross-reference for an offense that "involved fraud" should be applied only where the offense of conviction was one the rested upon proof (or formal admission) of an intent to defraud. And yet, that obvious and straightforward solution, which is fully consistent with the "charge offense" approach, apparently was not even considered. An observer might conclude that the Commission had made a basic policy shift toward "real offense" sentencing, but I am aware that anything like that had been decided or even discussed. The more likely explanation is "simplification" for its own sake, without considering the broader policy issue.

In either case, the practical result is equivalent to a basic shift of policy. By consolidating §2N2.1 into §2F1.1, we would mix a wide range of offenders and offenses under the same guideline: misdemeanants with felons, the least with the most culpable, purely commercial harms with personal injuries or risks to public health or safety, and widely disparate underlying statutory policies. As can be seen, ultimately this does not reduce overall complexity; it simply shifts the complexity from guideline selection to the application of increasingly complex and broad-ranging individual guideline sections. I would predict that many observers would find it unseemly that offenses against statutes motivated by considerations of public health and safety would be sentenced under a guideline designed initially for commercial frauds; they will demand modifications to put health and safety risks into the guideline text itself. The beginnings of this process already can be seen in the Commission's own proposal of a departure consideration for injury risks, and its request for comments on an attenuation of the economic loss concept that heretofore has been central to the fraud and theft guidelines, focused as they are on property crimes. Once that process develops, the "fraud" guideline becomes less focused on fraud; it becomes, in effect, a generic guideline tending toward the "real offense" system that the Commission rejected ab initio.

By raising this point, I do not mean to comment on the overall merits of "real offense" versus "charge offense" sentencing. The Commission may wish to re-examine that fundamental policy choice. But I see no indication in the record that the Commission has done so, or intends this current proposal as a basic policy shift. That is a very large subject that deserves separate and complete consideration in its own right. My concern is that the Commission unintentionally may be backing into a major policy shift without ever having considered the subject at all.

3. The General Approach to "Regulatory" Offenses. I have a similar concern regarding the implications of the current proposal as indicating yet another deviation from the fundamental policy choices on which the existing guidelines' structure rests, which is the overall approach to "regulatory" offenses. Current §2N2.1 is only one of several guidelines based on the same overall approach, which was first formulated in 1987 and continues to be stated in Chapter 1, Part A of the current Guidelines (pages 8-9). That approach describes a four-tiered structure for dealing with regulatory offenses, in order to distinguish differing levels of harm and culpability in a way that parallels the substantive law's distinction of "public welfare offenses" from more serious crimes. As food and drug offenses are the widely-recognized paradigm for "regulatory offenses," the withdrawal of §2N2.1 may be interpreted as a signal that the Commission intends to dismantle the guidelines' overall approach to "regulatory offenses" more generally. As in the case of "charge offense" sentencing, that may or may be the Commission's intent. But from what I have seen, I am unaware

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of any general policy decision by the Commission on this subject, and, once again, I do not believe that the Commission should place itself in the position of backing into a major policy shift on an ad hoc, piecemeal basis.

If the Commission wishes to re-examine its overall approach to regulatory offenses, I believe that the appropriate way to proceed is to begin with the general principles stated in §4(f) of Chapter 1.A of the existing Guidelines. As a matter of law, that provision is a "policy statement" that the courts are required to consider--and all participants have a right to rely upon as being an accurate statement of Commission policy--until it is explicitly modified. The current proposal is inconsistent with that statement, because it proposes to remove the purely technical level of offense from the sentencing structure. That move would have very profound implications for the law enforcement options available to regulatory officials, even within the immediate context of food and drug offenses, but especially if it were generalized to such matters as currency reporting, environmental recordkeeping offenses, and the like. I see no indication that any of those implications have been considered by the Commission or its staff, or discussed with the regulators or the regulated industries. From this perspective, the current proposal is precipitous and ill-considered simply as a matter of orderly procedure, quite aside from its underlying merit, which, as I have indicated above, is questionable.

In any case, I believe that any changes to specific guidelines implicating the overall approach to regulatory offenses would be premature unless and until proposed modifications to the general principles are exposed for public comment and debate, and full consideration and approval by the Commission.

