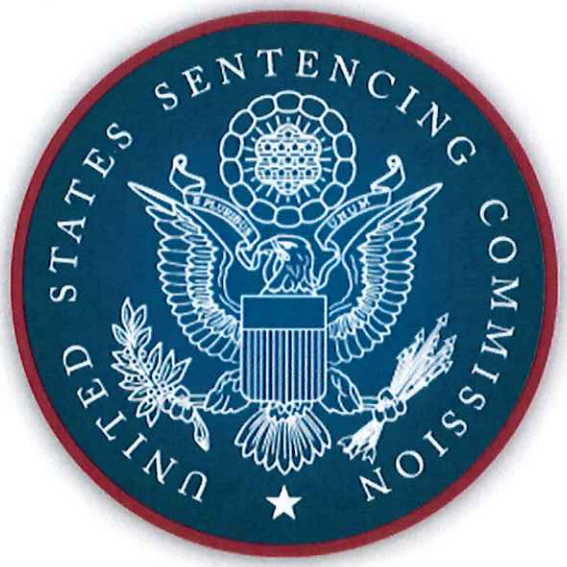
Public Comment



Proposed Amendments

2002

INDEX TO PUBLIC COMMENT
2002 AMENDMENTS
February Submissions

I. Amendment 1: Cultural Heritage ..... (page 1 of the Summaries)

PUBLIC COMMENT SUMMARIES
2002 AMENDMENTS
February Submissions

Amendment 1 - Cultural Heritage

The Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ strongly supports this amendment and the proposed guideline, but believes there are several improvements that could make the guideline more effective.

Pattern of Similar Violations: Concerning the first issue for comment, DOJ believes the enhancement in subsection (b)(4)(B) should cover prior convictions for similar misconduct, but believes it should also cover two or more "acts" of misconduct, rather than two or more "civil or administrative adjudications" of misconduct. In most cases the prior offenses cannot be included in the relevant conduct "loss" determination because, for a variety of valid reasons, no expert archaeological damage assessment has been or can be conducted concerning these violations. Yet the evidence of these uncharged offenses is sufficiently reliable to support the "pattern" enhancement at sentencing. Therefore, DOJ recommends adding the following sentence to the end of Application Note 5(B):

> However, any such act of misconduct shall not be considered under this subsection if (i) it constitutes relevant conduct under section 1B1.3, and (ii) the value of any cultural heritage resource involved in such act of misconduct is fully taken into account in determining value under subsection (b)(1). enhancement at sentencing.

Archaeological value: DOJ also recommends that "archaeological value," which the proposed guideline would apply to the calculation of the value of an "archaeological resource," also apply to the determination of the value of other cultural heritage resources. Therefore, it recommends that Application Note 2 be revised to make the "archaeological value" method of valuation applicable to all cultural heritage resources, not just "archaeological resources," because such a revision would assure that the proposed guideline takes into account the loss of archaeological knowledge in a case involving damage to an archaeological site from which an artifact is taken that is not an archaeological resource because it is less than 100 years old.

Underestimating the Actual Value of Cultural Heritage Resources: With respect to the second issue, Application Note 7, DOJ is not convinced that there is a need for the proposed upward departure provision to address cases involving a combination of cultural heritage resources and other items. However, there is a need to clarify that an upward departure is encouraged where the value of the cultural heritage resource underestimates the seriousness of the offense.

Therefore, it recommends adding the following after the second sentence of proposed Application Note 7:

> For example, an offense may result in a loss of knowledge or cultural importance associated with an archaeological or other cultural heritage resource for which the value of the cultural heritage resource as determined under this guideline results in a substantial understatement of the seriousness of the offense. This is particularly true where the offense involved a cultural heritage resource of profound uniqueness or significance.

Enhancement for Use of Destructive Devices or Explosives: For the third issue for comment, DOJ believes the guideline should provide an enhancement for destructive devices. In addition, the proposed upward departure recommendation above could also cover an extremely serious case, such as the use of a destructive device to damage or destroy a national monument.

Additional Suggestions: First, because the felony threshold under the Archaeological Resources Protection Act is $500, and the value of every cultural heritage resource should be given full consideration in sentencing determinations, DOJ recommends that subsection (b)(1)(A) be revised to make the one-level increase applicable to values between $500 and $5,000. Second, DOJ believes several technical or minor amendments are appropriate, including (i) that the definition of "museum" for purposes of the proposed guideline should include foreign museums that would otherwise meet the proposed definition, and (ii) that the definition of "cultural heritage resource" does not inadvertently exclude some designated archaeological or ethnological material, particularly since the proposed guideline already subjects such material to an enhancement.

Office of the Secretary, Gale Norton
U.S. Department of the Interior
Washington, DC 20240

Secretary Norton supports the creation of a new guideline for the protection of cultural heritage resources. She believes that the new guideline is long overdue and will help sentencing courts address relevant specific offense characteristics associated with these crimes. The proposed guideline will enhance consistency and certainty in sentencing while taking into account the unique character of our national landmarks and the irreplaceable character of these resources.

Assistant Secretary-Indian Affairs, Neal McCaleb
U.S. Department of the Interior
Washington, DC 20240

Assistant Secretary McCaleb recommends the adoption of §2B1.5 establishing a separate sentencing guideline for cultural resources crimes. He believes that the proposed guideline addresses the historical inequities in sentencing for these crimes, provides an appropriately severe base offense level and specific offense characteristics.

Bureau of Indian Affairs (BIA), Southwest Region
U.S. Department of the Interior
Albuquerque, New Mexico 26567

The BIA generally endorses the promulgation of §2B1.5 with three suggested changes:

1. The definition for pattern of similar violation should include misconduct similar to the instant offense in violation of any ***tribal*** "provision, rule, regulation, ordinance or permit."
2. An enhancement should be provided for other offenses committed at the same time even if the other offenses are not cultural resource related.
3. An enhancement should be provided for the use of a destructive device and the definition of destructive device should not be limited to explosives.

American Association of Museums (AAM)
Edward H. Able, President & CEO
Washington, DC

The AAM generally supports the new guideline for cultural heritage resource crimes but offers comments in a few specific areas. AAM also included a letter that was submitted to a sentencing court explicating many of the same issues.

1. *Proposed Section 2B1.5(b)(1):* AAM argues that loss of any archaeological object will entail loss of both archaeological value and commercial value, and these harms are different. Thus, this valuation should not be the greater of the two, but aggregated. AAM recommends changing "or" to "and" in Commentary 2(B), so that the text would then read, "The value of an archaeological resource is (i) its commercial value and its archaeological value, and (ii) the cost of restoration and repair."

2. *Proposed Section 2B1.5(b)(2) and (3):* AAM supports the inclusion of "museums" explicitly in (2). AAM also agrees that offenses involving the types of objects listed in (3) deserve increased severity of punishment, even if the offenses did not involve prior location in the institutions, including museums, listed in (2). However, in the case of cultural heritage resources of the types listed in (3) from, or located, prior to the offense, in *museums*, the effect of (2) and (3) together as currently written would be additive, and will have a disparate impact based on the type of object. AAM recommends revising the text of (3) as follows: "If the offense involved a cultural heritage resource ***not from, or located, prior to the offense, on, in, or in the custody of the entities listed in (2) above, but*** constituting (A) human remains; (b) a funerary object; (C) designated archaeological or ethnological material; or (D) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels."

3. *Proposed Section 2B1.5(b)(4)(B):* AAM particularly supports the inclusion of non-Federal violations in the definition of "pattern of similar violations," but recommends that

only one violation should trigger the enhancement. AAM also supports applying the enhancement for prior convictions for similar misconduct and for similar misconduct for which there has not been a civil or administrative adjudicate. The latter category would apply to those with access to cultural heritage resources by virtue of employment at, or connection to, a cultural heritage site, such as a museum. AAM specifically recommends changing "two" to "one" in Application Note 5(B) and adding "or convictions" after "adjudications." A sentence should be added to the end of 5(B) to the effect that where there was sufficient evidence to trigger a formal action, such as a dismissal from a position or formal reprimand, for a similar offense in the past, the enhancement should have effect, even if there was no prior conviction or civil or administrative adjudication.

4. *Adjustment for offenses by "insiders":* The proposed guideline does not provide an enhancement for abuse of position of trust. The AAM strongly believes that there should be an enhancement of at least two levels for offenses committed by those who have some formal connection to the victim entity, where that entity is one of the entities listed in subsection (b)(2) of the proposed guideline, *i.e.*, the national park system, etc., and including museums. The formal connection should not be limited to those who receive monetary compensation or on the basis of the offender's formal level of authority as museums rely largely upon volunteers. In addition, unpaid volunteers and support staff may have extensive access even though they do not have a high level of formal authority. A new exception could be created (either in Chapter Three or in the application notes to §2B1.5) to the current abuse of position of trust enhancement based on the existing exception for Postal employees. If a specific exception is not possible, AAM urges the Commission to make clear in the application notes that, given the nature of museum operations, such violations are analogous to embezzlement.

