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STATEMENT OF THE F.A.S. DRUG POLICY PROJECT TO THE U. S. SENTENCING COMMISSION

Comment on the Proposed Changes to MDMA ("Ecstasy") Penalties

SUBMITTED 9 March 2001 to the U.S. Sentencing Commission by:

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Summary

Responding to a Congressional directive, the Sentencing Commission has published a proposal to set a sentencing weight equivalency for MDMA that is the same as the equivalency used for heroin: the proposal equates 1 gram of MDMA with 1 kilogram of marijuana. **Because the usual doses of MDMA and heroin differ, treating the substances alike on a weight-for-weight basis would implicitly treat one dose of MDMA as being equivalent to ten doses of heroin. There is no rational basis on which such an equivalency could be made.** While MDMA has risks, the damage done by heroin to its users, and the damage done by its users and dealers to others, vastly outweighs the damage done by MDMA. Whether we look at death, addiction, infectious disease transmission, crime by users, or violence among dealers, the damage from heroin is orders of magnitude greater.

It would be more reasonable to treat ten doses of MDMA as equivalent, for sentencing purposes, to one dose of heroin. That would imply an equivalency of 1 gram of MDMA to 10 grams of marijuana. Such an equivalency would mean that a single dose of MDMA would be treated as equivalent to approximately eight doses of marijuana, a comparison consistent with the data. The published proposal would treat a single dose of MDMA as equivalent to about eight hundred doses of marijuana, a quantity that would support daily smoking for more than two years. That comparison is not reasonable.

If the Commission were to ratify the published proposal, the resulting change in sentencing would have the effect of diverting enforcement resources away from heroin, cocaine, and methamphetamine toward MDMA. The result of such a diversion would be to make the overall drug abuse problem worse.

Analysis

1. The Commission proposes to treat 1 gram of MDMA as equivalent, for sentencing purposes, to a kilogram of marijuana. This would accord MDMA the same punishment value, weight-for-weight, as heroin.

2. In comparing drugs for sentencing purposes, weight is not an appropriate basis, from either a medical or a policy-analytic standpoint. **Weight needs to be converted to dosage units to make comparisons meaningful.**

3. According to the Drug Enforcement Administration, a typical tablet sold as "Ecstasy" contains 75 to 125 mg of the pure drug and has a gross weight of about 300 mg. Thus, what is considered for sentencing purposes a gram of MDMA contains about 3.3 dosage units. A retail dose of heroin typically contains about 10 mg of pure heroin mixed with about 20 mg of diluent and adulterant. Thus a gram of retail heroin contains about 33 dosage units. While street purity varies for both drugs, if they were sold at equal purities, then the published proposal making MDMA and heroin equivalent on a weight-for-weight basis for sentencing purposes would treat a single dose of MDMA as equivalent to about ten doses of heroin.

4. MDMA, when taken in hot, unventilated dance club settings with strenuous physical activity and inadequate hydration, has been known to cause death.

5. There is growing laboratory evidence that MDMA is capable of causing lasting neurological changes in some of its users. How damaging those changes are, and how they depend on dosage, frequency, other conditions such as ambient temperature and hydration, and idiosyncratic characteristics of the user remain matters of scientific controversy.

6. There is also growing evidence that MDMA can generate and sustain patterns of heavy use (more than once a week, more than one dose per session) over periods of at least months in some of its users.

7. **This evidence contradicts earlier claims that MDMA is "harmless" or "non-addictive."** Still, while rates of damage on a per-dose basis are difficult to compute, **the gross measured damages due to heroin and MDMA differ by orders of magnitude.**

8. According to the Drug Abuse Warning Network (DAWN) "heroin/morphine" accounted for 4,820 medical examiner mentions (**deaths** related to acute or chronic use) in 1999, while "MDM" [which we assume to mean MDMA] accounted for 42 mentions: **a ratio of more than 100:1.**

9. "Heroin/morphine" accounted for 84,409 **emergency department mentions** (emergency department visits related to acute or chronic use) in 1999, while "MDM" accounted for 2,850 mentions: **a ratio of nearly 30:1.**

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10. Heroin addiction is a relatively common consequence of heroin experimentation, and for many, though not all, of its victims heroin addiction is a chronic, relapsing condition. The 1998 Treatment Episode Data Set (TEDS) reports heroin as accounting for approximately 14% of the estimated 1,564,156 drug treatment "episodes" (each episode representing one patient entering a period of treatment). That is, about 218,000 people entered treatment in that year for heroin abuse or dependency.

11. **MDMA, while more widely used than heroin according to surveys, is much less likely to lead to patterns of abuse or dependency requiring clinical treatment.** TEDS reports *no* MDMA treatment episodes for 1998, but the number (if one includes private physician visits) is probably in the hundreds or thousands at most, rather than the hundreds of thousands documented for heroin.

12. **Heroin is often taken by injection, and thereby linked to the transmission of infectious disease, including HIV/AIDS and hepatitis B and C. MDMA is usually taken orally; injection is rare.**

13. Heroin addiction is commonly accompanied by large volumes of income-producing crime; studies in some heroin-using subpopulations show hundreds of criminal acts per addict per year. **MDMA use has not been linked to non-drug crime.**

14. Heroin dealing, both wholesale and retail, is frequently characterized by violence. Retail heroin dealers routinely carry guns. **MDMA markets have not been reported to produce any substantial violence.**

15. Thus we can find no justification, either pharmacologically or in policy terms, for treating MDMA as even close to equivalent to heroin on a dose-for-dose basis. **The proposal to treat MDMA and heroin as equivalent on a weight-for-weight basis, thus treating each dose of MDMA as equivalent in danger to about ten doses of heroin, cannot withstand even casual scrutiny.**

16. Both in its pharmacology and its risk profile, MDMA more closely resembles the hallucinogens than it does heroin. MDMA is far less likely than PCP or LSD to generate acute psychological crises ("bad trips") or extreme acting-out behavior. However, MDMA has some level of toxic risk and has some non-trivial risk of generating addictive-like behavior. Moreover, unlike the true hallucinogens, MDMA is highly reinforcing, which suggests that the transition from initiation to regular use may be more common among MDMA users than among users of LSD or mescaline. Thus any overall comparison of MDMA with the other hallucinogens would depend on the relative weighting of the risk of acute psychological crisis and related behaviors against addictive and toxic risks.

17. Comparing MDMA directly with marijuana, **the proposal that 1 gram of MDMA be treated as equivalent to 1 kilogram of marijuana is also grossly disproportionate.** A marijuana cigarette typically contains somewhat more than one-third of a gram. Thus a kilogram of marijuana (assuming that it consists entirely of usable material) represents

more than 2,500 doses, while a gram of MDMA sold at retail (including filler) represents between three and four tablets. **The proposed amendment thus equates a single dose of MDMA with approximately eight hundred marijuana cigarettes, enough to support daily marijuana smoking for more than two years.** The evidence does not support the assertion that the two activities create equivalent levels of risk. Treating one gram of MDMA as equivalent to ten grams of marijuana would equate a single dose of MDMA to about eight doses of marijuana, a more reasonable figure.

18. Changing the weight equivalency for the sentencing of MDMA offenses affects more than the amount of time MDMA dealers will spend in prison. Within any finite budget, drugs compete for enforcement attention. Sentencing patterns help determine enforcement patterns, both by influencing investigative and prosecutorial evaluations of which cases are "major" and by making successful investigations easier by increasing the leverage that can be applied to some suspects to provide information about others. **The Commission should consider whether, in the face of accumulating evidence that heroin is making a resurgence, it wants to encourage the Drug Enforcement Administration to move resources out of heroin enforcement into MDMA enforcement.** We do not think that such a shift of resources would serve the public interest.

19. We recognize that the Commission is acting under Congressional mandate to increase the penalties for MDMA distribution, while our recommendation would reduce the current marijuana-equivalency assigned to MDMA. Precision on these matters is impossible; no single figure can precisely reflect the full complexity of the comparisons across drugs on the multiple categories of risk and damage to users and others. However, the current equivalency (1 gram of MDMA to 35 grams of marijuana) is at or above the top of the range of values that can be supported by the data, whether MDMA is compared to heroin or to marijuana. **No increase in the relative penalty valuation of MDMA can be rationally justified.**

Summary: Comparisons of Heroin and MDMA

Measurement	Heroin	MDMA	Ratio
Potency (doses per gram), pure form	100 doses/gm	10 doses/gm	10:1
Potency (doses per gram), typical retail mixture *	33 doses/gm	3.3 doses/gm	10:1
Medical examiner mentions (deaths) in 1999 (source: DAWN)	4,820	42	100:1
Emergency department mentions in 1999 (source: DAWN)	84,409	2,850	30:1
Addiction treatment episodes in 1998 (source: TEDS)	216,834	None reported; actual number unknown	Greater than 100:1
Infectious disease transmission via injection use	Very high	None reported; actual number unknown	Greater than 1000:1
Violence in distribution	Very high	Low	Greater than 1000:1
Linkage to non-drug crime by users	Very strong	None reported	Greater than 1000:1

* based on a typical retail mixture gross weight of
30 mg per dose of heroin and 300 mg per dose of MDMA

About FAS: Founded by World War II atomic scientists in 1945, the Federation of American Scientists is a civic organization devoted to issues of science and society. The FAS Drug Policy Project works to bring insights from pharmacology, social science, and policy analysis to the problems of substance abuse control.

Should the US Direct More Law Enforcement Effort at XTC?

Written Testimony Submitted by

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To the House Subcommittee on Crime Oversight Hearing On
"The Threat Posed by the Illegal Importation, Trafficking, and Use
of Ecstasy and Other 'Club' Drugs" June 15th, 2000

Introduction

The question has arisen as to whether this is a good time to direct additional law enforcement effort at XTC. Or, might other interventions, such as treatment and prevention, be better alternatives? One constructive way to approach this question is by stepping back and asking, for what types of drugs and at what point in an epidemic of drug use is law enforcement likely to be the preferred intervention? Then one can ask whether XTC is likely to fit that description.

Levels and patterns of drug use rise and fall over time in modest ways as do all sorts of phenomena, but drug use patterns can also change explosively. In particular, drug "epidemics" can begin with low rates of use being replaced by exponential growth up to some plateau, from which drug use gradually declines to some endemic level that may or may not be much greater than the original level (Musto, 1999). In such a dynamic situation, it may make sense for the mix of policy interventions to vary over time as well. Such adaptive or dynamic policies are not uncommon in other spheres. For example, the Federal Reserve adjusts interest rates in response to its perception of where the economy is in the business cycle.