B. Organizational Sentencing

The Commission's notice also proposes to extend the provisions of Chapter 8 to food and drug offenses, which were omitted from Chapter 8 as promulgated in 1991. Obviously, the wisdom of this change will depend to a large extent upon the resolution of the issues concerning the survival of §2N2.1, as Chapter 8 employs Chapter 2 offense levels as a factor in determining organizational sanctions. If the Commission decides to defer consideration of the Chapter 2 changes--as I believe it should--then a deferral of any related Chapter 8 changes also would be in order.

It is difficult to comment on this subject, as I am unfamiliar with the rationale for excluding food and drug offenses from the original Chapter 8. The Staff Report suggests that the application of Chapter 8 guidelines to food and drug offenses would produce essentially the same results as non-guideline law, for the small number of cases that the staff examined (Staff Report, at 19-20). However, given the small number of cases available, I am not sure that this is a good argument for extending Chapter 8 at this time. If the rationale for excluding food and drug offenses initially was the unpredictability of consequences, then we still do not have enough information to make confident predictions. Moreover, the Staff Report does not provide even anecdotal evidence of serious problems with non-guideline sentencing. In this context, the Commission might be best advised to let well enough alone, as compared with the unpredictable alternative.

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One of the possible adverse effects of Chapter 8 as applied to food and drug offenses is that its concepts of compliance programs may or may be compatible with the regulatory compliance standards and procedures already imposed by the Food and Drug Administration and other regulatory agencies. However, I see nothing in the Staff Report to indicate that this issue was reviewed with the appropriate regulatory officials. At a minimum, and aside form all other issues, that reviewed should be completed before the Commission considers applying Chapter 8 standards in this heavily regulated environment, as the application of the sentencing guidelines' incentives to these firms may have the unintended consequence of undermining the regulatory agencies' efforts.

C. Loss, Gain, and "Regulatory Fraud"

Finally, the Commission's notice calls for "comment as to whether 'gain' should be a substitute for 'loss' when the essence of the offense is fraud against regulatory authorities with no economic loss," 61 Fed. Reg. 83. No specific guideline language or context is proposed. the issue was raised in the specific context of food and drug offenses by the Staff Report (pages 13-15), but the Commission's notice appears to contemplate application to all offense sentenced under §2F1.1, which itself would give the concept a very broad application, and the concept would have the tendency to migrate--I am inclined to use the term metastasize, given its destructive potential-- elsewhere in the guidelines. I would strongly urge the Commission to take no action on this concept during the 1996 amendment cycle, because this is potentially the most far-reaching aspect of the current proposal, and I do not believe that the Commission has begun to consider its true consequences.

Like some of the other issues, this question may seem at first to be a technical matter of guideline application. But it is not. To adopt such a concept would be a radical shift in the entire focus of our sentencing system, both before and during the guidelines era. I am aware that "gain" is referred to in some portions of the existing guidelines, but always as a proxy for "loss." The current proposal would totally disconnect the two, by contemplating a situation of no economic loss (or even a risk of loss). That is a radical change, and a potentially destructive one, especially in the suggested context of "regulatory fraud," which is probably the worst imaginable context in which to adopt such a concept.

Even as a general proposition, sentencing on "gain" rather than "loss" is wrong as a matter of theory and infeasible as a matter of practice. I have made these points many times, in my published articles,[16] in Congressional testimony,[17] and in internal memoranda to the Commissioners when I was

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[16] *See* Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties,* 26 Am. Crim. L. Rev. 514, 554-70 (1989); Parker, *Rules Without: . . . : Some Critical Reflections on the Federal Corporate Sentencing Guidelines,* 71 B.U.L. Rev. 397, 408-10 (1993); Parker, *The Economics of Mens Rea,* 79 Va. L. Rev. 741, 754-62 (1993).