5. *Enhancement for use of sophisticated means:* AAM suggests that the Commission may want to consider ways that this intent can be more accurately expressed. This might be done by reviving and adding the prior formulation to the present one, by adding "or more than minimal planning" after "sophisticated means" in (C). AAM believes this would add flexibility, so that offenses related to either formulation would receive the enhancement.

6. *Application Note 7 (upward departure vs. enhancement):* Because there could be a vast array of items that are not cultural heritage resources involved in a given crime, AAM thinks that "departure" rather than "enhancement" may be preferable. AAM suggests that the judge should have somewhat more guidance in making his or her decision than is currently provided in Application Note 7. That note currently takes into account the monetary value of the items that are not cultural heritage items. There are two other measures of value that need to be taken into account in addition: disruption of services provided by the entities noted in the proposed Section 2B1.5(b)(2) and damage to a museum's reputation that might inhibit its ability to borrow exhibit items in the future.

7. *Application Note 7 (upward departure for underestimation of value):* AAM generally supports an upward departure to take into account the non-monetary loss inflicted by cultural heritage resource crimes.

8. *Enhancement if the offense involved destructive devices:* AAM supports this enhancement and suggests creating a subsection (b)(6), paralleling the proposed subsection (b)(5). This might be done by substituting the words "destructive devices" or "explosives" for "dangerous weapons" but otherwise repeating the text of (5) for the new (6). AAM thinks this merits a separate enhancement from that already proposed for "dangerous weapons," which would include firearms, knives, etc. Having both conventional hand weapons and a bomb creates a much more dangerous situation than hand weapons only.

9. *Objects in transit to or from a museum:* AAM points out that the proposed guideline does not take into account the fact that items may be in transit from or to the museum when the offense occurs. AAM would add "or in the custody of" to the proposed subsection (b)(2).

10. *Proposed Section 2B1.5(b)(1):* AAM notes that the proposed amendment and Application Note 2 address questions of valuation, including the cost of restoration and repair, but they do not address cases, such as when a gold object has been melted down, when an object is rendered incapable of restoration. AAM believes that an upward departure under §5K2.5 would take into account such damage, but if it does not, they would recommend that the Commission craft a more explicit provision assuring a higher sentence for such a case.

David Tarler
1209 12th Street, N.W.
Washington, D.C. 20005-4305

Mr. Tarler is an attorney and archaeologist whose responsibilities include training federal attorneys on heritage resources protection law.

Mr. Tarler urges the Commission to adopt the proposed amendment, states that he strongly supports the stand-alone guideline, and offers his viewpoint on several key points.

Archaeological value: Mr. Tarler requests that the Commission direct sentencing courts to use "archaeological value" to determine the value of any cultural heritage resource, regardless of age, so long as the evidence for archaeological value is probative because commercial value never fully measures the intrinsic value of a cultural heritage resource. Mr. Tarler recommends that this can be accomplished by eliminating subsection (A); replacing the beginning of subsection (B) with the words "(B) The value of a cultural heritage resource . . ."; and replacing the beginning of subsection (i) of subsection (C) with the words "'Archaeological value' of a cultural heritage resource, including an archaeologic resource, means . . . ."

Sentence enhancement based on value: Mr. Tarler proposes a threshold sum of $500.00. He notes that this lower amount represents the dividing line between a misdemeanor and a felony violation of the Archaeological Resources Protection Act. He states that ARPA constitutes the best evidence of Congressional will with regard to a value-based enhancement for offenses involving cultural heritage resources, namely that the value amount should be $500.00. Thus, Mr. Tarler recommends that the Commission replace the beginning of §2B1.5(b)(1) with the words "(1) If the value of the cultural heritage resources (A) exceeds $500 but did not exceed $5,000, increase by 1 level . . . ."

"Pattern of similar violations": Mr. Tarler believes that similar conduct should qualify for the enhancement even where no civil or administrative adjudication, or even criminal conviction, occurred. He states that restricting the pattern enhancement to occasions where the defendant has previous adjudications will nullify the enhancement because prior adjudications are rare. Mr. Tarler states that evidence which proves, for purposes of sentencing, that a defendant committed two or more acts of misconduct similar to the instant offense should constitute evidence of a pattern of similar violations and ensure that the defendant receives the enhancement.

Upward Departure: Mr Tarler recommends that the Commission include several examples of offense conduct meriting an upward departure or additional enhancement.

National Park Service
Francis P. McManamon, Ph.D.
Chief Archeologist, National Park Service
Departmental Consulting Archeologist, Department of the Interior
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

The substance of Dr. McManamon's letter is identical to David Tarler's letter above.

National Park Service
Robert Stearns, Ph.D.
Manager, National NAGPRA Program
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dr. Stearns limits his comments to those provisions of the proposed amendment that relate to the criminal provisions of NAGPRA. He states that the National Park Service fully supports the proposed guideline and offers several recommendations:

Base Offense Level: Dr. Stearns strongly supports establishment of a base offense level of 8 for offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources.

SOC – Value: Dr. Stearns suggests that the Commission lower the threshold for the 1 level valuation enhancement from $2,000 to $500.

SOC – Source Location: Dr. Stearns suggests that the Commission add "tribal lands" to the list in §2B1.5(b)(2) and add a definition in the application notes that reads: "'Tribal Land' has the meaning given the term in 25 U.S.C. § 3001(15)." He states that NAGPRA provides special protection to cultural items found on tribal land: the removal or excavation of cultural items from Federal lands may only be conducted following issuance of an ARPA permit and consultation with the appropriate Indian tribe or Native Hawaiian organization.

SOC – Types of Cultural Heritage Resources: Dr. Stearns suggests that the Commission add "sacred object" and "object of cultural patrimony" to the list in §2B1.5(b)(3) and add two definitions in the application notes that read as follows: "'Sacred object' means specific ceremonial objects which are needed by religious leaders for the practice of religions by their present day adherents" and "'Objects of cultural patrimony' means an object having ongoing historical, traditional, or cultural importance central to a group or culture itself, rather than property owned by an individual, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual." Dr. Stearns adds that NAGPRA provides special protection to sacred objects and objects of cultural patrimony, as well as to human remains and funerary objects. He concludes that extending the 2 level enhancement more generally to offenses involving sacred objects and objects of cultural patrimony would be equitable.

SOC – Pecuniary Gain: Dr. Stearns states that the 2 level enhancement would necessarily apply to all violations of 18 U.S.C. § 1170, because a financial incident is one of the elements of the offense. Thus, Dr. Stearns believes that for purposes of sentencing violations of 18 U.S.C. § 1170, the proposed enhancement for a pattern of similar pecuniary or commercial violations [§2B1.5(b)(4)(B)] would be moot as presently written.

Proposed Enhancement – Fiduciary Trust: Dr. Stearns suggests that the Commission add a 2 level enhancement if the offense involves a cultural heritage resource for which the United States acts as a fiduciary on behalf of Indian tribes or Native Hawaiian organizations. He suggests that this enhancement would apply where it is determined that: 1) an Indian tribe or Native Hawaiian organization is the owner of the cultural item pursuant to 25 U.S.C. § 3002(a); or 2) the cultural item is to be expeditiously returned to an Indian tribe or Native Hawaiian organization pursuant to 25 U.S.C. § 3005.

Forest Service
William F. Wasley, Director, Law Enforcement and Investigations
Richard W. Paterson, Acting Director, Recreation, Heritage, and Wilderness Resources
United States Department of Agriculture
14th & Independence, S.W.
P.O. Box 96090
Washington, D.C. 20090-6090

Messrs. Wasley & Paterson writes to strongly urge the Commission to adopt the proposed guideline amendment. They offer comment on the three issues for comment:

Pattern of similar violations: Messrs. Wasley & Paterson state that the phrase "pattern of similar violations" is ambiguous and open for interpretation. They suggest that the enhancement in subsection (b)(4)(B) for a "pattern of similar violations" should be substantially broadened to apply to any defendant who is shown by competent evidence (including but not limited to criminal, civil, or administrative adjudications) to have any past history of two or more violations of Federal, state or local laws protecting heritage resources.

Upward Departure: They state that there will be cases where the value of a cultural heritage resource, as determined under subsection (b)(1) and Application Note 2, underestimates the actual value. The use of only the commercial value and the cost of restoration and repair to determine the value of the cultural heritage resource, unless they are archaeological resources, will not indicate the seriousness of the offense, and an upward departure will be warranted.

Destructive Devices: They request that the Commission include an enhancement for offenses that involve the use of destructive devices because this demonstrates a callous disregard for public safety.

Additional Suggestions: Messrs. Wasley & Paterson also request that the Commission make the following change to §2B1.5(b)(2): Insert "or lands administered by the Forest Service" following (A) the national park system. They state that §2B1.5(b)(1)(A) and the second Application Note 2(A) should be consistent with the proposed amendments to the Penalties section of ARPA and should state that, "If the value of the cultural heritage resources (A) exceeded $500 but not exceeded $5000, increase by 1 level."

Messrs. Wasley and Paterson add that Application Note 2(A) should be eliminated from the sentencing guidelines, stating that the method established by the ARPA Uniform Regulations (.14(a)) for the determination of archaeological value can be applied effectively to cultural resources less than 100 years of age.