The Recipe for a Drug Epidemic

The recipe for a "worst case" epidemic has the following ingredients. The substance initially has a benign reputation and is perceived to be hip or cool. First use is appealing (not an "acquired taste") and most users are happy with the drug's effects during some honeymoon period, but over time some proportion of users suffer substantial ill effects, in the form of addiction (as with heroin), chronic health effects (as with cigarettes), a mixture, or something else. If the proportion suffering ill effects is very large, the drug will acquire a negative reputation fairly quickly. If the proportion is very low, few people will suffer harm. In intermediate ranges, the absolute number of individuals harmed can be large, but they still will not represent the modal outcome. That allows naively optimistic potential users to convince themselves that "it won't happen to me."

In terms of market conditions, the worst case is a drug that rapidly moves from unavailable to widely available. If the drug has always been available, then older birth cohorts will have already been exposed to the drug. Some individuals will have used. Some will not have. But those cohorts are not susceptible to rapid initiation because most who might consider using the drug have already opted in or out. If the drug was

physically unavailable to older birth cohorts, then they can add fuel to the exponential spread of the drug the same way that dead wood accumulating in a forest that is not burned by natural fires can fuel a particularly intense fire when one finally does start.

On the other hand, if the availability grows slowly over time, then initially only the most determined or the best-connected potential users will have a chance to start. Their drug use will play out its effects over time before less well-connected individuals have a chance to start. That lets the less connected individuals witness the end of the "honeymoon period" of relatively happy use and onset of problematic use for some of their colleagues before they themselves decide whether to take a chance by trying the drug.

For a drug, population, and market with these characteristics, it is easy to create a positive feedback loop such that some initiation begets more initiation, and drug use sweeps through the population of "susceptibles". Kleiman (1992) gives an articulate qualitative description of this process, which is captured more formally by models such as those of Behrens et al. (1999, 2000). The key mechanism is reputational. As long as the number of initiates is increasing, most users will have been using for a relatively short period of time and, hence, be in their honeymoon period. That perpetuates the illusion that the drug is safe, inducing still more people to try the drug. The exponential growth is only broken when users begin to manifest obvious problems with the drug or the pool of individuals susceptible to drug use is tapped out.

Unfortunately, cocaine in the US in the 1970s had exactly these characteristics, and initiation grew by more than a factor of ten during the 1970s. In the 1980s when the dangers of addiction became more obvious, rates of initiation fell, but by then a large number of people had tried the drug and roughly one-sixth went on to have serious problems with it.

Ability of Interventions to Diffuse Epidemic Growth

What might the US have done to avert or at least mitigate its cocaine epidemic? School-based drug prevention programs have been shown in controlled studies to have an effect on initiation into drug use (see, e.g., Ellickson et al. 1990 and Botvin et al., 1995). However, the median age of cocaine initiation in the US was 21.5, and the typical school-based drug prevention program is run with 13 or 14 year olds, so prevention is most effective when done about eight years *before* the rapid increase in initiation. For the US cocaine epidemic, that meant the late 1960s and early 1970s. That lag is problematic because we did not realize we were suffering from a serious cocaine epidemic until the 1980s. Even if we are quicker to recognize an epidemic in the future, there is little one can do about part of the lag. School-based drug prevention may be cost-effective (cf., Caulkins et al., 1999), but it is not an efficient way to focus control on an immediate need. It is also not like a vaccine. Even a cutting edge prevention program cannot "inoculate" against drug use. Most of those who receive a prevention program who would have used in the absence of the program will still use even if they do receive a cutting edge prevention program.

Other forms of prevention (such as mass media campaigns) have a shorter lag, or none at all if they are directed not only at teens forming their opinions but also at young adults contemplating trying the drug. However, the evidence concerning their efficacy is thin at best.

Treatment is likewise not an effective way of diffusing the epidemic spread of initiation when most people are in the honeymoon period specifically because those who have not yet become dependent and who are not manifesting negative consequences of use generally do not want or perhaps even need treatment. It is even conceivable that during the explosive spread stage, helping those who are suffering from drug use could reduce the apparent dangers of the drug, watering down the drug's negative reputation, and, thereby, removing a potential brake on the spread of initiation. (Such perverse effects are unlikely later in the epidemic and, at any rate, are purely speculative.)

Enforcement, in contrast, has the capacity to focus its effects in the present, to respond quickly, and to be drug-specific. Had we directed more enforcement effort at cocaine in the late 1970s, instead of concentrating on heroin and marijuana, it is conceivable that such effort might have slowed the exponential growth through one or more of several mechanisms.

The ideal outcome of enforcement is that the substance becomes physically unavailable. If a set of users or potential users has only one point of supply and that supplier is incarcerated, the users might be physically unable to obtain the drug. The same basic principle applies if the users could identify an alternative supplier, but only at some nontrivial cost, effort, or risk (whether of being defrauded or arrested). This decoupling of consumers from the ultimate source of supply is most feasible when the market is "thin" in the sense that there are few alternative suppliers. It would be exceedingly difficult to achieve for cocaine in most parts of the US today when the typical user may know 10 or 15 alternative suppliers (Riley, 1997). Early in a drug epidemic, before the markets are as well established, it may be more feasible.

The second possible beneficial outcome of enforcement is that the risks of sanctions induce suppliers to demand substantial monetary compensation for incurring those risks associated with distributing the drugs, thereby driving up prices (Reuter and Kleiman, 1986). There is good evidence that higher prices suppress use and perhaps even initiation (Chaloupka and Pacula, forthcoming). This so-called "risks and prices" mechanism has been examined by a variety of quantitative models (e.g., Rydell and Everingham, 1994). A consistent finding is that once the market is large, "enforcement swamping" (Kleiman, 1993) makes it very expensive to raise the risk per kilogram delivered enough to greatly increase the price per kilogram or per gram. There is not compelling empirical evidence that enforcement is any more effective at driving up prices of drugs which have a smaller market, but economic logic suggests that it may well be so.

A third possible mechanism by which increased enforcement might deter or slow initiation is the direct threat of sanction against users. If users are under-estimating the health risks of the drug, e.g., because most of the users they observe are in the honeymoon phase, then creating a criminal justice risk might serve as a useful surrogate to keep potential users from taking foolish risks. In theory, one could even view this as the government compensating for an information failure (ignorance of the long-term health risks of drug use) with a tangible action when its words alone are not credible (e.g., because it cried wolf once too often over the risks of other substances).

Of course if few potential users are deterred and many users suffer severe criminal sanctions, over zealous enforcement against users can make them worse not better off. But enforcement approaches that maximize deterrence relative to sanction,

e.g., by focusing on certain rather than severe sanctions, may, particularly if employed at that point in the epidemic, help reduce the aggregate harm suffered by users.

Are We on the Brink of an XTC Epidemic?

Given this preamble, it is instructive to return to the case of XTC. Do XTC, the XTC markets, and the current population fit the characteristics of a drug that is about to undergo exponential spread of use that will, with the passage of some time, manifest substantial ill effects on users?

First consider the question of how harmful or dangerous XTC use is. There are certainly reasons for concern. XTC appears capable of permanently altering the brain. It operates directly on a key component of the brain's pleasure control system (serotonin). And users report very down days after their highs in a manner that is reminiscent of the crash that follows a cocaine high.

On the other hand, the levels of mortality and morbidity associated with XTC are not extremely high. Furthermore, some perhaps substantial proportion of the adverse drug reactions associated with XTC may actually be attributable to adulterants or polydrug use, and the most common scenario leading to death is dehydration and heat exhaustion – an outcome that could plausibly be addressed through a "harm reduction" or "safe use" public health campaign analogous to campaigns against drunk driving.[1]

At this point I remain agnostic on the issue of how dangerous XTC is. It is clearly not "safe" or risk free. But that is not in question. The question is whether the proportion of those who try XTC who suffer long term harm and the scale of those harms will be of the same order of magnitude as with, say, cocaine or heroin. Or will XTC look more like marijuana or even caffeine? One can argue, however, that caution is the preferred approach. If XTC is restricted for ten more years and turns out not to be terribly dangerous the cost of that error is less than the cost of not restricting it and finding out ten years later that it is just as dangerous as cocaine, except that the honeymoon period is longer (and, hence, more deceiving).

Second, is there evidence that any increase in XTC use in the US fits the pattern of explosive and exponential growth, as opposed to being just a change in tastes or popularity over time that has no substantial self-reinforcing feedback? Again, I must remain agnostic. To paraphrase Mark Kleiman in another context, "The conditions are right for explosive growth. We have no hard evidence of such an explosion in use, but our indicator systems are such that the absence of such evidence is not completely reassuring." (Kleiman and Caulkins, 1992)

The conditions are right in the sense that XTC is not widely viewed as a hard or dangerous drug, many first-time users enjoy the drug's effects, it is associated with youth subculture, and that subculture is believed by some at least to be a trend-setting subculture. On the other hand, XTC is not new in general or in the rave scene. It has been part of US culture for a number of years, and has a deeper and longer-lasting presence in Europe. It is not obvious why use has not exploded already if it has the potential to do so at all. On the other hand, seizures have risen dramatically in the last year or two, and there are plausible stories for a delayed spread, pertaining, e.g., to availability or to greater awareness of the drug spread by the internet. But another

[1] Martin Iguchi (personal communications, June 14th, 2000) also notes that although animals will self-administer XTC, they do not persist in use to the extent that they do with other addictive drugs.

scenario is that the media have created the illusion of a rapid escalation of use (Jenkins, 1999). If so, the quickest way to solve this drug scare might be to stop paying attention to it.

Would Mandatory Minimum Sentences Be an Effective Response?

Suppose one did not want to rule out the possibility that XTC has substantial delayed health risks and one believed that its use was spreading explosively. It might be a very appropriate time to direct greater enforcement resources toward XTC. There are several forms those additional efforts could take that might well be useful, such as: (1) Increasing the number of DEA and Customs agents who are trying to disrupt smuggling of XTC into the country, (2) Expanding prosecutorial resources to support such efforts and do a better job of discriminating among truly important vs. lesser defendants, and (3) Creating sanctions for users that are swift, certain, and not overly draconian.