[17] The clearest statement of the point from the perspective of practical policy formulation can be found in my post-hearing statement submitted in connection with my 1990 testimony before the

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counsel to the Commission. The fundamental point is that criminal prohibitions are never intended to outlaw "gains." They are always intended to prevent harms, which is another name for "loss." Thus, focusing sentencing policy on "gain" turns substantive legal policy upside down, by punishing something that the legislature did not mean to punish, and failing to punish what the legislature did mean to punish. While it is superficially tempting to believe that the deterrent policy of sentencing is served by focusing on offenders' gains, that is always the wrong focus. At the extreme, the logic implies that we impose the death penalty for a parking violation, if the offender saved a life by overtime parking. Even short of the extreme, that is not very good logic, and it is not the logic of criminal prohibitions, which set the penalty for overtime parking based on the social harm of overtime parking, and not on the basis of what offenders may "gain" from overtime parking.

As troublesome as the focus on "gain" is in general, it is all the more pernicious as applied to the concept of "fraud against regulatory authorities with no economic loss." Assuming that "gain" would in essence be "cost saved" by noncompliance with regulations, notice the incentive effects on regulatory and enforcement authorities: higher penalties, which presumably are what enforcers will seek in our adversarial system, will follow from more and more burdensome regulatory requirements. In an era when we already have an uproar over the burden of government regulation, we would have the Sentencing Commission giving regulators a very explicit incentive to impose even more burdensome regulations--not as necessary to insure public health and safety, but solely to raise the threatened penalty level. Now consider the incentives of potential violators: adopting this concept would tell them that if they are going to violate, they should make sure that they hurt someone economically; that way, they avoid the "no economic loss" condition. Once again, the incentive structure is upside down, in much the same way as it would be if the penalty for robbery were the same as--or, to make the analogy more direct-- more than the penalty for murder. Obviously, sentencing law should give a differential incentive for regulatory violators not to hurt anyone, by giving a lower sentence if no one is hurt.

Finally, this aspect of the proposal, more so than the others, threatens to involve the Commission in what is, in effect, the legislation of an entirely new offense of "regulatory fraud," which again would overstep the bounds of the Commission's limited powers. If there is to be such an offense, it should be legislated by the Congress, not the Commission. And if it were legislated, its rationale would rest on the harm to the governmental program involved--in other words, the "loss," whether conventionally "economic" or not--and not on violators' "gains."

D. Summary

Overall, the current proposal on food and drug offenses is insufficiently developed to be considered for approval by the Commission. The proposal rests on staff work that failed to recognize

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House Subcommittee on Criminal Justice. *See Oversight on the United States Sentencing Commission and Guidelines for Organizational Sanctions: Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives,* 101st Cong., 2d Sess. 488-51 (1990).

the fundamental nature of the underlying offenses as strict liability and regulatory crimes, and failed to observe the culpability and grading distinctions established by the Congress in the statutory provisions. The staff's analysis also fails to account for the effects of the plea bargaining process on observed culpability "admissions" by defendants. Furthermore, the staff's analysis does not support or recommend the current proposal to abolish the separate food and drug guideline. Rather, the staff focused only on a cross-referencing issue that can be resolved easily by a minor amendment to the text or commentary of §2N2.1.

More generally, the proposal has profound implications for the broader structure created by the Guidelines' basic approach of "charge offense" sentencing and the Guidelines' basic approach to regulatory offenses. There is no indication that either the staff or the Commission has perceived or considered these implications. In particular, the current proposal is inconsistent with the Commission's existing statement of policy regarding regulatory offenses, to which no amendment has been proposed. In both instances, the broader issues deserve full and separate consideration in their own right.

A similar situation exists with respect to the request for comment on the question of using "gain" rather than "loss" in cases of "fraud against regulatory authorities with no economic loss." Adopting such a concept would again be a profound and potentially disastrous shift in basic sentencing policy that deserves far more extensive consideration than it apparently has received to date.

For these reasons, the Commission should not proceed with the proposed food and drug amendments during the 1996 cycle. Instead, the Commission should withdraw its notice of proposed amendment, and direct further study the of the subject both in detail and in the broader context of overall guidelines structure, in order to insure that future amendments, if any, to the food and drug guidelines are both consistent with the Commission's explicit and considered judgment on basic policy questions and well-supported on their own merits.