Practitioners Advisory Group (PAG)
Jim Felman & Barry Boss, Co-Chairs

While PAG does not oppose the creation of a separate guideline to address cultural heritage resource crimes, it urges the Commission to wait until the proposed ad hoc advisory group on Native American issues [has been formed and] has had a chance to consider the amendment. PAG believes the current proposal seems biased in favor of the Department of Interior; thus, PAG suggests that the proposed advisory group would be in the best position to address other harms that may not be readily apparent and may not be covered by the§2B1.5 as proposed.

Pattern of Similar Violations: If the Commission goes forward with the current version of §2B1.5, PAG opposes the adoption of §2B1.5(b)(4)(B), the enhancement for a pattern of similar

violations. PAG argues that the enhancement is unfair because a civil and administrative adjudication are not reliable indicators for sentencing purposes.

Underestimating the Actual Value of Cultural Heritage Resources: PAG also opposes the language in Application Note 7 suggesting an upward departure in cases in which the offense level understates the seriousness of the offense. The example given is if the offense also involved the theft of or damage to items that are not cultural heritage items. PAG thinks that the additional theft or damage should be dealt with as a separate offense. If the additional loss is not a separate offense, PAG argues that the extent of the upward departure should not exceed the corresponding number of levels from the loss table in §2B1.1.

Downward Departure: PAG argues that it is more likely that Application Note 2 will overstate, rather than understate, the harm involved in the offense because not all tribes require elaborate burial ceremonies. Thus, Application Note 7 should provide for a downward departure when the harm is overestimated.

Enhancement for Use of Destructive Devices or Explosives: PAG states that an enhancement for the use of a destructive device may be appropriate when such use poses a risk to human life. On the other hand, PAG asserts that the typical damage caused by use of a destructive device should be considered part of the loss contemplated in Application Note 2, and attributable to the defendant, thus rendering an enhancement unnecessary. PAG further suggests that in some instances, the harm caused by a destructive device may already be covered by the guidelines because of the potential for additional charges when explosives are employed. If, however, the damage caused by a destructive device is not adequately addressed by the guidelines, PAG states that the sentencing court should be able to upwardly depart.

Additional Suggestions: PAG recommends that §2B1.5(b)(5)(B) only apply when the firearm was used in direct aid of the offense. The guidelines should differentiate between a hunter who comes across a site and takes an artifact and someone who goes into a museum or national memorial with a firearm.

Society for American Archaeology (SAA)
Robert L. Kelly, President
900 Second Street NE #12
Washington, DC 20002-3557

Mr. Kelly states that the Society for American Archaeology (SAA) strongly supports adoption of the proposed amendment.

Pattern of Similar Violations: In relation to the first issue for comment, the SAA believes the enhancement in subsection (b)(4)(B) for a "pattern of similar violations" should be substantially broadened to apply to any defendant who is shown by competent evidence (including but not limited to criminal, civil, or administrative adjudications) to have any past history of two or more violations of federal, state, or local laws protecting cultural heritage resources.

Underestimating the Actual Value of Cultural Heritage Resources: Regarding the second issue for comment, the SAA argues that the value of a cultural heritage resource under subsection (b)(1) and Application Note 2, is underestimated. The use of only the commercial value and the cost of restoration and repair to determine the value of cultural heritage resources, unless they are archaeological resources, will not indicate the value of those resources as appropriately as will the use of archaeological value and cost of restoration and repair, according to the SAA. Additionally, there are resources of such extreme and irreplaceable value and the cost of restoration and repair will not be reflective of their true heritage value and will substantially understate the seriousness of the offense. Therefore, the SAA suggests that Application Note 7 should be revised to affirmatively state "There will be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted" and further suggests the third sentence of Application Note 7 should be eliminated or revised to cite specific examples of the types of nationally important cultural heritage resources.

Enhancement for Use of Destructive Devices or Explosives: The SAA maintains that for the third issue for comment, although the use of explosives with regard to a cultural resource crime may be covered by other statutes and guidelines, it would nevertheless be appropriate to include this enhancement.

Additional Suggestions: SAA suggests that §2B1.5(b)(1)(A) should be consistent with the amended penalties of the Archaeological Resources Protection Act of 1979. In 1988, the APRA was amended and the penalties section of the Act lowered the felony threshold from $5,000 to $500. Therefore, the SAA proposes that §2B1.5(b)(1)(A) should state "If the value of the cultural heritage resources (A) exceeded $500 but did not exceed $5,000, increase by 1 level."

Finally, the SAA expressed concerns regarding Application Note 2. First, many cultural heritage resources important to this country's history are less than 100 years old and would not be covered under that subsection because "archaeological resources" must be at least 100 years old. Second, the archaeological value of cultural heritage resources less than 100 years old usually will more truly reflect the heritage value of these resources than does their commercial value. Therefore, it is the SAA's position that the provisions of Application Note 2(B) should apply to determining the value of all cultural heritage resources for the purposes of subsection (b)(1) and that Application Note 2(A) should be eliminated from the proposed amendment.

Archaeological Institute of America (AIA)
Boston University
Nancy C. Wilkie, President
656 Beacon Street
Boston, Massachusetts 02215-2006

Value of Heritage Resources: The AIA believes the initial two-level enhancement of the proposed guideline is a starting point for calculating non-pecuniary harm.

The AIA supports the third enhancement provided if the offense involved commercial advantage or private financial gain. An enhancement based on commercial gain motivation in one way to provide sufficient punishment that is a meaningful deterrent to the commission of cultural heritage resource crimes, and provides a legitimate distinction between those who traffic is cultural objects for pecuniary gain and those who take objects to satisfy their own interest but who are not motivating others to do likewise.

The AIA also supports the enhancement for offenses involving specially protected resources or resources from specially protected places because the places and types of objects included have all been recognized by federal law, international agencies, or international conventions as having particular value to the cultural history of humankind.

Pattern of Similar Violations: The AIA supports the enhancement for a "pattern of similar violations" in §2B1.5(b)(4)(B) because the apprehension and successful prosecution of those who commit cultural heritage resource crimes are difficult to attain and not as frequent as are warranted.

Underestimating the Actual Value of Cultural Heritage Resources: The AIA supports Application Note 7 but states that there are additional circumstances in which the offense level, to the extent it is based on the commercial value of the cultural heritage resource that has been stolen, damaged or destroyed, may well still be inadequate. The AIA states that its suggestions regarding Application Note 2(B) would address this problem. (See *Value* section immediately following.)

Value of Cultural Heritage Resources: The AIA asserts that there is a discrepancy between the valuation of cultural heritage resources and the valuation of archaeological resources. The AIA suggests that expanding the method of valuation in Application Note 2(B) to all cultural heritage resources would solve this apparent discrepancy.
Enhancement for Use of Destructive Devices or Explosives: The AIA supports an enhancement for use of explosives.

Additional Suggestions —

Foreign Museums: The AIA recommends expanding the definition of "museum" under §2B1,5(b)(2)(F) to include museums located outside the United States, therefore applying to thefts from a museum when the stolen object is later brought into the United States.

Definition of Archaeological and Ethnological Material: The AIA suggests that the Commission clarify the definition of "designated archaeological and ethnological material" in subsection (C) of §2B1.5(b)(3). To accomplish this, the AIA proposes changing the citation to the CPIA in Application Note 4(A) to read "19 U.S.C. §§ 2601(7) and 2604," thereby referring to the more specific sections of the Act.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

February 21, 2002

MEMORANDUM:

TO: Chair Murhpy
Commissioners
Tim McGrath
Frances Cook
Charles Tetzlaff
Ken Cohen
J. Deon Haynes
Pam Montgomery
Lou Reedt
Judy Sheon
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment – Late Submissions

Attached for your review is public comment that was received after the February 4th deadline. A summary of the Federal Public Defender submission is also provided for your review.

Stolen Cultural Property: In addition, the AIA states that the CPIA recognizes a second category of cultural objects, that is, "stolen cultural property," and prohibits the import into the United States of "any article of cultural property documented as appertaining to the inventory of a museum or religious or secular monument or similar institution in any State Party that is stolen from such institution . . ." in 19 U.S.C. § 2607. The AIA states the proposed guideline does not recognize this category of cultural heritage resources for an enhancement, although it is specifically recognized by federal law as deserving special legal treatment. Therefore, the AIA suggests that a category be added to include "stolen cultural property" and that Application Note 4(A) require an additional reference to "19 U.S.C. §§2601(6), 2607." in order to incorporate this category into the guideline, as the only means of providing enhanced protection to some categories of cultural heritage resources stolen from foreign countries, as these may not otherwise be included in the specific categories listed in Section 2B1.5(3).

Definition of Cultural Heritage Resources: Further, the AIA recommends adding the following to the definition of "cultural heritage resources" in Application Note 1: (1) "any designated archaeological or ethnological material, as defined in 19 U.S.C. §§ 2601(7) and 2604;" and (2) "any object constituting stolen cultural property, as defined in 19 U.S.C. §§ 2601(6) and 2607" to be sure all the cultural heritage objects listed in other sections of the proposal are included. Adding these sections will ensure that ethnographic objects, religious objects and museum objects which are under 100 years of age and worth less than $100,000 would be included, because at the present time, the definition of an "object of cultural heritage, as defined in 18 U.S.C. § 668(a)" in Application Note 1(F) only covers some of the above objects.