The form of expanded law enforcement that is least likely to be useful is the one the US has turned to most often in similar situations in the past – extending sentences. Long drug sentences have generally been found to be inefficient at controlling drugs, not only relative to treatment but also relative to other forms of law enforcement (Caulkins et al., 1997). There are many reasons for this, but an obvious one is that the people who get involved in drug markets are not always very far sighted, so the difference between being locked up for five years or six years occurs so far in their future that it carries little marginal deterrent power. Another is that the sentence length has often been keyed to quantity possessed, which is an unreliable indicator of the importance of the defendant. A courier or mule may be arrested while in possession of large quantities, but if a replacement can be recruited for a few hundred dollars then locking such a person up for five or ten years accomplishes very little.[2]

More to the point, however, if the goal is to disrupt the epidemic spread by focusing the intervention at this point in time, one would probably rather incapacitate five people for the next two years than one person for the next ten. Deterrent effects may manifest at the time of arrest, but not the effects of incapacitation.

Does this mean that mandatory minimum sentences are a bad idea for XTC at this point? Not necessarily literally but in practice yes. Literally having some minimum mandatory sentence is not necessarily a bad idea. Too often convicted drug defendants are simply put on probation, which is neither an effective sanction nor a meaningful control in jurisdictions where probation officers' case loads are very high. To avoid this problem, many states have mandatory two-day jail sentences for first time DUI offenders and mandatory 2-10 day sentences for second time offenders (Shine and Mauer, 1993).

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[2] The statement of Lewis Rice Jr., Special Agent in Charge of the Drug Enforcement Administration's New York Field Division, at this hearing is indicative of the problem. Rice describes the investigation of a major XTC smuggling organization based in the Netherlands. This organization offered a "finder's fee" of approximately $200 for recruiting a courier, so the loss of a courier's services costs the organization about $200 in incremental costs. These couriers smuggled between 30,000 and 45,000 pills per trip. Elsewhere, Rice observes that "Base offense level 26 (to which five-year mandatory sentences are keyed) is reached by trafficking about 28,570 dosage units of MDMA." Incarcerating someone costs the government about $25,000 per year, so giving a mandatory minimum sentence to a convicted courier, instead of just imposing a short sentence, imposes about $200 in costs on the supplier organization at a cost of about $125,000 to the taxpayers.

What is problematic with most mandatory drug sentences proposed as a response to an emerging drug threat, besides their being keyed to quantity possessed, is that the minimum sentences are much too long. Mandatory minimum drug sentences of five or ten years are too long to be cost-effective for all but a very select group of very high-level cocaine traffickers (Caulkins et al., 1997). (By way of comparison, the average time served for homicide in the US is about six years.)

Being able to threaten defendants with massive sanctions as a way of inducing cooperation is very appealing to law enforcement. In theory if the very long sentences are never actually used, they can be an efficient tool for prosecutors. However, even leaving issues of constitutionality and civil rights aside, for they are not within my area of expertise, past history is not encouraging. The long sentences are actually given not just threatened, and there is some evidence that the ability to avoid long sentences by turning state's evidence can even work perversely (Schulhofer, 1993). Regardless, it would be cheaper for taxpayers to greatly expand prosecutorial budgets than to make the existing prosecutors more effective by giving them mandatory minimum sentences as a tool. Buying prosecutorial efficiency at the expense of expanded prison populations is penny-wise and pound-foolish given the relative costs of adjudication and incarceration.

In summary, if one believed that XTC is likely to turn out to be a very harmful drug (more like cocaine than marijuana in the toll it takes on the average user) and one believed that we are at the brink of an XTC epidemic – two statements about which I am agnostic – then it might make sense to direct more law enforcement effort at XTC at this time. However, even in that case, it still would not make sense for that additional law enforcement effort to take the form of mandatory minimum sentences of the sort we have for cocaine and heroin at the federal level.

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March 12, 2001

The Hon. Diana E. Murphy
Chair, United States Sentencing Commission
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 200002-8002

RE: Proposed Amendment to the Money Laundering Guidelines
(U.S.S.G. § 2S1.1)

Dear Judge Murphy and the Members of the Commission:

As a current white collar criminal defense attorney and former federal prosecutor, I am writing to express my support for the amendment the Commission staff has proposed to the money laundering guidelines (U.S.S.G. § 2S1.1). The most important change the proposed amendment makes is that it eliminates the money laundering table in § 2S1.1, and instead bases the offense level for money laundering offenses primarily on the offense level for the underlying offense. This change is critically needed to correct certain unfortunate anomalies that have crept into judicial interpretations of this guideline over the years. These anomalies have produced inconsistent and inequitable results in individual cases, depriving the sentencing process for money laundering offenses of the predictability and relative uniformity the Guidelines were intended to secure.

The proposed amendment also remedies what has become a confusing circuit split on the question of whether fraud and money laundering offenses should be "grouped" under § 3D1.2(d). Several circuits have held that grouping is not appropriate. *See, e.g.*, *United States v. Green*, 225 F.3d 955 (8th Cir. 2000); *United States v. Napoli*, 179 F.3d 1, 8-13 (2d Cir. 1999); *United States v. Kneeland*, 148 F.3d 6, 16 (1st Cir. 1998); *United States v. O'Kane*, 155 F.3d 969 (8th Cir. 1998); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993); *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992). Other circuits have held that grouping of money laundering and fraud offenses is appropriate. *See United States v. Landerman*, 167 F.3d 895, 899 (5th Cir. 1999) (dicta); *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996) (dicta); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997); *United States v. Sokolow*, 91 F.3d 396, 410-11 (3d Cir. 1996); *United States v. Leonard*, 65 F.3d 1181, 1186 (5th Cir. 1995). Finally, some circuits have held that whether to "group" money laundering and fraud or other offenses under § 3D1.2(d) should be left to a case-by-case determination. *See United States v. McClendon*, 195 F.3d 598, 602 (11th Cir. 1999); *United States v. Filippi*, 1999 U.S. App. Lexis 2840 (4th Cir. Feb. 23, 1999) (mail fraud and money laundering counts were properly not grouped); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (mail fraud and money laundering counts were properly grouped); *United States v. McMahon*, 1997 U.S. App. LEXIS 36369 (4th Cir. 1997) (fraud and money laundering

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should not have been grouped); *United States v. Mullens*, 65 F.3d 1560, 1564-65 (11th Cir. 1995) (fraud and money laundering counts should be grouped where amount taken by fraud and amount laundered were co-extensive); *United States v. Porter*, 909 F.2d 789, 792-93 (4th Cir. 1990) (gambling and money laundering counts should not have been grouped).

During my own career as a federal prosecutor between 1989 and 1996, I used the money laundering statute in cases involving organized crime figures and individuals who had agreed to launder money for narcotics traffickers. The money laundering statutes (18 U.S.C. § 1956 and 1957) filled a significant void in the federal criminal code when they were enacted in 1986, and they unquestionably constitute one of the Justice Department's most important weapons against large-scale criminal enterprises.

During the course of the 1990's, however, the money laundering statutes became increasingly popular with federal prosecutors, and they have been put to uses that are far afield of what Congress envisioned when it enacted these statutes. While some of this increase in federal money laundering prosecutions is doubtless attributable to federal prosecutors' growing familiarity with, and understanding of, the money laundering statutes, there is another, less appropriate explanation for the increasing use of the money laundering statute as well.

Many federal prosecutors have long believed that the offense levels imposed by the Fraud Table under § 2F1.1(b)(1) were too low. This frustration with the penalties available under § 2F1.1 encouraged some prosecutors to use the money laundering statute as a way of circumventing the penalties that would otherwise be applicable in a fraud case. Prosecutors also discovered that the threatened use of money laundering charges -- with their much greater penalties -- could be employed as a cudgel to coerce guilty pleas in cases that might otherwise have gone to trial. While many federal prosecutors have avoided this temptation and have continued to employ the money laundering statutes in a manner consistent with the intent of the statute's drafters and the Justice Department's public pronouncements, there are some U.S. Attorney's Offices where the use of the money laundering statutes to increase the potential sentencing exposure of defendants in fraud cases has become essentially standard practice. Thus, rather than being used primarily against organized crime and narcotics trafficking, as the original drafters of the money laundering statutes contemplated, they are increasingly used by some federal prosecutors as a means of circumventing the penalty structure that would otherwise apply in fraud cases under § 2F1.1.

It is unfortunate enough that federal prosecutors are using the threat of possibly ill-founded money laundering charges to coerce defendants into entering guilty pleas in fraud cases they might otherwise choose to contest.[1] But equally problematic is the way that some courts have interpreted

[1] Unfortunately, juries do not necessarily see through ill-founded charges of money laundering. A review of the appellate case law suggests that money laundering convictions are

the grouping rules in cases where the laundering of funds is a secondary or incidental part of the defendant's overall scheme of fraudulent conduct. After holding that fraud and money laundering offenses should be "grouped" under § 3D1.2(d), several courts have held that the entire amount taken by fraud falls within the scope of the "relevant conduct" of the money laundering offense, even if only a small portion of the funds taken by fraud were ever laundered or intended to be laundered. The fraud loss is then used to calculate the defendant's sentence on the money

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frequently reversed on grounds of insufficiency of the evidence or because the conduct in question simply did not constitute money laundering. *See, e.g., United States v. Dobbs*, 63 F.3d 391, 397-98 (5th Cir. 1995) (reversing defendant's convictions on two counts of money laundering under § 1956(a)(1)(B)(i) because of insufficient evidence of intent to conceal); *United States v. Heaps*, 39 F.3d 479, 484-87 (4th Cir. 1994) (reversing defendant's convictions on four counts of money laundering charged under §s 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i) because evidence insufficient to establish the promotion or concealment elements of these offenses); *United States v. Dimeck*, 24 F.3d 1239, 1243-47 (10th Cir. 1994) (reversing defendant's conviction on charge of conspiracy to commit money laundering under § 1956(a)(1)(B)(i)); *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994) (reversing conviction for violation of 18 U.S.C. § 1957 because funds involved in financial transaction were not property derived from mail and wire fraud scheme); *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474-1478 (10th Cir. 1994) (affirming district court's grant of judgment of acquittal on twelve money laundering counts charging violations of § 1956(a)(1)(B)(i) because of insufficient evidence of intent to conceal, but reinstating five others); *United States v. Johnson*, 971 F.2d 562, 569-570 (10th Cir. 1992) (reversing the defendant's convictions on 27 counts charging violations of § 1957 because the "proceeds" of the defendant's acts of wire fraud were not received until after these transactions occurred); *United States v. Awan*, 966 F.2d 1415, 1433-35 (11th Cir. 1992) (reversing verdict on charge of conspiracy to violate money laundering statute because evidence insufficient to establish that defendant knew the funds involved were derived from criminal activity); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 923-25 (5th Cir. 1992) (reversing money laundering conviction under § 1956(a)(1)(B)(i)); *United States v. Lovett*, 964 F.2d 1029, 1036-37 (10th Cir. 1992) (reversing two money laundering counts based on § 1956(a)(1)(B)(i) because evidence insufficient to establish that defendant acted with the intent to conceal the nature or source of the funds used); *United States v. Sanders*, 929 F.2d 1466, 1472 (10th Cir. 1991) (reversing two money laundering convictions under § 1956(a)(1)(B)(i) because of insufficient evidence to establish that transactions were designed to conceal the nature or source of the proceeds used); *United States v. LaBrunerie*, 914 F. Supp. 340, 346 (W.D. Mo. 1995) (dismissing money laundering charges prior to trial because transactions did not involve proceeds derived from a specified unlawful activity). *Cf. United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) (finding that evidence was insufficient to sustain three money laundering charges under § 1956(a)(1)(A)(i), although it was sufficient to sustain the defendant's convictions under § 1956(a)(1)(B)(i)).