Very truly yours,

Jeffrey S. Parker

cc: Pharmaceutical Research and Manufacturers of America

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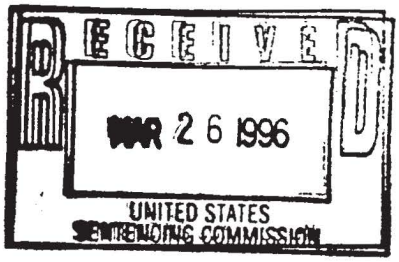
March 8, 1996



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WASHINGTON DC 20002-80002

Dear Chairman Conaboy and Commissioners:

The Executive Council of the Criminal Justice Section of the North Carolina Bar Association has carefully studied the proposed Amendments to the Guildelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the Federal Register for the 1996 Amendment Cycle. The Bar Association has also established a dialogue with your Practitioner's Advisory Group and has studied the group's responses to the Amendments for this cycle.

The North Carolina Bar Association fully endorses the positions taken on each of the proposed amendments by the Practitioner's Advisory Group. The Bar especially urges the adoption of those amendments and modifications endorsed by the Practitioner's Advisory Group in regards to money laundering and controlled substances.

With regards to crack cocaine, the Bar believes a 5 to 1 ratio is the best substitute for our preferred 1 to 1 ratio which was rejected by Congress last year. We endorse 5 to 1 because it is consistent with other ratios established in the drug tables and would establish the same penalty for crack as currently exists for heroine, PCP and methamphetamine and their equivalents.

The North Carolina Bar Association thanks the Sentencing Commission for this opportunity to express its views on the proposed amendments and remains available for future consultation on these and any other matters.

Sincerely yours,

D. Thomas Lambeth, Jr., Vice-Chair
Criminal Justice Section
North Carolina Bar Association

DTL,jr/kd

[2027]

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031-96

March 11, 1996

Mr. Michael Courlander
U.S. Sentencing Commission
Washington, D.C.

Dear Mr. Courlander:

I am writing this letter to express my support of badly needed reforms to the federal sentencing guidelines as they apply to money laundering. I am familiar with the present draconian guidelines because my husband and the father of our two children (ages 7 & 12) is currently serving the 51st month of a 121- month prison sentence for money laundering. He is a non-violent, first-time offender.

To briefly state the background of the case -- In September of 1991 my husband, Tim Woiner, former president of L.U. Kustom, Inc. (a wholesale jewelry business in Pittsburgh) was convicted of money laundering and sentenced to 121 months in prison under 18 U.S.C. Section 1957. The statute states, as interpreted to me by various legal professionals, that an individual may be found guilty if he engages in a monetary transaction in excess of $10,000 that the government believes was generated by unlawful activity. The most disturbing part of this statute is that it states the government need not prove the individual had any knowledge that the money was generated by unlawful activity.

My husband attempted on numerous occasions to establish the legitimacy of the New York jeweler with whom he was dealing. He was a legitimate businessman who was convicted based upon mere association with an alleged money launderer. The government, by their own admission, had no direct evidence that my husband knew of any illegal activity, it was strictly a circumstantial case. (The government conducted over 700 hours of surveillance prior to arresting my husband, and could not use one second of it in trial because it contained nothing incriminating.)

I cannot believe it was the intention of the lawmakers in 1986 to author legislation that would be used to snare unwary businessmen, but that is exactly what has happened in this case.

In addition, it has come to our attention that the New York jeweler the government contends was the initiator of this illegal activity has never even been sentenced as he continues to testify against others all over the United States. Interestingly enough, he was never brought by the government to testify against my husband, and, in fact, made a statement to the government (provided to us prior to trial as exculpatory evidence) that my husband and his co-defendant had no knowledge of any illegality.

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So my husband, who is a non-violent first time offender is sentenced to 121 months in prison. Even though he was indicted on 7 million dollars of illegal activity, relevant conduct allowed the sentence to be based on every dollar of business ever transacted which amounted to 96 million dollars (not an outrageous sum to anyone familiar with the wholesale gold jewelry trade, but it certainly proved to be an effective tool used by the prosecution to impress a confused and bored jury without any knowledge of this complex industry). And since he did not live a life of crime, he cannot provide the government with any information that might serve to reduce his sentence.