Delaware NAGPRA and Historic Preservation
David M. Scholes, M.A., Director
P.O. Box 825
Anadarko, Oklahoma 73005

Pattern of Similar Violations: Mr. Scholes believes that the enhancement should cover prior convictions for similar misconduct, and this should be the case even if there has been a civil or administrative adjudication.

Underestimating the Actual Value of Cultural Heritage Resources: Mr. Scholes states the criminal should be held accountable for all damage, and agrees with the idea that the proposed Application Note should provide an upward departure if the value of a cultural heritage resources underestimates its actual value.

Use of Destructive Devices: Mr. Scholes supports this enhancement.

Additional Suggestions: Mr. Scholes suggests publicizing the crimes and their penalties because it may deter the crimes.

The Advisory Council on Historic Preservation
Javier Marqués, Assistant General Counsel

Mr. Marques supports the addition of the proposed guideline §2B1.5. In his view, cultural heritage resources are irreplaceable and possess an intrinsic value that transcends the monetary considerations normally involved with other types of properties. Mr. Marques states that providing higher offense levels when theft, damage, destruction or illegal trafficking relates to a cultural heritage resource is consistent with Congressional intent, and hopefully deters people from diminishing our Nation's shared heritage.

National Trust for Historic Preservation
Elizabeth S. Merritt, Deputy General Counsel
Anita C. Canovas, Assistant General Counsel
1755 Massachusetts Avenue, N.W.
Washington, D.C. 20036

The National Trust for Historic Preservation in the United States (National Trust) strongly endorses the proposed amendment. The National Trust offers comments on the following issues:

Pattern of Similar Violations: The National Trust believes the enhancement should be expanded to include convictions, and/or misconduct which has not been subject to civil or administrative adjudication because these offenses are not always prosecuted. Additionally, the National Trust believes that the pattern of "similar violations" should be construed to include a broad range of misconduct related to damage or loss of cultural resources, such as trespass or theft involving cultural resources on private or state lands.

Underestimating the Actual Value of Cultural Heritage Resources: The National Trust believes that an upward departure would be warranted when application of subsection (b)(1) of Application Note 2 underestimates the actual value of the cultural heritage resource. The National Trust states that this departure could be important for cultural heritage resources that do not specifically qualify as "archaeological resources" under ARPA. Further, there may be cases where the "archaeological value" of a "non-archaeological resource" would be higher than its commercial value, and would more accurately reflect its "actual" value, especially if the scientific costs of retrieving the data would be high. Additionally, there may be extremely significant tor unusual resources whose actual value is simply not reflected accurately by the provided formulas.

Enhancement for Use of Destructive Devices or Explosives: The National Trust states that the term "destructive devices" should be expanded to included "techniques" that are destructive to the resources as well. Therefore, the National Trust supports increasing the base offense level based on the use of explosives or other destructive devices and techniques on cultural resources.

Value of Cultural Heritage Resources: The National Trust states that use of the term "archaeological value" rather than "commercial value" will more accurately reflect the actual

value of the cultural heritage resource. Thus, the National Trust recommends applying the standard used for archaeological value to all cultural heritage resources.

AhaMakav Cultural Society, Fort Mojave Indian Tribe
Chad Smith, Tribal Archaeologist
P.O. Box 5990
Mohave Valley, Arizona 86440

Mr. Smith states that the AhaMakav Cultural Society is in full support of the proposed amendment. However, the Society proposes §2B1.5 should be changed to add: "(H) an Historic Property of cultural or religious importance to a Federally recognized Indian Tribe." Further, the Society believes §2B1.5(b)(3) should include another type of cultural heritage resource in addition to those listed: "(E) an item of cultural patrimony of a Federally recognized Indian Tribe" as defined in the Native American Graves Protection and Repatriation Act as something necessary for the continuation of traditional cultures.

Caddo Tribe of Oklahoma
Robert Cast, Historic Preservation Officer
Cultural Preservation Department
P.O. Box 487
Binger, Oklahoma 73009

The Caddo Tribe supports the promulgation of §2B1.5 and the increase in penalties for cultural resource crimes. The Caddo Tribe specifically supports the enhancement for "pattern of similar violations" because it will increase punishment and deterrence for repeat offenders. The Caddo Tribe also urges that the court consider all circumstances surrounding the violation when determining whether the "actual value" of a cultural heritage resource is underestimated and if an upward departure might be appropriate. Lastly, the Caddo Tribe supports the enhancement for the use of explosives and the brandishing of a dangerous weapon.

The Confederated Salish and Kootenai Tribes of the Flathead Nation
Marcia Pablo, CSKT Historic Preservation Officer & Director
P.O. Box 278
Pablo, Montana 59855

The Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) support the proposed amendment. CSKT suggests that the desecration of human remains carry a harsher penalty than the proposed level 8. Also, the CSKT suggests that the desecration of human remains be addressed with a separate enahncement.

Pattern of Violations: The CSKT recommends that the guidelines contemplate all prior conduct which could have been considered harmful to a cultural heritage resource, regardless of the forum or stage of the adjudication. They suggest that the pattern enhancement be at least two levels.

Valuation: The CSKT recommends that the value of cultural heritage resources and non-cultural heritage resources be aggregated for purposes of enhancement, as well as enhancing the sentence by recognizing the non-pecuniary nature of cultural heritage resources.

Explosives: The CSKT suggests that sentences be enhanced for the use of explosive devices. Additionally, they suggest enhancing the sentence for use of heavy equipment which aggravates the damage.

Confederated Tribes of the Umatilla Indian Reservation
Jeff Van Pelt, Manager
Cultural Resources Protection Program
Department of Natural Resources
P.O. Box 638, 73229 Confederated Way
Pendleton, Oregon 97801

Mr. Van Pelt writes for the Confederated Tribes of the Umatilla Reservation (CTUIR) Cultural Resources Protection Program of the Department of Natural Resources, and is impressed with the proposed guidelines and believes they are a significant step towards putting teeth in the enforcement and deterrence effects of the cultural resources protection laws. CTUIR states that the guidelines cover the most important factor in these guidelines, stressing the non-monetary value of the resources and the large class of individuals harmed by the crimes, but also believes more coverage would be better.

Desecration of Human Remains: CTUIR would recommend the desecration of human burials be enhanced more than 2 levels because of the nature of the action. People should know that grave-robbing is wrong, injuring both the deceased ancestor as well as the living relatives of those burials. The CTUIR views the destruction of graves for recreation, personal gain, or economic profit as particularly heinous and as a hate crime against Native Americans. Although this activity is discussed in §2B1.5(a)(3) with numerous other activities, CTUIR argues that this section should be expanded to focus specifically on grave desecration, or alternatively, another section should be added.

Pattern of Similar Violations: CTUIR suggests the guideline should provide enhancement for all past conduct which could have been considered harm to a cultural heritage resource, no matter what forum or stage of the adjudication. The enhancement should be at least 2 levels, as identified in the proposed guidelines, or up to the statutory maximum. Whomever is destroying an Indian grave or archaeological site for personal or economic gain is committing a crime against the tribal members who created the site, the tribes who are related to those sites and the public at large, increasing the harm many fold, and this should be taken into account during the sentencing phase.

Valuation of Cultural Heritage Resources: CTUIR states in the event that non-cultural heritage resources are harmed as well as cultural heritage resources, it would be preferable that the person be charged under two statutory violations for the sentences to run consecutively. However, if the

conduct merges into a single crime, the value of the cultural heritage resources and non-cultural heritage resources should be aggregated for purposes of the enhancement.

Use of Explosive Devices: CTUIR supports sentence enhancement for the use of explosive devices, as it is increased for dangerous weapons. Additionally, Mr. Van Pelt states the sentence should be enhanced for use of heavy equipment, which aggravates the damage and demonstrates a callous disregard for the resources destroyed.

Coquille Indian Tribe
Edward L. Metcalf, Chairman
P.O. Box 783
3050 Tremont
North Bend, Oregon 97459

The Coquille Tribe supports the proposed guideline to establish a higher offense level for cultural heritage resource crimes and agrees that they amount to more than traditional "property damage."

Guidiville Indian Rancheria
Marlene Sanchez, Tribal Chairperson
P.O. Box 339
Talamage, CA 95481

The Guidiville Indian Rancheria Tribal Council (Tribe) states that most of the tribally associated cultural resources are located on Indian Reservations and Indian Rancherias; thus, special provisions to protect these areas should be incorporated in the guideline. To that end, the Tribe suggests that the Commission add enhancement provisions at §2B1.5(b)(2) to include reference to Federal Indian Reservations and Rancherias.

The Hopi Tribe
Wayne Taylor, Jr., Chairman
P.O. Box 123
Kykotsmovi, Arizona 86036

The Hopi Tribe supports the proposed guideline to establish a higher base offense level for cultural heritage resource crimes than the current base offense level for generic property damage. The Hopi Tribe also supports the proposed enhancements, including those for specifically protected items, such as human remains, funerary objects or archaeological materials.