laundering table under § 2S1.1, even though the actual amount laundered was a mere fraction of the figure that is used. *See United States v. Landerman*, 167 F.3d 895, 899 (5th Cir. 1999) (dicta) (court could properly have consolidated $23,000 personally laundered by defendant with $6.1 million taken in fraud scheme and then calculated loss using the money laundering table); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (where defendant laundered only $5,051, but received $851,000 as the proceeds of his fraudulent activities, the $851,000 figure would be used to calculate his offense level under the money laundering table); *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996) (dicta); *United States v. Sokolow*, 91 F.3d 396, 410-11 (3d Cir. 1996) (calculating defendant's sentence under the money laundering table based upon not only the $2.2 million laundered, but also an additional $1.8 million taken by the underlying fraud scheme); *United States v. Leonard*, 65 F.3d 1181, 1186 (5th Cir. 1995) (where defendant obtained $200,000 by fraud, but laundered only $3,320, defendant's sentence would be calculated based on the $200,000 amount, using the money laundering table). Moreover, all of the Chapter 3 enhancements that would otherwise have applied to an offense level derived from § 2F1.1 are now applied to a figure derived from § 2S1.1. This methodology can dramatically transform the defendant's sentence, as a case drawn from my own experience as defense counsel demonstrates.

The defendant, the operations manager of a North Carolina nursing home, was convicted on charges of misstating expenses on the facility's cost reports in order to avoid making substantial paybacks on funds previously advanced to the home under the Medicaid state plan. The total amount of the fraud loss was found to be $700,000. Two-level enhancements were also applied for more than minimal planning, role in the offense, abuse of position of trust, and vulnerable victims. Had the case been limited to the fraud charges, the defendant's offense level would have been a **24 (51-63 months).**

However, the defendant was also charged with money laundering for allegedly devising a separate scheme whereby she purchased supplies for the nursing home from her husband's company by way of a dummy intermediary set up to disguise the fact that she was dealing with a related party. While the purpose of this scheme seems to have been to disguise the source of the supplies she was purchasing, rather than to disguise the source or ownership of the funds she was using to purchase them, the defendant was simultaneously charged with both "concealment" money laundering under § 1956(a)(1)(B)(i) and "reinvestment" or "promotion" money laundering under § 1956(a)(1)(A)(i). She was convicted by the jury under both theories. The total amount of funds involved in this series of transactions -- which were also charged in the indictment as a scheme to defraud the government by evading the related party rules -- totaled roughly $55,000.

The District Court found that the fraud and money laundering offenses "grouped" under § 3D1.2(d). Accordingly, rather than calculate the defendant's money laundering guidelines based on the amount actually at issue in the supposed "laundering" transactions ($55,000), the court calculated the defendant's sentence under § 2S1.1's money laundering table using the $700,000

amount. This generated an offense level of **27**, to which a further six levels of Chapter III enhancements related to the fraud offense were added, producing a final offense level of **33 (135-168 months).** Thus, what would have been a sentence of 4-5 years, if calculated based on the fraud guidelines alone, was converted by the successful (and supplemental) use of the money laundering statute into a case carrying a sentence of 11-14 years.[2] The actual sentence imposed of 140 months (eleven-and-a-half years) was wildly out of proportion to that typically imposed in fraud cases involving far greater losses, as the cases cited in the accompanying attachment from our sentencing memo demonstrate.[3]

This troubling result was expressly recognized by the Second Circuit in *United States v. Napoli*, where it noted that

> grouping fraud and money laundering counts would produce an anomalous result in an important class of cases: *viz.*, where only a small portion of the funds obtained by a fraud scheme are thereafter laundered .... [In such cases,] grouping -- which is meant to protect defendants against arbitrary additions resulting from the Government's formal charging decision -- would actually increase the defendant's sentence, and this problem occurs systematically in cases where only a small portion of the funds obtained from a fraud victim are laundered.

179 F.3d at 12.

The Introductory commentary to U.S.S.G. § 3D1 states that the grouping rules are intended "to provide incremental punishment for significant additional criminal conduct" while also "limit[ing] the significance of the formal charging decision and [] prevent[ing] multiple punishment for substantially identical offense conduct . . . ." In cases where there is a vast disparity between the amount of money obtained by fraud and that which is laundered, however, allowing the fraud loss amount to be used to calculate the defendant's offense level under the money laundering guideline and table will result in a dramatic increase in the defendant's

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[2] Under the amendments currently proposed by the Commission staff, the defendant's offense level in this case would have been either a **28 (78-97 months)** or a **29 (87-108 months),** depending on how much of an enhancement was given based upon the defendant's conviction for "promotion" or "reinvestment" money laundering.

[3] It perhaps is also worth noting that prior to trial, the Government offered the defendant a plea agreement to a single conspiracy charge, with a recommendation that she serve 18 months. In this case, the money laundering statutes were clearly used to dramatically punish a defendant for not agreeing to a guilty plea, with the apparent intention of making her case a cautionary example to others.

prospective sentence, thereby turning on their head the fundamental principles underlying the grouping rules. In such a case, there will not be "incremental" punishment for additional criminal conduct, but a complete transformation in the defendant's sentencing exposure based upon conduct that was only a small part of the overall scheme. In addition, rather than limiting the significance of the formal charging decision, the approach reflected by cases like *Leonard* and *Walker* winds up dramatically magnifying the effect of the prosecutor's decision to charge particular acts as money laundering, rather than as merely additional overt acts in the underlying scheme to defraud.

Two drafting issues that apparently remain unresolved by the Commission staff are (1) whether the enhancement applied in cases of "promotion" or "reinvestment" money laundering under § 1956(a)(1)(A)(i) should require a showing that the laundered funds "significantly" or "materially" promoted further criminal conduct, and (2) whether the resulting enhancement should be two or three levels (*see* section § 2S1.1(b)(2)(B) of the proposed amendment). It is my sense that many federal prosecutors either do not clearly understand the difference between "promotion" or "reinvestment" and "concealment" money laundering, or prefer to charge both in order to increase the pressure on defendants to plead guilty (because "promotion" money laundering is a higher base offense level [23] at present). The defendant in the case I discussed earlier was charged with both "promotion" and "concealment" for the exact same set of transactions, and was convicted by the jury on both theories. *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) and *United States v. Bifeld*, 42 F. Supp.2d 477 (M.D. Pa. 1999) provide additional illustrations of defendants being charged under both subsections. Because it is my sense that neither prosecutors nor juries are able to reliably distinguish between what constitutes "promotion" and "concealment" money laundering, I believe it is very important that any additional enhancement for "promotion" money laundering require a showing to the court that the laundered funds "significantly" or "materially" promoted further criminal conduct.

I therefore strongly endorse the efforts of the Commission staff to restore equity, uniformity, and predictability to the operation of the money laundering guidelines, as well as to remedy the circuit split that has developed concerning the "grouping" of fraud and money laundering offenses.

Very truly yours,

Jefferson M. Gray

Enclosure

COMPARATIVE SENTENCES IN OTHER FEDERAL FRAUD AND/OR MONEY LAUNDERING CASES

FRAUD AND MONEY LAUNDERING CASES FROM THE WESTERN DISTRICT OF NORTH CAROLINA:

United States v. Guller, Docket No. 3:97CR294-20-MU (W.D.N.C. 1999): defendant convicted at trial of laundering $1.139 million derived from $17 million theft from Loomis Fargo sentenced to 97 months (pertinent documents attached)

United States v. Cole, Docket No. 3:97CR87-V (W.D.N.C. 1998): defendant, Criminal History Category IV, who pled guilty to fraud charges involving a loss of at least $600,000 and possibly as much as $870,000 [the amount ordered payable as restitution], and who also pled guilty to "promotion" money laundering, and who received an enhancement for obstruction of justice and was denied a reduction under § 3E1.1, received an agreed sentence of 110 months (pertinent documents attached)

United States v. McMahon, 1997 U.S. App. LEXIS 36369 (4th Cir. Dec. 30, 1997) (unpublished): defendant convicted at trial in W.D.N.C. on charges of fraud (involving a loss of $9 million), "concealment" money laundering (involving $1.2 million), tax evasion (evading more than $1.8 million in taxes), and other offenses found to be an offense level of 31 (108-135 months) (pertinent documents attached); *see also* Government's Brief in Appeal No. 96-4515 at pages 4-7 (attached as Exhibit 13)

United States v. Mederos, Docket No. 3:97CR132 (W.D.N.C. 1997): defendant who pled guilty to charges of fraud (involving a loss of more than $13 million) and money laundering (involving more than $1 million) and who received 4-level enhancement for role (= offense level of 32?) sentenced to 87 months after receiving three-level reduction under U.S.S.G. § 3E1.1 (pertinent documents attached)

FRAUD AND/OR MONEY LAUNDERING CASES FROM OTHER JURISDICTIONS:

United States v. Hedges, 175 F.3d 1312, 1999 U.S. App. LEXIS 9773, *8 (11th Cir. 1999): defendant who pled guilty to securities fraud that caused a loss of more than $92 million found to be an offense level 28 (78-97 months) and received a sentence of 84 months

United States v. Nesenblatt, 171 F.3d 1227, 1229 (9th Cir. 1999): defendant pled guilty to wire fraud charges involving a loss of $80 million; with additional enhancements for role in the offense (3 levels) and receiving more than $1 million in proceeds from an offense involving a financial institution (4 levels), defendant's offense level was a 30 (97-121 months) before applying downward departures

United States v. Reeder, 170 F.3d 93, 109 (1st Cir. 1999): defendant was convicted at trial of various fraud-related offenses causing a loss of $16.5 million [no money laundering charges were brought]; he received a four-level enhancement for role; defendant was found to be an offense level 23 (46-57 months), and received a 46-month sentence