In addition, prior to being charged with this offense, my husband received a commendation letter from the FBI for his cooperation (in the form of grand jury testimony) in the apprehension of criminals in the jewelry industry. The trial judge refused to acknowledge this cooperation as substantial cause to depart from the sentencing guidelines. This cooperation was provided at a time when my husband had no incentive to do so. He was merely acting as a good citizen and businessman.

The Sentencing Commission's on-going attempts to reform these unjust guidelines gives us hope that vital changes will be made. Our children have already sacrificed four of the most formative years of their lives to this system, and if nothing changes, they will lose four and one-half more. Tragically, they are not alone. We are struck by the number of intact middle-class families with young children we see twice each week when we visit my husband. Like our children, their only interaction during the most critical years of development is in a prison visiting room and by telephone. In a country that never fails to tout its belief in family values that is the most heinous injustice of all.

I think it is important that the Sentencing Commission as well as Congress is aware of the effects the present money laundering convictions and corresponding sentencing guidelines have had on the American family. I applaud your efforts for reform and hope I have provided you with some additional insight.

Sincerely,

Rita M. Woiner

Rita M. Woiner

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032-96

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March 6, 1996

Michael Courlander
U.S. Sentencing Commission
One Columbus Circle N.E., Suite 2-500
Washington, D.C. 20002

RE: Federal Sentencing Guidelines/MONEY LAUNDERING

Dear Mr. Courlander:

I am writing to respond to the request for public opinion on the Money Laundering guideline.

I urge that, as the Commission has recommended, in cases where there is a money-laundering conviction but money-laundering is not the prime objective of the activity (e.g., interstate transportation of stolen property), the sentence be tied to the underlying offense rather than to the money-laundering statute. The lengthy sentences which have resulted from the current application of the Guidelines are not only unfair but in my opinion a misuse of scarce resources which would be better used to incarcerate more violent or repeat offenders.

Very truly yours,

Peter J. Hughes

PJH/maj

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033-96

AMERICAN ASSOCIATION FOR CONSTITUTIONAL
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1 Columbus Circle N.E.
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Attention: Public Information

February 22, 1996

Fax: (202) 273-4529

Commentary on: (a) The U.S. Sentencing Commission's Proposed Guidelines on Laundering Monetary Instruments; (b) The need for offense levels to comport with the seriousness of the defendant's offense conduct; (c) The consistency and appropriateness in the use of the money laundering statute (RE: P.L. 104-38); (d) The charging and plea practices of Federal prosecutors with respect to the offense of money laundering (RE: P.L. 104-38); (e) The Disparities in Sentencing for Money Laundering Offenses. (f) Conclusions and recommendations. (g) APPENDIX.

Dear Commissioners:

We are responding to the U.S. Sentencing Commission's request for public comment on proposed sentencing guidelines for money laundering offenses as announced in the Federal Register (Jan. 2, 1996, vol 61, No 1, pp 79-83) and, specifically, on pending alternative proposals or on some variation of them that appropriately addresses the goals of: (1) Assuring that offense levels comport with the seriousness of the defendant's offense conduct; and (2) avoiding unwarranted sentencing disparities as a result of charging practices.

Unequivocally, we support the U.S. Sentencing Commission's resubmission of its 1995 proposed guidelines, which were the result of a three year study, and reflect common sense. We recommend slight clarification of the due process requirement related to sentencing resulting from "sting" application of the money laundering statute, particularly as it relates to the representation of an "underlying unlawful activity", and the sentencing level of such underlying

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activity which often cannot be determined or if a defendant had no part in it.

We oppose the Department of Justice alternative proposals as being excessive and unwarranted. We will qualify our statements further in our commentary. Also we are presenting commentary on P.L. 104-38 and on the extreme disparities of the sentencing guidelines which exist at the present time which, regrettably, this law has permitted to continue. Furthermore, we comment on the inconsistencies, inappropriateness and the lack of proper guidelines in the use of this statute, which has resulted in charging excesses, coercive tactics and outrageous plea practices by Federal prosecutors with respect to the offense of money laundering. Finally, we provide, in the body of this commentary and in the Appendix, specific examples of abuses of the due process requirement of the statute, of violations of the Fifth and Sixth Amendment of the Constitution, of sentencing disparities, some within the same Federal Judicial Circuit. Our commentary on these issues is not based on opinions or vague perceptions but on careful, documented research of facts, caselaw, literature review, testimony of experts, and the Commission' s own reports and proceedings of public hearings.