The Hopi Tribe attached a copy of a November 15, 2001, letter that they sent to AUSA Robert Kennedy in the District of Colorado. The letter offered support for the prosecution and sentencing of a defendant charged with ARPA violations. Also attached is an article from the Arizona Daily Sun describing the seemingly light sentences for defendants convicted of digging up Anasazi remains. The attachments demonstrate the Hopi Tribe's continued interest in increasing penalties for persons who commit cultural heritage offenses.

The Navajo Nation
Alan S. Downer, Director
Historic Preservation Department
P.O. Box 4950
Window Rock, Arizona 86515

Mr. Downer generally supports the proposed guideline and offers two specific suggestions for improving it:

- Revising §2B1.5(2) by adding: "(H) an Historic Property of religious or cultural importance to a Federally recognized Indian Tribe or Tribes."
- Revising §2B1.5(3) by adding "Items of Cultural Patrimony of a Federally recognized Indian Tribe."

The Navajo Nation
John A. Kern, Staff Attorney
Office of the Chief Prosecutor
P.O. Box 3779
Window Rock, Arizona 86515

Mr. Kern generally supports the proposed guideline and endorses the changes recommended by Mr. Downer (above).

Tribal Preservation Office, Pawnee Nation of Oklahoma
Francis Morris, NAGPRA Coordinator
Repatriation Office
P.O. Box 470
Pawnee, Oklahoma 74508

As the Historical Preservation Officer for the Pawnee Nation of Oklahoma and the NAGPRA coordinator, and therefore speaking for the Pawnee Nation, Ms. Morris states they are in total agreement with the Commission and agrees with the proposed amendments to the guidelines.

Prairie Island Indian Community
Audrey Kohnen, President, et. al.
5636 Sturgeon Lake Road
Welch, Minnesota 55089

The Prairie Island Indian Community notes that the Federal Register notice includes "National Parks" as a protected area but not "Indian Reservations." They urge the Commission to include all Reservations as protected areas under the cultural heritage guideline.

Pyramid Lake Paiute Tribe
Alan Mandell, Tribal Chairman
P.O. Box 256
Nixon, Nevada 89424

The Pyramid Lake Paiute Tribe commends the Commission for its effort to increase the accountability upon individuals who choose to cause harm and damage cultural resources and supports the proposed guideline for such offenses. They suggest, however, that the enhancement in §2B1.5(b)(1) begin at $500 instead of $2000.

Shoshone-Bannock Tribes
Blaine Edmo, Chairman
Fort Hall Indian Reservation
P.O. Box 306
Fort Hall, Idaho, 83203

The Shoshone-Bannock Tribes (Tribes) write to express their support for the proposed amendment. Additionally, they offer comment on the following issues.

Pattern of Similar Violations: The Tribes assert that, in its current form, courts may interpret violations differently depending on the context of the action. Thus, The Tribes state that "pattern of similar violations" should be applied such that when a violator commits a crime against a cultural resource, regardless of that resource's importance, the violation is a cultural resource crime and should be cumulative to the first violation.

Valuation and Upward Departure Provision: The Tribes state that value should be determined on damages in addition to the "archaeological/research value," such as damages based on the importance of the cultural resource. The Tribes suggest that value could be ascertained by the cultural group associated with the resource. Additionally, the Tribes state that non-cultural heritage resources are often overlooked because of the boundaries set to protect a cultural heritage resource. The Tribes believe that a non-cultural heritage resource is equally important to a cultural group, even if the resource does not have archaeological importance. The Tribes suggest that the Commission assign penalties for these types of resources as well.

Use of Explosives: The Tribes state that penalties for intentional destruction of cultural heritage resources by use of explosives or other destructive devices should be severely penalized.

§2B1.5: The Tribes state that the current iteration of §2B1.5 is unclear as to whether the guideline applies to interstate, intrastate, or transportation across national borders. They ask if section (2) implies that the United States has jurisdiction to penalize if items(s) from another country are found in the U.S. or if America's item(s) are transported out of the country.

Spokane Tribe of Indians
Louie J. Wynne, Tribal Historic Preservation Officer
P.O. Box 100
Wellpinit, WA 99040

The Spokane Tribe of Indians (Tribe) supports the amendment. Specifically, the Tribe commends the Commission on the attempt to differentiate between general property destruction and human remains.

Regarding the issues for comment, the Tribe states the following.

Pattern of Similar Violations: The Tribe believes that all prior violations must be included in the definition of "pattern."

Funerary Objects: The Tribe states that the enhancement for offenses involving human remains or funerary objects should be the maximum allowable. Further, the Tribe suggests a separation between the disturbance of an archaeological site and grave goods or human/funerary objects.

Explosives: The Tribe states that the use of explosives to unearth human remains/funerary objects will cause extensive damage to the point that it may be impossible to retrieve all items. Thus, this should be punished extensively because in some Tribal beliefs it is extremely offensive if the individual cannot be buried whole.

Additional Suggestions: The Tribe also suggests that the Commission change §2B1.5(b)(3) to address only A and B, and adding an additional section for items C and D. Also, the Tribe suggests setting the increase for items A and B at a minimum of four levels, or otherwise maximizing the sentence. The Tribe also states that §2B1.5(b)(3) seems to equate human remains with an architectural sculpture, and this may not be what the Commission intended.

The Tulalip Tribes, Cultural Resources Department
Hank Gobin, Cultural Resources Manager
6410 - 23rd Avenue N.E.
Marysville, Washington 98271

The Tulalip tribe states that tribes throughout the United States have always sought ways and means to put some teeth and meaning into prosecuting those who pillage and plunder historical sites for profit in a million dollar black market. Therefore, those who steal from the dead for profit with a general disrespect for cultural ways of life should receive the maximum punishment allowable.

The tribe believes an area of concern that may or may not be addressed in the proposed guideline is that when a site has been damaged, the cost of repair, retrieval and reburial in some cases is accrued at the expense of the tribe. [Mr. Gobin does not suggest whether restitution or some other means of recompense might be appropriate in this instance.]

White Mountain Apache Tribe
Dallas Massey, Sr.
P.O. Box 1150
Whiteriver, Arizona 85941

The White Mountain Apache Tribe strongly supports the establishment of sentencing guidelines that take into account the community-based values of the objects and places left behind by previous generations, as well as the fragile, unique and irreplaceable qualities of cultural heritage resources.

Yavapai
Prescott Indian Tribe
Ernest Jones, Sr., President
530 E. Merritt
Prescott, AZ 86301-2038

The Yavapai (Tribe) supports the amendment. The Tribe is concerned that Application Note Item 2(A) does not adequately address the value that a Native American tribe would place on a cultural resource. They suggest that valuation could be addressed in a stipulation that would include consultation by affected Native American tribes.

Yurok Tribe
Dr. Thomas Gates, Yurok Tribe Heritage Preservation Officer
15900 Hwy. 101 N.
Klamath, CA 95548

The Yurok Tribe commends the Commission's efforts to bolster sentencing guidelines for cultural heritage offenses. They suggest the following changes.

- Section 2B1.5(b)(2) should include additional heritage resource locations and types such as: Tribal Lands that are (1) determined eligible or listed on a Tribal Heritage Resources Register; and/or (2)determined eligible to be placed on the National Register of Historic Places.

- §2B1.5(b)(3) should include items of cultural patrimony, as defined by NAGPRA.

The Yurok Tribe also suggests an enhancement based on the number of victims (in the case of a stolen or damaged item that belonged to an affiliated Native American family or religious society). Thus, if there are between 10 and 50 victims, then increase by two levels; if there are more than 50 victims, increase by four levels.

National Congress of American Indians
Tex G. Hall, President
Washington, D.C.

The National Congress of American Indians (NCAI) writes to express strong support for the proposed amendment. To strengthen the protection of cultural heritage resources and reflect the increased non-pecuniary value of cultural heritage resources located on Indian land, NCAI encourages the Commission to include an upward departure provision for offenses involving the theft, damage to, destruction of, or illicit trafficking in cultural heritage resources that are located on federal lands held in trust for the benefit of Indian tribes or members of Indian tribes.

National Association of Tribal Historic Preservation Officers
Alan S. Downer, General Chairman
P.O. Box 19134
Washington, DC 20036-9189

Mr. Downer requests the Commission consider including grave desecration as a guideline enhancement, and recommends a three level increase or the maximum sentencing for such crimes.

Further, Mr. Downer suggests the guideline should support the recognition given to the desecration of Native American sacred sites in the National Historic Preservation Act of 1992 by including these kinds of properties along with other heritage resources. Mr. Downer also encourages the Commission to specifically reference "Items of Cultural Patrimony" in the guideline and to call for 2 or more levels of increase for crimes involving these items.

Confederated Tribes of Coos Lower Umpqua and Suislaw Indians (The Tribes)
Carolyn Slyler
Vice Chair, Tribal Council
1245 Fulton Ave.
Coos Bay, OR 97420

The Tribes support the new proposed guideline as written.