United States v. Landerman, 167 F.3d 895, 897-98 (5th Cir. 1999): defendant, an attorney, pled guilty (after appealing and securing reversal of his original convictions at trial) to charges of conspiracy to commit mail fraud, wire fraud, and money laundering arising out of a scheme that resulted in a loss of $6.1 million; "virtually all of the $6.1 million acquired by the scheme during Landerman's involvement was laundered"; defendant received a 60-month sentence

United States v. Christopher, 142 F.3d 46, 55-56 (1st Cir. 1998): defendant was convicted of wire fraud charges at trial arising out of a scheme that resulted in losses of $26.7 million and was sentenced under 1988 version of the Sentencing Guidelines to 121 months, after receiving various enhancements

United States v. Fivaz, 1998 U.S. App. LEXIS (10th Cir. June 16, 1998) (unpublished): defendant who pled guilty to fraud charges arising out of a Ponzi scheme that caused a total loss of at least $7 million found to be an offense level 19/Criminal History Category III (37-46 months)

United States v. Calozza, 125 F.3d 687, 689-93 (9th Cir. 1997): defendant stole $8.8 million through a Ponzi scheme, and recycled $2.3 million in payments to the earlier investors; defendant pled guilty to charges of fraud and money laundering; defendant received enhancements for vulnerable victims and abuse of position of trust, but a reduction for acceptance of responsibility; money laundering and fraud charges were not "grouped"; Court of Appeals found that defendant's offense level should have been a 31 (108 to 135 months)

United States v. Loayza, 107 F.3d 257, 266 (4th Cir. 1997): defendant in mail fraud Ponzi scheme defrauded investors of $643,000, and used funds coming in from new investors to make $96,000 in "interest payments" to earlier investors; defendant was convicted at trial on fraud

charges [no money laundering charges were brought] and appears to have been sentenced based on an offense level of 18 (27-33 months)

United States v. Rockson, 1996 U.S. App. LEXIS 33480, *26-*28 (4th Cir. December 24, 1996) (unpublished): two defendants (Dadzie and Rockson) were convicted at trial of laundering $6 million and $2 million respectively for international narcotics traffickers; Dadzie received a sentence of 121 months and Rockson was sentenced to 87 months

United States v. Smith, 44 F.3d 1259, 1263 (4th Cir. 1995): defendants were convicted at trial on charges of both fraud and of money laundering involving a loss of $2.9 million; the lead defendant received a sentence of 87 months

United States v. George, 986 F.2d 1176, 1177-79 (8th Cir. 1993): defendant who pled guilty to bank fraud charges involving an actual loss to seven banks totaling $4.3 million was sentenced to 33 months in prison and ordered to pay restitution "in an amount exceeding $4 million"

United States v. Hernandez, No. 98-963-CR-Moreno (S.D. Fla. sentenced 4/13/99): Elsa Hernandez, director of nursing at a home health agency, received a 63-month sentence after pleading guilty to participation in a conspiracy to file more than $42 million in false claims to Medicare (*BNA Health Care Fraud Report*, 4/21/99, at 357 (copy attached)

United States v. Dominguez (S.D. Fla. 1999): owner of health care agency who pled guilty to charges of Medicare fraud involving losses of $12.9 million sentenced to six years in prison (*New York Times*, 1/25/99, at page A19) (copy attached)

United States v. Johnson, No. 1:97-CR-426 (N.D. Ga. sentenced 12/28/98): two defendants were convicted at trial on some charges, and subsequently entered guilty pleas to other charges, which alleged that they had defrauded Medicaid out of $9.5 million. The two defendants were accused of overbilling Medicaid for costs at three nursing homes owned by one defendant, and then diverting the resulting proceeds to themselves through various financial transactions. The two defendants received sentences of 50 months and 36 months in prison and were ordered to pay restitution of $5 million and $1.15 million respectively (*BNA Health Care Fraud Reporter*, 1/13/99, at 23) (copy attached)

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March 8, 2001

Michael Courlander, Public Affairs Officer
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Re: Comment – Proposed Amendment 18 – Immigration

Gentlemen:

I am the original author of the Aggravated Felon Removal Act, which was enacted by Congress as part of the Omnibus Crime Control Act in November 1988.

I strongly agree with the concept that the current uniformly applied 16 level enhancement is inappropriate.

The term "Aggravated Felon " was designed by me to **only apply** to non-citizens convicted of Murder, Robbery, Rape, Kidnapping and Felony Sale of Narcotics. The Sentencing Commission appropriately set a 16 level enhancement for these types of cases. Unfortunately, over the last 12 years Congress has substantively expanded the original narrow definition of what should constitute an Aggravated Felony.

I intend to suggest to the House and Senate Immigration Sub-Committees that the current overly broad definition be scaled back so the original intent can be effectuated.

Thus, your proposal in Option One to impose a 16 level increase over base on those that have been convicted of an aggravated felony involving death, serious bodily injury, the discharge or other use of a firearm, or a serious drug trafficking offense is remarkably prescient on your part! In this option, which is the one I recommend, you correctly discern that these particular crimes, not the sentence should be the trigger. This is appropriate, since in some courts cases can be disposed of with minimum sentencing provided the defendant will be deported.

With respect to Option One I would merely add the crimes of Rape and Robbery to the listing. Kidnapping, which I had in the original act, fortunately does not occur that often so it could be deleted. However, Rape and Robbery should be definitely included.

I again commend you on discerning and proposing appropriate corrections to a serious problem. The additions of expanded definitions, etc. to my original act have not only offended my pride of authorship but are missing the mark and ensnaring inappropriate people.

If I can arrange my schedule, I wish to testify at the public hearing and will be in contact with you tomorrow with respect to this.

Sincerely,

Walter P. Connery

Walter P. Connery

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March 1, 2001

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Re: Comments On Proposed New Guideline For Fraud

Dear Members of the Sentencing Commission:

I submit for the Commission's consideration my comments to the proposed new guideline for fraud. By way of background, I am a former Justice Department Fraud Section prosecutor from the pre-guidelines era. In private practice, I specialize in white collar criminal defense. I have become familiar with § 2F1.1, the current fraud guideline, by handling several cases in which it was applied to calculate the sentence.

I understand that the Commission's proposed amendment would consolidate the fraud guideline with theft in a revised § 2B1.1. I have reviewed the proposed guideline and have the following comments:

1. Loss. In many typical fraud cases, loss is a hotly contested issue, which the government chooses to avoid by not even attempting to prove at trial. For example, in a case involving complex financial transactions and the submission of allegedly false financial information to a bank, the government will request, and be granted, jury instructions that state that it is no defense that the bank did not rely on the information, or did not suffer a loss. Indeed, a defendant can be convicted without any evidence of loss in the record. Then, for sentencing purposes, the responsibility for applying the guidelines is given to a probation officer, who did not attend the trial and is not familiar with the complex financial transactions involved in the case. Nevertheless, the probation officer must write a presentence report and ascertain the loss. In my experience, the probation officer is ill-equipped for this task because of this lack of familiarity, combined with the absence of clear evidence in the record establishing loss. To alleviate this problem, the probation officer merely contacts the government case agent, such as the FBI, to get the government's version of the loss amount and then adopts that figure to apply the guideline level. The defense is immediately at a disadvantage, having to play "catch up" by

filing objections to the presentence report and trying to convince the court to order the probation officer to change the report.

This determination of loss becomes more important than the actual trial because it drives the guideline level. Yet the loss calculation lacks the precision, and fairness, that the guidelines assume it to have. This is compounded by the fact that, even if a defendant is acquitted on the majority of the counts against him, these counts are still considered "relevant conduct" to be used by the probation officer, in consultation with the case agent, to come up with a loss figure. When loss has not been litigated at trial, which is often the case, the post-trial calculation of loss is an inherently unreliable and unfair basis to determine the sentence.

For these reasons, and because fraud cases involve too much double counting (discussed below), I do not believe there is any good reason to change the loss table to increase the offense level for various amounts of loss. The proposed new guideline would add anywhere from one to six additional guideline levels based on loss. This will only increase the unfairness of the arbitrary manner in which loss is calculated. Regardless of what causation standard is used in the new guideline (actual loss, reasonably foreseeable loss, intended loss, etc.), in complex financial cases the loss calculation is performed by someone who is simply not familiar enough with the evidence to determine even a reasonably accurate dollar amount. Therefore, I respectfully suggest that the Commission not exacerbate this problem by increasing the penalties for loss.

2. More than minimal planning. I enthusiastically support the elimination of this enhancement, as proposed by the new guideline. This is currently an automatic 2-level increase, because in any case with any amount of loss, it is automatically assumed that it involved more than minimal planning. This has led to double counting with § 3B1.1 – leader or organizer, which is a 4-level increase. Defendants who are considered leaders or organizers of conduct that is considered "extensive" under § 3B1.1, are also considered to have engaged in "more than minimal planning." The result is double counting two different guidelines, for a total increase of 6 levels, for the same conduct.

While the proposed elimination of "more than minimal planning" will alleviate this double-counting, it does so only by increasing the loss table point levels. For the reasons discussed above, I do not believe that these increases are appropriate. Furthermore, the same double-counting problem will arise with the proposed increase for "sophisticated means" in § 2B1.1(b)(10) of the proposed amendment. This increase of 2 levels (or, alternatively, an increase up to level 12) will also be satisfied by someone being a leader or organizer. The net result will still be a double counting of two guidelines, for a total increase of 6 levels, for the same conduct.

In any fraud case in which an extensive loss is calculated, the probation officer will automatically include an increase under § 3B1.1 on the theory that the defendant was the leader or organizer of conduct that was "extensive," even if no one else is prosecuted. These enhancements, i.e., more than minimal planning, sophisticated means, and leader/organizer,

should all be eliminated as redundant to the initial determination that a significant loss was caused. That is, the increased offense levels that correspond with the increased loss amounts already take into account the increased "sophistication" and the "extensiveness" of the underlying offense.

3. Retroactive Effect. The proposed amendment represents a major change to the fraud guideline. Because of the breadth of the proposed changes, it is difficult to determine which particular provisions will result in lower sentences for defendants already sentenced. Therefore, it is respectfully suggested that the amendment, if adopted, be designated for retroactive application under § 1B1.10(c), in order that defendants who have already been sentenced based on inaccurate loss calculations and double counted enhancements receive the benefit of whatever relief the amendment provides them.