The issues addressed in our commentary are obviously of concern to Congress since P.L. 104-38, included a directive for a report on "the charging and plea practices of Federal prosecutors with respect to the offense of money laundering", a report which must include "an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute".

Since the Sentencing Commission has been charged with the responsibility of commenting on the study to be prepared by the Department of Justice, we sincerely hope that the documentation provided in the present commentary will be of some usefulness to the

Commission. Furthermore, we are prepared to provide additional documentation and references, as needed.

(a) The U.S. Sentencing Commission's Proposed Guidelines on Laundering Monetary Instruments.

We wholeheartedly support the Commission's proposed amendments to the sentencing guidelines. We believe that these amendments should not be compromised or changed as they have been promulgated by the Commission after a long and careful review. However, we recommend that a clarification be made, or a separate section be included, in the proposed amendments for offenses sentenced under 1956(a)(3), the "sting" provision of the money laundering statute. For such "sting" offenses where the money laundering activity is based on a government-staged, hypothetical, underlying unlawful activity, the amended sentencing guideline should include more specific language pertinent to the underlying offense which led to the sentencing for money laundering; specifically,that the Fifth Amendment, due process requirement of proper representation of the "underlying unlawful activity" was indeed met by the undercover government agents in a "sting" that resulted in a money laundering conviction; furthermore that the charging indictment issued by federal prosecutors which resulted in conviction and sentencing included the proper notification requirement of the Sixth Amendment in that the defendant was indeed accountable for the underlying offense in the indictment and that the specific State or Federal law were cited in supporting proper charges of the violation of the underlying unlawful activity along with money laundering charges.

Such clarification to the sentencing guidelines would serve the additional purpose of limiting excesses and overzealousness by government attorneys in charging improperly defendants with money laundering counts in government-staged "stings". It would make it harder for federal prosecutors to circumvent the Fifth amendment requirement of proper representation of the underlying unlawful

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activity or to interpret improperly the statute that "some form of unlawful activity" means that such activity does not have to be represented in a "sting" but that representation can be peripherally and indirectly established through "circumstantial" evidence of their own fabrication. It would alleviate the use of the underlying unlawful activity as being simply "definitional" in escalating any alleged offense or financial transaction to a money laundering offense, with guaranteed conviction and inappropriate high sentencing level. Finally, it would require federal prosecutors to charge a defendant properly for money laundering in an indictment by citing the specific federal or state statute that applies to the underlying unlawful activity and whether the defendant (not a government entity staging a "sting") has or could have violated the underlying unlawful activity. Without an actual or even hypothetical violation of a specific underlying unlawful activity, which must be a felony under State or Federal law, there should be no money laundering offense.

Such provisions in the amended sentencing guidelines (and hopefully in the money laundering statute) would restrict federal prosecutors from abusing the statute and its high sentencing levels in "sting" prosecutions where the only evidence of a defendant's "guilt" is the one fabricated by government attorneys. It would require federal prosecutors to prove at trial to a jury the elements of the underlying offense as a prerequisite of a money laundering conviction and not mislead juries that the underlying offense can be merely "definitional".

Thus, for 1956(a)(3) sentencing we propose the following changes to Section 2S1.1, as marked in bold lettering:

(A) Proposed Amendment

Sections 2S1.1 and 2S1.2 are deleted and the following inserted in lieu thereof:

``Sec. 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the Greatest)

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*(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise was accountable, **notified, and properly charged** for the commission of the underlying offense under Sec. 1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined, **or, for 1956(a)(3) offenses, if the underlying offense was properly represented and the defendant committed or was a participant in the underlying offense (or otherwise was accountable, notified and properly charged for the commission of the underlying offense under Sec. 1B1.3 (Relevant Conduct) and the offense level for that offense can be determined**; or*

(2) 12 plus the number of offense levels from the table in Sec. 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of, or were to be used to promote, an offense involving the manufacture, importation, or distribution of controlled substances or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism; or

(3) 8 plus the number of offense levels from the table in Sec. 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

*(1) If the defendant knew or believed (**through proper representation of an underlying unlawful activity**) that (A) the financial or monetary transactions, transfers, transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct , or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.*

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

(b) The need for offense levels to comport with the seriousness of the defendant's offense conduct.