Amendment 2 — Implementation of the Foreign Corrupt Practices Act

Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ supports this amendment, and believes it would appropriately treat Foreign Corrupt Practices Act (FCPA) offenses the same as those involving bribery. DOJ also believes this amendment will effectively implement the Organization for Economic Co-Operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. DOJ states that under the OECD Convention, each party is required to impose comparable criminal sentences for both domestic and international public corruption. DOJ believes that the current treatment of FCPA violations as commercial bribery is contrary to the intent of the Convention.

Appropriate Guideline for 26 U.S.C. §§ 9012(c) and 9042(d) Offenses: Regarding the first issue for comment, the DOJ believes the text of the synopsis incorrectly suggests that payments under 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), and 78dd-3(a)(3) are bribes of non-official third persons, of which the payor has some idea that a portion will be passed to the public official or candidate, and incorrectly concludes that these payments should be treated differently than bribes of the public official or candidate himself. The bribes under these sections are more properly understood as bribes of the public official or candidate through an intermediary. While many payments subject to FCPA prosecutions are not made directly to the official or candidate, DOJ's experience is that the direct recipient is but an agent of or consultant to the public official. To suggest that such payments should be treated differently or at a lower offense level, e.g., under §2B4.1, is inappropriate and would be contrary to the intent of the statute.

Appropriate Guidelines Sentence for Certain FCPA Offenses Involving Persons Other than Public Officials: With respect to the second issue for comment as to whether bribes to foreign candidates under 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), and 78dd-3(a)(2) should remain in §2B4.1 because that section also applies to "similar offenses involving United States Presidential and Vice Presidential Candidates under 26 U.S.C. §§ 9012(e) and 9042(d)," DOJ states these latter offenses apply only to payment of a "kickback or any illegal payment in connection with any qualified campaign expense." In DOJ's view, the payments prohibited under the FCPA apply to payments intended to cause the candidate to use his influence with other public officials to affect their official acts or to cause the candidate, if elected, to take some official action. The focus of FCPA's prohibitions, therefore, is not on the candidate's campaign expenditures but payments intended to influence his conduct with respect to governmental actions. Accordingly, DOJ believes these provisions should be covered by the same public corruption guideline, §2C1.1, as applies to bribes to public officials.

Practitioners Advisory Group (PAG)
Co-Chairs Jim Felman & Barry Boss

PAG states that, given the amorphous nature of the underlying criminal offense, it is concerned about enacting any changes that will increase the potential sentences for individuals convicted of violating the Foreign Corrupt Practices Act ("the Act" or "FCPA").

PAG contends that the proposed amendment would shift FPCA offenses from U.S.S.G. §2B4.1 to U.S.S.G. §2C1.1. PAG states that this modification is apparently fueled by the perception that the public corruption aspect of FCPA violations, though usually committed for commercial purposes from the perspective of the defendant, is the essence of the violation. PAG states that neither amended guideline defines "public international organizations," nor is it well-defined in the FCPA, and it would appear to be a highly elastic term. [PAG did not submit a recommendation for further defining "public international organizations."]

PAG suggests that, in most cases, the amended guideline will result in a significantly increased sentence for individuals found to have violated the FCPA. PAG is troubled by this result because they are not aware of any statistical analysis or widely held belief supporting the proposition that defendants convicted of this crime are presently being under-punished. Accordingly, PAG urges the Commission to move cautiously in making any such revision.

Amendment 3 - Career Offenders and Convictions under 18 U.S.C. §§ 924(c) and 929(a). Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ believes the definitions for the career offender guideline should be amended so that the career offender provision is more fully consistent with the statutory directive in the Commission's organic statute. In the spring of 2000, however, the Commission promulgated Amendment 600 (effective November 1, 2000), which amended the career offender definitional guideline, §4B1.2, to exclude violations of 18 U.S.C. § 924(c) from the application of the career offender provision (although it did include such violations for purposes of prior convictions). That guideline amendment was a response to amendments in the 105th Congress to 18 U.S.C. § 924(c) that, among other things, transformed mandatory fixed sentences into mandatory minimum sentences carrying a maximum of life imprisonment. Pub. L. No. 105-386. In the view of DOJ, a violation of 18 U.S.C. § 924(c) (with underlying violent offense (as opposed to drugs)) is a crime of violence and should be subject to the career offender statute. The gravamen of the offense consists of using or carrying a firearm during and in relation to a federal crime of violence or drug trafficking crime, or possessing a firearm in furtherance of such a crime. DOJ sees no reason to exclude the offense from the application of the career offender provision, especially given the fact that it is already explicitly included for purposes of prior offenses.

Further, although DOJ supports the gist of this amendment as currently drafted, it believes it has identified an anomaly in the application of the amendment. Under the amendment, a small number of career offenders would actually receive lower sentences than they would if they had little or no criminal history.

As a possible solution to this anomaly, DOJ recommends the creation of a schedule of additional consecutive time (beyond the minimum) for someone who is a career offender with a section 924(c) conviction rather than a default offense level for § 924(c) career offenders (e.g., the proposed offense level of 37). The guideline could require that for those career offenders convicted of violating section 924(c), the sentence would be computed as otherwise applicable with a specific number of years added on for the 924(c) violation (the mandatory consecutive portion). The add-on could be the same for every career offender, or it could vary depending on certain offense or offender characteristics. This would ensure that every career offender receives a higher sentence than if he were not a career offender.

Practitioners Advisory Group (PAG)
Washington, DC 20009

PAG opposes this amendment because it would work an unreasoned, uncalled for change to the current rules under §4B1.1 (Career Offender) for classifying 18 U.S.C. § 924(c) or § 929(a) convictions, allowing them to count as the present (or third) conviction needed to make a defendant a career offender for sentencing purposes. PAG believes that the amendment should be rejected because it is not based on any empirical study or call for action by Congress or any of the players in the federal criminal justice system, and the only identifiable reasoning behind it is flawed.

According to PAG, the amendment is, at its core, grounded in the criminal history section of the Guidelines and deals with the interaction between a current offense and past convictions and how they mix (and how a certain group of defendants should be treated) at sentencing. PAG believes the amendment is premature at best and should be deferred in light of the ongoing recidivism study by the Commission staff which is to be completed in fall 2002.

Further, PAG believes that neither 28 U.S.C. § 994(h), nor its construction in LaBonte, require or support the amendment. PAG believes that the total disconnect between LaBonte/28 U.S.C. § 994(h) and the heart of the amendment is of major significance in evaluating the amendment, because this is the only posited basis for the enactment. PAG argues that if the amendment is to stand or fall on what is required by LaBonte, then it must fall, because the drastic redefinition of 18 U.S.C. § 924(c) or § 929(a) offenses neither flows from or is suggested by LaBonte. Without the need for reclassification, the myriad new rules (the second part of Amendment 3) are rendered unnecessary.

In opposing Amendment 3, PAG also finds it significant that there has not been any call for the changes made in the amendment, and it could locate no court opinion, position paper or other monograph lamenting the current treatment of these convictions or calling for the changes outlined in the amendment. In addition, there has been no congressional directive or legislation requiring such a change, and PAG believes this is especially significant given that the Commission's last review of the treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions was just over one year ago, when it promulgated Amendment 600.

Finally, PAG states that if not rejected, then the amendment should at least be held for consideration in a future amendment cycle in light of the recidivism study because the format of the study, the data relied on, and its conclusions will guide not only future amendment proposals, but will shape the debate regarding those amendments and, possibly, the entire structure of Chapter Four of the Guidelines. It is PAG's understanding that consideration of the structure of Chapter Four and the general rules for scoring prior convictions, found at §§4A.1.1, 4A1.2 and 4A1.3, has been deferred until after the study is finalized.

Amendment 4 - Expansion of Official Victim Enhancement

Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ recommends one minor modification to the amendment. According to DOJ, neither the language of the guideline nor the application note makes clear that the enhancement applies when an assault occurs off prison property, for example, during a work assignment in the community while the inmate is supervised by a "prison employee," as defined by the application note. This could be remedied by amending the last portion of subsection (b)(2) to read "in the custody or control of prison or other correctional facility authorities." However worded, the criteria for applying the enhancement, it believes, should be two-fold: the defendant was in official detention – whether pretrial or serving a term of imprisonment – and the defendant was under the personal control of detention authorities at the time of the assault.

Further, DOJ recommends a broader enhancement that would include individuals who perform other functions in a prison or who assist law enforcement in the performance of their duties, even if those persons do not supervise or have regular contact with prisoners. Any assault in a prison setting threatens prison security and affects the prison's ability to maintain order. In addition, it believes this enhancement would be consistent with the principle underlying the guideline enhancement to include civilians assisting law enforcement within the scope of the guideline. Assaulting persons who are assisting police poses an additional threat to public order that warrants such an enhancement.

Practitioners Advisory Group (PAG)
1615 New Hampshire Avenue, NW
Washington, DC 20009

PAG takes no position on whether or not the enhancement should be expanded to cover prison employees as well as corrections officers. But PAG does oppose broadening the scope of the adjustment beyond prison employees as suggested in the issue for comment, seeing no justification for including private attorneys, for example, within the definition of an "official victim."