Finally, in the money laundering area (§ 2S1.1) the amendment includes a specific Application Note (Note 7) that states that the conviction for money laundering should be grouped with the counts of conviction for the underlying offense. This amendment will definitely benefit some defendants who received extra guideline levels due to the separate grouping of money laundering. Therefore, retroactive effect should be given to this amendment.

Thank you for the opportunity to submit these comments.

Sincerely,

Terence J. Lynam

Terence J. Lynam

Freeborn & Peters

February 23, 2001

United States Sentencing Commission
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Dear Sir or Madam:

We would like to submit the following comments regarding the Proposed Amendments to the Sentencing Guidelines:

(1) We recommend that application of (a)(1) of proposed §2S1.1 should not be expanded to include defendants who are otherwise accountable for the underlying offense under 1B1.3(a)(1)(B). The reason for this recommendation is that involvement by a defendant under 1B1.3(a)(1)(B) is substantially less than under 1B1.3(a)(1)(A).

(2) We recommend that the enhancement referred to in (b) Specific Offense Characteristics (2)(C) not be expanded to include all forms of concealment. We base this recommendation on the belief that sophisticated concealment should be a sufficient basis for enhancement.

(3) Regarding application of Subsection (a)(2)(C) Value of Funds, we recommend Option 2 because it would more fairly and accurately assess the punishment of the crime, than would the methods set forth in the other options.

(4) We would also recommend that the provisions of §2S1.1 be made retroactive to previously sentenced defendants, as were the previous amendments under §1B1.10. Only a limited number of cases would be affected, and in those cases an equalization of sentencing would be accomplished.

Yours very truly,

Weston W. Marsh

WWM/pcb

cc: Peter W. Olson
Oscar William Olson, Jr.

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David Tarler
1209 12th Street, NW
Washington, DC 20005-4305

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

March 5, 2001

Dear Commissioners:

As an attorney and an archeologist whose responsibilities include, among other things, training Federal attorneys on archeological and heritage resources protection laws, I am responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage (66 Fed. Reg. 7962, 7991-92 (2001)). I believe that the U.S. Sentencing Guidelines are deficient as applied to crimes affecting the archeological resources, historic properties, and other cultural items that are part of our heritage, and I respectfully urge the Commission to incorporate Guidelines provisions in the Economic Crimes Package that redress those deficiencies. Although I serve as a consultant to the Department of the Interior's Consulting Archeologist, my opinions do not necessarily reflect the position of the Department of the Interior.

In the United States, we recognize the importance of heritage resources, as well as the role of government in protecting them. As Attorney General Janet Reno wrote in the foreword to Heritage Resources Law (Hutt, Blanco, and Varmer (1999)), heritage resources

> . . .are important to us on many different levels: providing our scientists with information which is both fascinating and important to us all; and giving ordinary modern peoples a sense of respect and kinship with ancient peoples. . .Our heritage resources serve as the ultimate model of what we are capable of accomplishing. . ..
>
> The universal fascination with traces of our past is evident in every community in the nation. Americans from all walks of contemporary life agree that we must defend our heritage resources as fiercely as we defend our natural resources. The law is one of our most powerful tools.

Heritage resources crime is serious because it deprives people of things that satisfy their emotional and spiritual needs, and intellectual curiosities, but it also is serious in terms of economics and the Government's ability to exercise its legal responsibilities. In terms of economic impact, according to INTERPOL, "[t]he annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking" (INTERPOL-USNCB, Cultural Property Program, About the Cultural Property Program, <www.usdoj.gov/usncb/cultprop/about/cultureabout.htm>(accessed Jan. 25, 2001)). In terms of legal responsibilities, heritage resources crime adversely affects property and other items for which the United States has a perpetual duty to act either as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives, and Native Hawaiian Organizations. Unfortunately, the Sentencing

Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes in at least five ways.

First, the courts use the Guidelines to constructively treat defined archeological resources (16 U.S.C. 470bb(1)) and historic properties (16 U.S.C. 470w(5)) as mere fungible property. In the absence of a specific guideline addressing crimes that affect archeological resources and historic properties, they have chosen to use the theft of property guideline as the most analogous guideline. However, with no specific enhancement for archeological resources and historic properties in the theft guideline, the resulting base offense level for heritage resources crimes is the lowest in the entire Guidelines. Moreover, the Guidelines do not provide sentence enhancements even when crimes affect what the Legislative and Executive branches of government have determined to be resources possessing enhanced significance, such as National Historic Landmarks (16 U.S.C. 470a(a)(1)(B)), national monuments (16 U.S.C. 432), historic properties included in the World Heritage List (pursuant to the Convention concerning the Protection of the World Cultural and Natural Heritage), "designated archaeological or ethnological material" (19 U.S.C. 2601(7)), or "pre-Columbian monumental or architectural sculpture or mural." Thus, as applied, today the Guidelines stand for the proposition that offenses involving odometers and contraband cigarettes are more repugnant than crimes affecting World Heritage sites.

Second, the courts are split regarding use of the Guidelines for sentencing criminal violations of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170). NAGPRA protects defined Native American cultural items (25 U.S.C. 3001(3)). In U.S. v. Corrow (941 F. Supp. 1553, 1566-67 (D.N.M. 1996), aff'd, 119 F.3d 796 (10th Cir. 1997), cert. denied, 522 U.S. 1133 (1998)), the sentencing court found that, beside there being no specific guideline addressing NAGPRA crimes, no analogous offense guideline existed for use to determine the base offense level. Consequently, the court was guided by the general sentencing provisions of 18 U.S.C. 3553(b). Other courts, however, have applied the Guidelines by analogy to NAGPRA crimes (see U.S. v. Garcia, No. 92-515-LFG (D.N.M. 1993); U.S. v. Stephenson, No. CR 95-82-LH (D.N.M. 1995); U.S. v. Kramer, No. CR-96-337-BB (D.N.M. 1997); U.S. v. Tidwell, No. CR-97-00093-02-EAC (D. Ariz. 1998), aff'd, 191 F.3d 976 (9th Cir. 1999); U.S. v. Fragua, No. 1:97 CR 00482-001 (D.N.M. 1998); U.S. v. Tosa, No. 1:97 CR 00482-002 (D.N.M. 1998)). To compound the issue of the split of authority as to whether the Guidelines are applicable to NAGPRA crimes, some Native American cultural items subject to NAGPRA also are archeological resources subject to the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470aa-mm), and in sentencing defendants convicted of violating ARPA, the Guidelines are used analogously. Thus, the same item(s) might fall inside or outside the Guidelines, depending on the court and the statute used to convict. This confusion regarding the applicability of the Guidelines for crimes involving Native American cultural items that also are archeological resources appears to frustrate the underlying rationale of the Guidelines, namely reasonable uniformity in sentencing.

Third, the Guidelines, as applied, give disparate treatment to national cemeteries, on the one hand, and other human remains, funerary objects, and cemeteries on "public lands" (16 U.S.C. 470bb(3)), "Federal lands" (25 U.S.C. 3001(5)), "Indian lands" (16 U.S.C. 470bb(4)), "tribal land" (25 U.S.C. 3001(15)), and wherever else Federal law applies (see 16 U.S.C. 470ee(c)). The Guidelines provide an enhancement for crimes affecting national cemeteries, but not other interments. Consequently, to the extent that this enhancement applies to human remains or funerary objects, the Guidelines do not stand for the equal protection of dead bodies coming within the scope of Federal law, nor do they satisfy the objective of reasonably uniform sentences for similar criminal offenses.

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Fourth, the Guidelines, as applied, do not distinguish between heritage resources crimes committed for non-pecuniary gain and offenses committed for pecuniary gain or commercial purpose, as they do for other crimes. Commercial looters, who earn all or part of their income from looting and the subsequent sale of what they find, might make substantial sums of money from their activities, whereas non-commercial looters engage in these activities because of their interest in the past and their desire to possess archeological, historic, and other cultural items. When the courts apply the Guidelines uniformly to commercial and non-commercial looters, they risk imposing the same sentence for criminal conduct of different severity. Consequently, as they are used for heritage resources crimes, the Guidelines could be undermining some of the basic purposes of criminal punishment, namely just punishment and rehabilitation.

Fifth, the Sentencing Guideline application notes omit the statutorily prescribed measure of "archaeological value" to determine loss for offenses committed in violation of the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470ee), and this omission has resulted in at least one court refusing to follow the will of Congress. In 1979, Congress, believing that archeological resources and sites are an accessible and irreplaceable part of the Nation's heritage, that they were increasingly endangered because of their commercial attractiveness, and that existing Federal laws did not provide adequate protection to prevent their loss and destruction, enacted the Archaeological Resources Protection Act to secure the protection of archeological resources and sites (16 U.S.C. 470aa). At that time, Congress realized that any disturbance of an archeological site always results in archeological destruction because removing an archeological resource from its original location always destroys the context of the artifact. Recognizing that fair market value and the costs of repair and restoration, or both, to gauge loss would be inadequate to measure this irreparable harm, Congress provided a means to determine the value of the loss to humanistic science caused by an ARPA offense. That measure of loss, called "archaeological value" (16 U.S.C. 470ee(d) & ff(2)(A)), is defined in the uniform regulations that Congress required the Executive Branch to promulgate and submit to Congressional committees (see 16 U.S.C. 470ii). Archaeological value is

> the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.
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> 43 C.F.R. 7.14(a); 36 C.F.R. 296.14(a); 18 C.F.R. 1312.14(a); 32 C.F.R. 229.14(a).

The definition of archeological value in the ARPA uniform regulations is a reasonable interpretation of the Act, and is consistent with the purpose of the statute and the authority given by Congress to the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Tennessee Valley Authority to promulgate regulations. Moreover, archeological value (combined with costs of restoration and repair) has been held to be an appropriate method of determining loss for an offense involving an archeological resource (see U.S. v. Shumway, 112 F.3d 1413, 1425-26 (10th Cir. 1997)). Nevertheless, at least one court constructively rejected categorically the use of archeological value to measure loss. In U.S. v. Hunter (48 F. Supp.2d 1283 (D. Utah 1998)), the court accepted the Government's valuation of damage to archeological sites managed by the Bureau of Land Management and the Forest Service, based on the cost of repair and restoration. However, the court rejected the archeological value offered by the United States for the destroyed resources at all the sites as a "speculative assessment", "fictional scholarship", and "absurd." Instead, the court assigned an admittedly subjective and arbitrary measure of loss to the

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destroyed resources that it called "aesthetic diminishment."