The Commission's proposed sentencing amendments for money laundering offenses are the result of a three-year effort directly resulting from a continuous ongoing guideline review, in-house studies, public hearings, testimonies of experts, and a thorough and diligent revision process. Congress, as one of the fundamental goals of the Sentencing Reform Act, specifically directed the Commission to

undertake this review of the sentencing guidelines so that offense levels comport with the seriousness of a defendant's offense conduct and thus unwarranted sentencing disparities for similar offense conduct are avoided.

Passage of P.L. 104-38 and disregard of the Commission's recommendations for these well justified amendments negates previous Congressional directives and is contrary to the spirit of the law - the Sentencing Reform Act. Furthermore, without proper justification or proper hearings, Congress, through its passage of P.L. 104-38, continues the disparities of sentencing and contradicts its own goal of balancing the federal budget by allocating close to $4 billion for the building of additional prisons which, to a large extent, will house "marginal offenders" serving longer and undeserved sentences for offenses which do not comport with the seriousness of the offense conduct. Such contradictory policy is counterproductive to the U.S. economy and is not in the best interest of our country.

Because the Money Laundering statute was new, the Commission did not have much caselaw on which to base guideline penalties for money laundering offenses. The Commission based its original guidelines on representations made to Congress by the Department of Justice when it enacted the 1986 Anti-drug legislation believing, as Congress did, that the money laundering statute and its high sentencing levels would apply to professional money launderers, principally those associated with narcotics and organized crime. Accordingly, the U.S. Sentencing Commission promulgated appropriate guidelines that addressed the seriousness of such crimes by setting relatively high ``base offense levels''. These base levels were much higher than the base levels for other relatively serious offenses such as robbery, extortion, and aggravated assault.

These guidelines still remain in effect, even though in 1988 and in subsequent years, and through vigorous Department of Justice lobbying, Congress passed amendments to the money laundering laws,

including a "sting" provision. These new money laundering amendments created new classes of "offenders", some of them marginal and not involved with drugs or organized crime. The Department of Justice failed to provide guidelines to its attorneys on proper application of the amended money laundering statute. Thus, misapplication of the "sting" provision of the money laundering statute with a low threshold of "proof" and "evidence" often fabricated by overzealous government prosecutors created still another class of offenders subjected to the same sentencing guidelines as the more serious offenders. Further misapplication of the money laundering statute, charging excesses, and manipulation of the high sentencing levels of the statute in plea-bargaining by federal prosecutors, resulted in proliferation of offenders for underlying conduct which did not warrantee such extreme punishment. Through such abuses in charging and plea-bargaining, disparities in sentencing levels became more common and received the attention of the U.S. Sentencing Commission and of the legal profession.

To alleviate these obvious disparities, the Commission conducted appropriate studies, held hearings and finally promulgated amendments to the guidelines which were commensurate with the seriousness of the underlying offenses. These are the well-justified amendments that P.L. 104-38 prevented from taking effect on November 1, 1995.

Contrary to Department of Justice claims, the Sentencing Commission's proposed amendments will not substantially lower penalties for serious money laundering offenses. In fact the amendments provide that the enhancement in sentencing for money laundering offenses will be tied to the underlying offense. However, the Commission's amendments provide that offenders will be punished in a manner which is more commensurate with the actual seriousness of the offense, thus eliminating the prosecutors' temptation to charge money laundering so frequently, which often leads to vast and disproportionately increased sentencing.

Finally, in the interest of justice and fundamental fairness, it is paramount that the U.S.Sentencing Commission's proposed amendments to the guidelines for money laundering be implemented by Congress as these amendments will be more effective, and will serve better our criminal justice system as they tie sentencing penalties more closely to the underlying offense from which the funds were derived.