Amendment 5 - Acceptance of Responsibility

Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ supports the proposed amendment. In its opinion, there is no benefit from timely disclosure of the defendant's involvement in the offense that merits the additional adjustment when the court must continue to have hearings and conferences and the government must continue to prepare for trial. Furthermore, the amendment would add a level of clarity to what the defendant must do to earn the additional adjustment that, ultimately, should benefit the plea negotiation process.

Further, with respect to the circuit conflict the amendment purports to resolve, DOJ agrees with the majority view and therefore supports the amendment. It also thinks the bracketed application note, which proposes an exception for an "extraordinary case," should be deleted as superfluous, because the proposed amendment explicitly speaks only to the "ordinar[y]" case. DOJ states it has difficulty conceiving of any "extraordinary case" that would warrant the reduction despite the commission of another offense while pending trial or sentencing on the instant offense because the commission of an additional crime casts doubt on the sincerity of contrition for another offense.

Practitioners Advisory Group (PAG)
1615 New Hampshire Avenue, NW
Washington, DC 20009

PAG opposes the proposed revision to U.S.S.G. §3E1.1 that would limit a judge's discretion to award a third level reduction for acceptance of responsibility, believing the Commission should not so revise Chapter Three at this time.

PAG argues that denying judges the discretion to award defendants a third offense level reduction in select cases would add unnecessary further rigidity to the guidelines. Moreover, this unwelcome change would be attempting to solve a problem that has been described only anecdotally; PAG is not aware of any statistical analysis or detailed study that supports the proposition that judges have too much discretion in awarding the third level for acceptance of responsibility.

According to PAG, this rule seems to recognize the unfairness in penalizing a defendant who has good reasons for the delay in pleading guilty, violate the well-settled proposition that judges stand in the best position to evaluate those reasons. Further, the proposed revision would eliminate that discretion and require the sentencing court to deny defendants the third level reduction, regardless of what delayed their guilty plea, and despite their being forthcoming about their involvement.

PAG questions how widespread the purported problem is, and how many cases there are nationally in which a defendant "waits until the eve of trial" to plead guilty. PAG also questions in how many of those cases delays in guilty pleas are the defendant's fault and in how many the lateness is attributable to the government (or to no one in particular). PAG believes it would be unfair to penalize defendants whose guilty plea decision is delayed because they cannot get timely discovery or other information from the government (which is probably not an uncommon occurrence).

PAG states that defendants already face myriad pressures to plead guilty as soon as possible. These pressures are almost entirely exerted by the government, in conjunction with its utilization of both charge-bargaining and the provisions of U.S.S.G. §5K1.1.

However, if the Commission wishes to pursue DOJ's concern, PAG proposes that a statistical and economic analysis of the problem first be conducted. A working group could be formed to study and prepare a report (similar to the comprehensive 1991 Acceptance of Responsibility Working Group Report). Once the scope -- and even existence -- of the problem mentioned by DOJ is confirmed, then the proposed revision can be properly considered and weighed against its potential impact on defendants and courts.

Additionally, PAG opposes the second part of the proposed amendment that seeks to resolve a circuit split regarding whether a defendant must be denied the downward adjustment for acceptance of responsibility when he or she engages in any new criminal conduct before sentencing. Sentencing judges are best equipped to determine whether in a particular case new criminal conduct justifies depriving a defendant of a reduction for acceptance of responsibility.

New York Council of Defense Lawyers
Victor J. Rocco, President
120 West 45th Street
New York, New York 10036

The New York Council of Defense Lawyers (NYCDL) objects to the proposed amendment to §3E1.1 which would eliminate subsection (b)(1), explaining that the Commission's argument that subsection (b)(1) undermines the incentive to plead guilty ignores the language of the guideline itself. The NYCDL believes a defendant complying with subsection (b)(1) may often save the Government more time and money than a defendant complying with subsection (b)(2), because the Government will naturally seek to have all information regarding the crime at the time of sentencing; therefore it will be better served by a defendant who comes in early and reveals all factual information than by a defendant who states he wants to plead guilty but waits until the sentencing to provide information.

The NYCDL also argues that by eliminating the extra level reduction for a defendant who seeks a constitutional challenge or seeks to argue the inapplicability of the statute to his conduct, the proposed amendment goes against Application Note 2 and will make it less likely that these

defendants will cooperate fully at an early stage with respect to the conduct at issue. This result, it argues, is inconsistent with the goals of the guideline.

Further, the NYCDL argues that eliminating subsection (b)(1) will not only penalize the defendant who comes in early, saving the Government time and money, but will also unnecessarily force a defendant to give notice of his intention to plead guilty before his attorney has exhausted all avenues to prevent him from being unjustly convicted.

With respect to the circuit conflict the amendment purports to resolve, the NYCDL states that the rationale in the minority circuit is both reasonable and supported by the text of the guideline itself. Therefore, the Commission should conclude that criminal conduct which occurs pending trial or sentencing and which is wholly distinct from the offense of conviction may not be considered in assessing whether a defendant has accepted responsibility for the offense of conviction. However, should the Commission decline to follow the minority circuit, the NYCDL argues it should still not adopt the proposed amendment because it goes far beyond merely adopting the majority position which holds that subsequent criminal conduct may be considered. Instead, the proposed amendment creates a presumption that, barring extraordinary circumstances, the reduction should ordinarily be denied when the defendant has committed an additional offense. According to the NYCDL, such an amendment would unnecessarily curtail the discretion usually afforded the sentencing court in deciding whether to award the initial two-level adjustment.

Alternatively, the NYCDL recommends the Commission should allow the courts to fashion appropriate sentences in light of all the relevant factors so that, at most, any amendment should make clear that a subsequent offense is one factor that may be considered in evaluating whether a defendant is entitled to credit for acceptance. According to the NYCDL, because it is both reasonable and supported by the text and commentary of the guidelines, the Commission should adopt the position of the minority circuit and conclude that a defendant's criminal conduct that occurs pending trial or sentencing which is wholly distinct from the offense of conviction may not be considered by the district court in deciding whether the defendant should receive a sentencing reduction. However, should the Commission believe that the commission of subsequent dissimilar offenses is relevant, it should not impose a presumption that, absent extraordinary circumstances, a defendant should be denied the downward adjustment if he engages in criminal conduct that occurs subsequent to the offense.

Amendment 6 - Consent Calendar Amendments

Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ supports the Consent Calendar Amendments, but would recommend a minor modification in Part 15 of the amendment. Although it supports Part 15, it believes the Commission may want to explore further amending this area of the guidelines in the future to insure that the guidelines reflect the seriousness of trafficking offenses as demonstrated by the congressional findings surrounding the Act and by the statute's maximum sentence of life imprisonment. For purposes of the current proposal and amendment year, DOJ believes §2G1.1 should retain an encouraged upward departure for certain violations of 18 U.S.C. § 1591. DOJ argues there may be circumstances where §2G1.1 does not reflect the seriousness of trafficking offenses, and thinks the Commission should review this matter and explore further amending the guidelines to reflect the seriousness of trafficking offenses. For purposes of the current proposal, DOJ does not think that completely deleting the existing upward departure provision is warranted. Although it recognizes the need to amend the existing departure provision, it believes the guideline should retain some upward departure language, such as: "an upward departure may be warranted if the defendant received an enhancement under subsection (b)(2) but that enhancement does not adequately reflect the seriousness of the defendant's promotion of a commercial sex act by a person who had not attained the age of 18 years."

FEDERAL PUBLIC DEFENDER

District of Arizona
222 North Central Avenue, Suite 810
PHOENIX, ARIZONA 85004-2250

FREDRIC F. KAY
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 602-382-2800

February 14, 2002

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

Re: Comments Relating to Proposed Amendments
Federal Register Notice – November 27, 2001

Dear Judge Murphy:

I write on behalf of the Federal and Community Defenders to comment on the proposals published by the Commission relating to the guidelines for (1) acceptance of responsibility, §3E1.1; (2) cultural heritage, § 2B1.5; and (3) career offender, § 4B1.1.

Thank you for your consideration of our comments. As always, we are available to provide the Commission with any additional information it may require.

We look forward to meeting with you on February 25, 2002.

Very truly yours,

Jon Sands/sh

Jon Sands
Chair, Sentencing Guidelines Subcommittee

cc: U.S. Sentencing Commissioners
Timothy B. McGrath
Charles R. Tetzlaff
Carmen Hernandez

ACCEPTANCE OF RESPONSIBILITY – § 3E1.1

The Federal Defenders oppose the proposed amendment to the acceptance of responsibility guideline because it limits the flexibility of district court judges and makes the guideline less fair and more subject to challenge. In addition, we believe that the Commission should not make changes to §3E1.1 – a guideline that was applied in 90% of cases last year – in this piecemeal fashion. The guideline should be amended, if at all, only after adequate study of Commission data including consideration of the various defense requests for adjustments that have been submitted over the years. We recommend that the Commission defer modifications and convene an *ad hoc* working group – with participation by the defense bar – to study whether disparity or unfairness affects application of the acceptance of responsibility guideline and to recommend changes where appropriate.