The holding in U.S. v. Hunter, namely, that, in almost all cases, the commercial value of archeological resources destroyed or injured must be used to determine loss, has a chilling effect on the deterrent value of ARPA. Also, it raises further legal issues about the use of archeological value. For example, courts might rely on Hunter to hold that they have discretion to use commercial value or archeological value for purposes of determining whether a violation is a misdemeanor or a felony. Similarly, administrative law judges might rely on Hunter to find that they have discretion to use archeological value or commercial value to determine the amount of a civil penalty.

Contrary to the court in Hunter, I believe that when it enacted ARPA, Congress mandated that, for purposes of sentencing, the value of the destroyed or injured archeological resources is either the commercial value or the archeological value of the resources, and that Congress gave the Executive Branch the authority to choose which of those value to use to determine loss. Although it is absurd to use archeological value when determining whether an ARPA offense is a felony (or the actual damages recoverable in a civil penalty), and yet ignore the statute when assessing loss for purposes of sentencing, Hunter, nevertheless, stands for the proposition that the Sentencing Guidelines can be used to deny the Executive Branch the authority it derives from Congress, through ARPA, to decide how archeological resources are to be valued when they are destroyed in violation of the Act.

I offer five suggestions for remediation of the deficiencies I have presented. As part of the Economic Crime Package, I respectfully urge the Commission to address them, either through a new guideline, or amendments to existing guidelines, specific offense characteristics, and application notes.

First, the Commission should remedy the split of authority over whether the Guidelines apply to crimes committed in violation of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170), and the problem of inconsistent outcomes, where the same offenses committed against the same resources result in different sentences, just because some offenses were charged under ARPA (and were sentenced under the Guidelines), and other offenses were charged under NAGPRA (and, thus, were sentenced under 18 U.S.C. 3553(b)). I believe that the Guidelines should be made to apply to violations of 18 U.S.C. 1170.

Second, the Commission should remedy the Guidelines' disparate treatment of dead bodies, where an enhancement exists for crimes committed in a national cemetery, but no enhancement exists for crimes committed against other human remains or funerary objects that come within the scope of Federal law. I believe that if sentencing enhancements exist for crimes involving national cemeteries, that offenses against any human remains or funerary property deserve an enhancement, wherever Federal law applies.

Third, the Commission should remedy the equal treatment by the Guidelines of commercial and non-commercial looters, which risks thwarting the purposes of criminal punishment by providing the same sentence for criminal conduct of differing severity. I believe the Guidelines should provide an enhancement for crimes involving heritage resources committed for pecuniary gain or commercial purpose, just as they do for other offenses.

Fourth, because heritage resources crime affects important interests such as social identity, spiritual and emotional well-being, academic pursuit, economics, and the fiduciary responsibilities of the Government to the public, in general, and native peoples, in particular, the Commission should disavow the policy

engendered by the Guidelines, that crimes against heritage resources are among the least repugnant for our nation. I believe the base offense level should be raised for crimes involving defined "archaeological resources" (16 U.S.C. 470bb(1)), "historic properties or resources" (16 U.S.C. 470w(5)), "sacred objects" (25 U.S.C. 3001(3)(C)), "cultural patrimony" (25 U.S.C. 3001(3)(D)), and "objects of cultural heritage" (18 U.S.C. 668(a)), regardless of the statute used to convict, or, alternatively, that there should be an enhancement. I also believe the sentence should be further enhanced when the resources have enhanced significance, either because they come from National Historic Landmarks or national monuments, or because they constitute "designated archaeological or ethnological material" or "pre-Columbian monumental or architectural sculptures or murals." Furthermore, if the resources come from a World Heritage Site, the sentence should include an even greater enhancement.

Fifth, the Commission should include "archaeological value", as defined by the ARPA uniform regulations, in the application notes. The inclusion of "archaeological value" would overrule the refusal of some courts to apply this statutory measure in determining loss for purposes of sentencing, it would obviate the risk of creating disparity in sentences for similar criminal offenses, committed by similar offenders, through the use of arbitrary loss determinations, and it would remedy the absurdity of using archeological value to determine whether an offense is a felony, but ignoring it at sentencing. I believe that archeological value should be the proper measure of loss in an offense involving an archeological resource, regardless of the statute used to convict, where the Government proves archeological value to a jury.

The looting of, and injury to, heritage resources harms our citizens' well-being, and significantly affects illegal markets and important fiduciary responsibilities. Recognizing these threats, each Secretary of the Interior, since 1991, has followed a policy, called "A National Strategy for Federal Archeology", whose objectives include education, efforts to fight looting and preserve the archeological record in place, and interagency cooperation in information exchange at the Federal, State, and local levels. Because the issues concerning sentencing for crimes involving heritage resources are so important to the Federal archeology program, I respectfully urge the United States Sentencing Commission to address them within the framework of the Economic Crime Package.

Sincerely,

David Tarler

David Tarler

Michael A. Greene
263 East 3560 South
Salt Lake City, UT 84115-4720
March 05, 2001

The United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002
Mr. Michael Courlander, Public Affairs Officer

Dear Mr. Courlander:

I request that this letter and the enclosed report, previously submitted to the Senate Judiciary Committee on Club Drugs, be admitted into the record on the pending Ecstasy sentencing revision. The report discusses reasons for accepting Ecstasy as a legitimate psycho-therapeutic agent and for a more sound approach when considering methods to deal with its abuse.

I neither use illegal drugs nor do I encourage the abuse of any drug, including tobacco or alcohol, because of their negative effects; but I am even more concerned for the total effect that drug prohibition has had on our society. It has diminished the public's trust in our justice system and in those governmental agencies established to protect the people. There is no reason to maintain an approach that merely continues this demoralizing trend.

The average number of deaths directly attributed to Ecstasy toxicity appears to be about ten per year (according to recent data from SAMHSA). Alcohol use accounts for 100,000 deaths per year. This is a mortality rate 10,000 times greater, yet the use of alcohol is sanctioned by the government.

It is important to ask, what is being accomplished by making criminals of those who use relatively benign drugs while sanctioning the use of much more destructive drugs. The incongruity created by such laws borders on the absurd. White is black and black is white. When a law is irrational, the enforcement of that law is unjust.I hope that any changes made to the penalties for Ecstasy use acknowledge the fallacy in increasing the severity of the consequences of a "criminal activity" whenever such increases have, for other illegal drug use, proved to be of dubious value.

I realize that these are philosophical issues and your task is to create sentencing guidelines reflecting the nature of the crime that are both rational and reasonable. I argue that it is neither rational nor reasonable to increase the criminal penalties associated with a law that is already ridiculous. The only rational and reasonable approach is to accept that people use drugs and find ways to minimize the harm that such use brings to both the individual and society. Refusing to increase the criminal penalties for the use of Ecstacy would help to minimize the harm done to both the individual and society.

Sincerely,

Michael A. Greene

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Considerations of Michael A. Greene
Independent Researcher &
Drug Law Reform Advocate
July 21, 2000

Presented to the Senate Judiciary Committee
Orrin G. Hatch, Chairman
On the Event of the Utah Field Hearings
"Emerging Drug Threats and Perils to Utah's Youth"
Presented on July 6, 2000 in Salt Lake City, Utah

Senator Hatch, thank you for the opportunity to respond to the Utah Field Hearings on the "Emerging Drug Threats and Perils to Utah's Youth" that was held in Salt Lake City on July 6, 2000. I too see a real threat to our youth from these relatively new emerging drugs. I wish to make it clear that I am firmly against the use and abuse of drugs by our youth, whether these drugs are the emerging "club drugs"- Rohypnol, GHB, Ecstasy and methamphetamine or the old standbys- alcohol and tobacco.

I applaud your efforts in fighting for our youth against these drugs, especially the insidious drug, methamphetamine. This drug's demoralizing and destructive effects on society approach even those of alcohol. Sherryl Bigelow's account of her daughter's addiction to "meth" clearly spoke of the powers of an addictive substance to destroy an individual's potential for a productive life. The illegal use of Rohypnol and GHB by individuals for their own perverted ends is unconscionable. The illegal uses that these drugs are put to as well as their hazards to the health and safety of the user deserve the most vigorous education and prevention efforts.

The issue that this report will focus on is of personal significance and of concern to many in the field of mental health. This issue concerns the use and abuse of the drug, MDMA, known as Ecstacy. The DEA Drug Intelligence Brief states that MDMA, "produces profoundly positive feelings, empathy for others, elimination of anxiety, and extreme relaxation-hence the name, 'hug drug'."[1] It is easy to understand the allure of a drug with effects such as these. Though the effects of the drug seem benign enough, the potential hazards of unsupervised use in uncontrolled environments are very real and must be considered when evaluating the illegal use of this drug.

Current status of MDMA

MDMA was placed in Schedule I of the Controlled Substances Act in 1986.[2] This decision was made against the recommendation of the DEA Administrative Law Judge, Francis L. Young. He recommended MDMA be placed in Schedule III to allow continued medical research and treatment. The ultimate placement of MDMA in Schedule I was primarily based on its abuse potential. The aspect of MDMA's "currently accepted medical use" was, and perhaps soon will be successfully, challenged. The DEA Drug Intelligence Brief on MDMA lists the most serious complications of unsupervised

use as, "severe dehydration and, in some cases, death from heat stroke or heart failure."[1] The data available from medical examiner reports compiled by the Substance Abuse and Mental Health Services Administration (SAMHSA) report zero deaths from Ecstacy for 1997. These results are surprising when considering that tens of thousands of users are taking this drug every weekend across the country in uncontrolled conditions using indeterminate dosages. With a relatively safe-use record such as this, we must reevaluate the judiciousness of placing MDMA in the same risk category as GHB, Rohypnol, methamphetamine and other Schedule I drugs.

MDMA in Psychotherapy

This report will focus on the potential psychotherapeutic use of MDMA. A video included in the testimony of DEA Administrator, Donnie Marshall as well as the DEA's Brief describes MDMA, "as a therapeutic agent [used] by small groups of therapists in the United States to facilitate psychotherapy."[1] These therapeutic uses are described in, "Subjective Reports of the Effects of MDMA in a Clinical Setting."[3] The officially sanctioned use of MDMA psychotherapy in Switzerland from 1988 to 1993 is reported in "Psycholytic Therapy with MDMA and LSD in Switzerland."[4]

As an honorary member of the National Foundation for Depressive Illness you must have some interest in the concerns of those suffering from depression. I have been afflicted with recurrent depression throughout my life beginning as a child. I was in my late thirties when diagnosed and I am now being treated for this condition. Though I have never used MDMA, extensive reading has led me to believe in its potential applications in mental health. Senator, I ask that you not allow the problems associated with the illegal use of MDMA to prejudice you from considering its legitimate uses. I hope that you will come to see the value of allowing research on the potential of MDMA. The remainder of this report concerns the justification for considering the therapeutic potential of MDMA.