(c) The consistency and appropriateness in the use of the money laundering statute

The Department of Justice had ample opportunities in the past to provide guidelines to its attorneys thus assuring consistency and appropriateness in the use of the money laundering statute. They have not done so. Neither have they addressed the issue of charging and plea practices of Federal prosecutors and the extreme sentencing disparities with respect to the offense of money laundering. As the Washington Post pointed out in a series of articles to be referenced in this commentary, and as Federal Judge Ideman in California and the 6th Circuit in Tennessee have suggested, prosecutorial misconduct is not being dealt honestly or effectively by the Department of Justice. It will be interesting to see if abusive charging and plea practices of its attorneys will be addressed honestly and effectively in the Department of Justice report that Congress has required in P.L. 104-38 or whether they will be whitewashed.

The disparities in sentencing and the charging excesses of federal prosecutors became vividly clear at the U.S. Sentencing Commission's public hearings on the proposed sentencing amendments to the guidelines for money laundering offenses, held in the last three years. There was an overwhelming support for the Commission's proposed amendments from those who testified at the public hearings. There was also severe criticism about the lack of consistency and appropriateness in the use of the money laundering statutes. To

illustrate the problem we will reiterate for the record only some of the comments made at some of these hearings

One of the principal authors of the money laundering statutes, was Mr. Charles W. Blau (U.S. Sentencing Commission's Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993, Washington DC. Transcripts of the hearing p.256-261). Mr. Blau had 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 lack of consistency and appropriateness in the use of the money laundering statute. At the hearing, among other comments, he stated:

> *"In looking at these statutes, ...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 <u>abused</u> or used, as the case may be.*

Similar views on the lack of consistency and appropriateness in the use of the money laundering statutes were additionally supported by testimony at public hearings held in 1994 and 1995. These reports are in the public record and in the Commission's archives.

(d) The charging and plea practices of Federal prosecutors with respect to the offense of money laundering.

The money laundering statutes and the high sentencing levels have been grossly abused by Federal prosecutors in charging and plea practices. This is especially true of the "sting" money laundering statute where prosecutors have "carte blanche" to fabricate the low threshold "evidence" and conditions that will guarantee a conviction. In the absence of guidelines from the Justice Department, overzealous prosecutors, anxious to obtain convictions, stretch both the law and the due process requirements in charging targeted individuals. The vagueness in the wording of the law and its definitions provides prosecutors with an excuse to circumvent the due process requirement of representation of an unlawful activity in sting operations. The same federal prosecutors control the fabrication of the evidence which may even be subsequently tampered to make a "sting" work every time. (See Example in the Appendix: The "Sting Money Laundering Conviction" of Dr. George Pararas-Carayannis in Hawaii - Gross Violation of His Due Process Right to a Fair Jury Trial under the Fifth Constitutional Amendment).

Charging abuses are often followed by plea-bargain abuses. The high sentencing level of the money laundering statute gives federal prosecutors a formidable weapon with which they can coerce defendants into "plea-bargaining". Plea bargaining essentially becomes threatening and blackmail tempered with promises of leniency at sentencing if defendants "cooperate". Those who succumb to the pressure, often receive sentences which are substantially lower than the guidelines. For those who refuse to plea bargain, the same federal prosecutors will serve them with superseding indictments that often charge frivolous, unsupported "offenses". Even if these coercive tactics still fail to coerce a defendant into "plea-bargaining", the benefit to prosecutors is that a defendant is stretched emotionally and financially to a breaking point so he cannot effectively put a defense. The charges in these superseding

or collateral indictments often are dismissed by federal prosecutors just before trial but only after they have taken their toll on a defendant and he has been rendered financially destitute. Finally, when a case makes it to trial and the defendant is convicted, as prearranged, not only the mandatory minimums are applied in sentencing in such defendant's case but the prosecutors ask for enhancements for "obstruction of justice" and for "not accepting responsibility for the crime".

At the 1993 Commission's hearing Mr.Bleau had the following comments pertaining to the charging and plea practices of Federal prosecutors with respect to the offense of money laundering:

> *"....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."*
>
> *"..... I think that it (the money laundering statute) 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....."

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):