MDMA Therapy Benefits

The accounts of psychotherapeutic use of MDMA, prior to scheduling by the FDA, consistently show significant benefit to the user's quality of life. What is most impressive in these accounts, is the measure of insight gained into the individual's

personal life and problems. The self-realizations acquired with MDMA psychotherapy are not unique to the field of psychotherapy as a whole. What is unique is that the realizations gained in a single MDMA session must usually be acquired over several years of conventional psychotherapy. Indeed, this is what proponents of this technique affirm is its fundamental advantage over conventional psychotherapy. This advantage is due to the capacity of MDMA to "promote feelings of peacefulness and acceptance that enable people to move through denial and defense in order to respond clearly to difficult realities and to experience complex emotions."[5]

Food and Drug Administration officials have granted permission to demonstrate MDMA efficacy in terminal cancer patients.[6] "Clinical case reports suggest that MDMA can reduce acute and chronic pain experienced by end-stage cancer patients; perhaps [it is] that portion of total pain and suffering resulting from emotional, psychological, cognitive and social variables."[5] The FDA is not requiring any further pre-clinical studies of MDMA for this study to proceed. Permission was only achieved after twelve years of regulatory appeals from the dedicated individuals at the Multidisciplinary Association for Psychedelic Studies (MAPS).[6] This organization has been working since 1986 to establish MDMA and other agents as valuable tools for the exploration of consciousness and therapy. The willingness of the FDA to investigate MDMA is a strong indicator that there are potential benefits to its clinical use.

MDMA and Neurotoxicity

There is an on-going debate on the issue of the alleged "brain damage" (i.e. neurotoxicity) caused by MDMA. In order to show the complexity of this issue I have provided a selective bibliography of research studies on MDMA's metabolism, pharmacology, neurochemistry, clinical studies, animal and human toxicology.[7] This partial bibliography is comprised of over three hundred studies, throughout a fifteen year period. This research still does not provide a clear answer to what appears to be a relatively simple question. Regardless of the final outcome, the effort has provided a significant gain in understanding neurochemistry.

The current debate on neural alteration by MDMA use is based on neural alteration that occurs in the rat brain when subjected to high chronic intravenous doses of

MDMA. However, it is still inconclusive whether this effect would apply to the human brain when subjects are administered low doses in a clinical setting. I argue that even if proven to occur, so called "brain damage" should not be a reason to prevent further research and medical applications.

MDMA Compared to Antidepressants

My argument is based on the well known, but conveniently over-looked, fact that all psychoactive medications alter brain chemistry, and therefore, neural functioning. How else could these drugs alter neuro-chemical processes, and ultimately behavior, without changing the way the human brain normally functions? With any drug, the potential risk must be weighed against the benefit that the use of such drug provides. This point is illustrated in Antidepressants and Receptor Function. In the chapter, How Antidepressants Work: Cautionary Conclusions, we find a statement resembling one said of MDMA, yet it addresses antidepressant effects, "In one of our studies in humans, exaggerated responses to the serotonergic effects of clomipramine persisted for as long as 34 days after we stopped clorgyline treatment; we should be concerned about the possibility that, once we have exposed a person to a drug, even for one day, there may be lasting changes in neurotransmitter systems" (pg.124). Again, from the same book, "Interrelated adaptational events in second messenger systems as well as serotonin and α_1-adrenoceptor changes and modifications in α_2-adrenoceptors and in dopamine, acetylcholine, histamine, GABA and other receptors have also been reported during chronic antidepressant treatment" (pg. 111).[8]

As an example of shared risk factors, compare the adverse effects of MDMA with those of a commonly prescribed antidepressant. The DEA Drug Intelligence Brief lists the effects of a MDMA overdose as, "characterized by a rapid heart beat or high blood pressure, faintness, muscle cramping, panic attacks and, in more severe cases, loss of consciousness or seizures. Other adverse effects include nausea, hallucinations, chills, sweating, tremors and blurred vision. MDMA users also report after-effects of anxiety, paranoia and depression."[1]

These same adverse effects exist for the drug Wellbutrin, as listed on the patient information leaflet. A listing of Wellbutrin's adverse incidents and their frequency are included in the supporting documentation. In addition to those adverse effects matching

those of MDMA, Wellbutrin's adverse effects extend to the neurological system as: ataxia/incoordination, myoclonus, dyskinesia and dystonia, mydriasis, vertigo and dysarthria. Adverse effects for the neuropsychiatric system include: mania, hypomania, increased libido, decrease in sexual function, memory impairment, depersonalization, psychosis, dysphoria, mood instability, formal thought disorder and frigidity and occurring rarely is suicidal ideation. These adverse effects were experienced by individuals taking recommended dosages of Wellbutrin under clinical trial settings.

In addition to these more extensive risk factors, Wellbutrin exhibits some abuse and dependence producing characteristics. "In a population of individuals experienced with drugs of abuse, a single dose of 400 mg Wellbutrin produced mild amphetamine-like activity...on the morphine-benzedrine subscale of the Addiction Research Center Index...higher doses, which could not be tested because of the risk of seizure, might be modestly attractive to those who abuse stimulant drugs" also, "Rhesus monkeys have been shown to self-administer bupropion intravenously."[9]

MDMA Threat Evaluated

It is unreasonable to equate a potentially useful drug like MDMA with other "club drugs", and in particular methamphetamine, when MDMA exhibits no more danger than many drugs now prescribed. The harm in this would be in creating an unjustifiable increase in public fear and apprehension. This would only serve to further obstruct efforts to promote legitimate MDMA research without providing any real prevention of continued illegal use. MDMA deserves the opportunity of an impartial and dispassionate investigation. The FDA's Drug Abuse Advisory Committee agreed that "hallucinogens pose no greater risk than other investigational drugs."[10] According to the FDA's Pilot Drug Staff medical officer, "[There are no unheard of] risks involving these compounds that we do not routinely face with every new drug we put through the Investigational New Drug process."[10]

It is important to distinguish between the two types of problems that can occur with the illegal, uncontrolled use of a substance, including MDMA. These two very distinct problems require very different approaches. With MDMA there are the actual physiological complications resulting from dehydration, overexertion and hyperthermia.

There are other physiological complications resulting from co-factors of MDMA use. These co-factors include: drug additives, overdoses, co-ingestion with other drugs, and ingestion of chemicals mistaken for MDMA. A rational approach for this problem would involve education, prevention and harm reduction for those who choose to use MDMA. As long as we cannot absolutely prevent illegal use of MDMA, we must do all we can to protect those who choose to use it.

The other problem involves the fears and anxieties that these very real hazards present to parents and those dedicated to protecting our youth. This problem arises in those not taking the drug and requires a full objective understanding of the actual risk to the physical health and safety of our youth. We must distinguish the health and safety factor from any moral or ideological position one may have on psychoactive drug usage.

This distinction will ensure that any official measures taken are based on alleviating the threat to the wellbeing of our youth and not on speciously alleviating the public's emotional reaction to the problem. U.S. Attorney for Utah, Paul Warner stated rightly that, "We can not prosecute our way out of this problem." Perhaps, he is implying there is need for clearly distinguishing between a real solution and one which merely duplicates past attempts at a solution. The dangers of drugs that threaten our youth do not compare to the peril of ineffectual drug policy that threatens our society.

Senator, the view of MDMA presented at the Utah Field Hearing did not give the public the full factual information they need to evaluate MDMA. Yet, your opening letter indicated that this would be the purpose of the hearing. In light of this, I request your help in fostering an attitude of recognition and acceptance of the valuable potential of MDMA in legitimate medical applications. In keeping with your pronouncement at the hearing, I would like this report and its attachments to be considered for incorporation into the official record of the hearing.

References

1 "Drug Intelligence Brief" MDMA-Ecstasy; Drug Enforcement Administration Intelligence Division, June 1999.

2 U.S. Department of Justice, Drug Enforcement Administration, "In the Matter of MDMA Scheduling," Docket No. 84-48.

3 "Subjective Reports of the Effects of MDMA in a Clinical Setting," Greer, G., MD and Tolbert, R., RN, MSN; Journal of Psychoactive Drugs, vol.18 (4): 319-327.

4 "Psycholytic Therapy with MDMA and LSD in Switzerland," Peter Gasser, MD; at the URL, http://www.maps.org/news-letters/v05n3/05303psy.html

5 "The Struggle to Conduct Research into the Therapeutic Use of MDMA," at the URL, hppt://www.maps.org/research/mdma/index.html, (pg. 3).

6 "June 1999: MDMA Research Permitted After Years of Effort," at the URL, http://www.maps.org/research/mdma/0699mdma.html

7 Ecstasy-Dance, Trance and Transformation, Nicholas Saunders with Rick Doblin, Quick American Archives; Oakland, CA 1996 (pgs. 241-272).
This is an excellent book packed with relevant information on all aspects of MDMA. It may be ordered at the MAPS website at http://www.maps.org

8 Antidepressants and Receptor Function, Ciba Foundation Symposium 123, (1986).

9 Glaxo Wellcome, Inc., Wellbrutrin (buprobion hydrochloride) Drug Insert; June 1997, RL-437, 646050.

10 "The Pink Sheet" 1992; 54 (29): T&G-11-T&G-12; July 20, 1992 from the Section on Trade & Government Memos.

CITY OF
PORTLAND, OREGON
BUREAU OF POLICE

VERA KATZ, MAYOR
Mark A. Kroeker, Chief of Police
1111 S.W. 2nd Avenue
Portland, Oregon 97204

February 1, 2001

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington D.C. 20002-8002
Attention: Public Information

Re: Proposed Amendment to Increase Ecstasy Sentencing

Dear Commissioner:

I am writing to you to encourage passage of an amendment to the federal sentencing guidelines that would enhance penalties for the manufacture, importation, and exportation or trafficking of Ecstasy.

Our community has realized a dramatic rise in the distribution and use of Ecstasy over the last year. We are finding much more Ecstasy available in our city than in years past. Information we are receiving through intelligence and investigation indicates that the user base is very young, ranging in age from mid-teens to mid-20's. In November 2000, Portland recorded its first ever Ecstasy death, when an 18-year-old young man overdosed on Ecstasy at a local "rave club".

The proliferation of this drug on our community, specifically on our young people is having a devastating effect. Tougher laws and sanctions will help reduce the impact of Ecstasy. I strongly support passage of increased penalties for Ecstasy.

Very truly yours,

MARK A. KROEKER
Chief of Police

MAK/jf

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