It makes little sense to reduce the court's discretion in the manner proposed. Judges will no longer be able to award an additional one-level reduction to defendants who confess at the time of arrest but who – for sound legal reasons – do not immediately plead guilty.[1] These situations frequently occur because counsel is reviewing or waiting for discovery, conducting an investigation or otherwise studying the client's legal options or because the defendant is waiting for the court to rule on a motion that asserts a violation of a legal or constitutional right.[2] To withhold the adjustment because the defendant is exercising rights critical to the reliability and fairness of the proceeding elevates form over substance. In all cases, it seems odd to deny the additional one-level reduction to defendants who confess at the time of

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[1] A defendant with an offense level of 16 or greater who is eligible for a two-level reduction in his offense level because he has accepted responsibility for his offense, may obtain an additional one-level reduction under the current version of U.S.S.G. § 3E1.1(b), in one of two ways, by:

> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of this intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently

The proposed amendment would eliminate subsection (b)(1).

[2] It is not clear how prevalent such cases are but a WestLaw search revealed only 13 cases decided under this provision in the year 2000.

arrest, arguably the quintessential demonstration that a person has accepted responsibility for his wrongful conduct in a very timely manner.

Notably, this proposal does not arise out of any of the priorities identified by the Commission. Rather, it is the result of the Department of Justice's interest in creating a stronger incentive for early guilty pleas which, in DOJ's opinion, will conserve prosecutorial and judicial resources. It does so not by some additional incentive but by eliminating judicial discretion. The proposal does not make the guidelines more certain, fair or uniform and does not promote sufficient flexibility "to permit individualized sentences when warranted." 28 U.S.C. § 991(b)(1). And when viewed against the backdrop of the realities of federal sentencing, the proposal elevates the conservation of resources above the exercise of constitutional rights.

Such a shift in emphasis is indefensible. A defendant cannot control pre-plea procedures. Even after a confession, the need for discovery and investigation is acute because uncharged relevant conduct may substantially increase a sentence and the indictment only sets the maximum penalties faced by the accused. But defendants do not control the diligence or schedule of counsel. Defendants also do not control the timely production of discovery and Brady materials by the government. Nor do defendants control defense counsel's ethical obligations to research the law and the facts before rendering legal advice. Undeniably, defendants should not be penalized and deprived of the additional one-level reduction merely because they assert constitutional or legal issues unrelated to factual guilt. See U.S.S.G. § 3E1.1, comment (n.2).

A system in which fewer than 5% of defendants go to trial is not in urgent need of yet more and earlier guilty pleas.[3] At every point in the process, there already exists pressure on the defendant to plead, to waive rights and to do so quickly. At initial appearance, a motions deadline looms for the accused, often within 15 days although discovery is not readily made available. The rush to be the first to obtain the substantial assistance agreement is another source of pressure. Increasingly, the government also relies on "fast-track" deals (*e.g.*, entering an early guilty plea and declining to file motions) and requires that defendants waive all manner of constitutional and statutory rights (including the right to argue for adjustments and departures under the guidelines and appellate rights) as a prerequisite to pleading guilty. We see no need for further incentives to rush the process particularly where the method selected will tie the hands of the judge who will no longer be able to look at why a defendant did not enter an earlier plea. At the same time that it penalizes defendants, the change will give freer rein to prosecutors even in cases where their inactivity in producing discovery and *Brady* materials or insistence on admissions to crimes not committed may be the primary cause holding up the accused's decision to plead and even where the prosecutor's

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[3] See 2000 Sourcebook of Federal Sentencing Statistics at 20 (guilty plea rate has increased from 91.7% in fiscal year 1996 to 95.5% in fiscal year 2000).

conduct may in the particulars of the case impinge on the due process and 6th Amendment rights of the accused. See, e.g., United States v. Fields, 39 F.3d 439, 446-47 (3d Cir. 1964) (reversing denial of third-level reduction where defendant was acquitted of count to which he refused to plead and convicted only of counts to which he was willing to plead).

Furthermore, substantial judicial and prosecutorial resources are already conserved under a guideline scheme that relies on relevant conduct applied on the basis of hearsay evidence without the benefit of confrontation. A defendant should not also have to face a Hobson's choice of rushing to the point of jeopardizing due process and the effective assistance of counsel so as not to lose an additional one-level reduction in his offense level. Against that backdrop, any proposal that binds the hands of judges in this fashion will create inequities that may be rectified in some, but not all, cases by judges granting departures under the authority of 18 U.S.C. § 3553(b).

The case law does not reveal any difficulties with the application of §3E1.1(b)(1) that would warrant its elimination as proposed. In fact, judicial discretion works to distinguish among defendants seeking the adjustment, winnowing out those defendants whose delay is such that they do not warrant an additional reduction. The guideline only allows the additional one-level reduction where the district court is satisfied that the defendant's disclosure is both timely and complete. Several cases illustrate this point. For example, in United States v. Paster, 173 F.3d 206, 215 (3d Cir. 1999), the defendant murdered his wife after she disclosed numerous extramarital affairs. He called the police, confessed and waited for the authorities to arrive. The raised the insanity defense to his first degree murder prosecution and challenged the voluntariness of his statement based on his mental condition. After receiving an opinion from a government psychiatrist that the defendant had not planned to commit the murder, the government offered a plea to a lesser offense, which the defendant accepted. The Third Circuit found that the additional one-level reduction under §3E1.1(b)(1) was appropriate because the defendant had timely and truthfully admitted his role in the offense when he was arrested. That he raised a constitutional challenge to his statement did not preclude the reduction. In contrast, where a defendant recants an earlier inculpatory statement, courts have denied a reduction under (b)(1) finding the statement incomplete. Compare United States v. Francis, 39 F.3d 803, 809 (7th Cir. 1994) (where defendant, after giving statement to FBI regarding his own role and that of his coconspirators, filed a sworn affidavit completely recanting his earlier statement, court denied the additional one-level reduction finding that the defendant's sworn affidavit denying specific facts of the conspiracy made his initial statement incomplete and therefore did not satisfy the requirements of § 3E1.1(b)(1)).

Were a comprehensive review of this guideline to take place, the Commission should clarify that delays relating to pretrial motions, and the production of discovery and *Brady* material should not be used to deprive a defendant of the additional one-level reduction under §3E1.1(b)(2), the other prong that provides for an additional one-level reduction. Although §3E1.1(b)(2) authorizes the additional one-level reduction if the defendant's plea is

sufficiently timely to save the government from having to prepare for trial and allow the court to allocate its resources efficiently, the government often successfully argues to preclude the additional reduction whenever it has to respond to a pretrial motion, effectively expanding the provision beyond its text – even if no trial preparation takes place. See, e.g., United States v. Lancaster, 112 F.3d 156, 158-59 (4th Cir. 1997) (affirming denial of additional one-level reduction to defendant who filed suppression motions then pled guilty nine days after denial of motions, and almost a month before trial). In some cases, the government argues that the mere filing of a motion by the defendant, without any preparation or response by the government whatsoever, disqualifies the defendant from receiving the additional one-level reduction.

In sum, the proposal makes the guideline less fair and more subject to challenge. By eliminating the court's discretion to consider the defendant's timely confession, the proposal shifts the focus from rewarding acceptance of responsibility and remorse to penalizing the exercise of constitutional rights to due process, assistance of counsel, and the other protections guaranteed by the 4th, 5th and 6th amendments to the U.S. Constitution. See United States v. McConaghy, 23 F.3d 351, 353-54 (11th Cir. 1994) (to avoid unconstitutional application of §3E1.1(b)(2) the district court must determine the timeliness of defendant's notice of intent to plead guilty based on the entirety of the circumstances). We recommend that the Commission not adopt this proposal but rather defer any changes to this guideline until it can conduct a more comprehensive review of Commission data with input from a working group that includes members of the defense bar.

Proposal to Resolve Circuit Conflict -- § 3E1.1

The second part of the proposed amendment is intended to resolve the split among the circuits about whether the sentencing court can deny the acceptance of responsibility reduction when the defendant engages in new criminal conduct beyond the offense of conviction. The proposal purports to adopt the majority position, requiring the sentencing court to consider such conduct when determining acceptance. Defenders oppose this proposal because it goes well beyond the findings of the majority of circuits, raises significant policy concerns and sets the stage for a new conflict on this same issue. As with the first part of this amendment, Defenders recommend that the Commission put off this amendment until it can fully review this guideline in based on data and the input of an ad hoc working group that includes members of the defense bar.

We also agree with the Sixth Circuit that whether a defendant has committed or been accused of committing an offense, distinct from the offense of conviction, after he enters a plea of guilty, should not determine whether the defendant has accepted responsibility for the offense of conviction, particularly where the alleged wrongful conduct is a failed drug test. United States v. Morrison, 983 F.2d 730 (6th Cir. 1993). Only in the extraordinary case for example, where the wrongful conduct amounts to relevant conduct to the offense of conviction should such allegations serve to deprive the defendant of a reduction for acceptance of responsibility.

Such post-plea offenses are better treated as an aspect of criminal history and in fact are addressed in Chapter 4 of the guidelines. A conviction that has become final whether it arises out of conduct committed before or after the defendant pleaded guilty counts as criminal history. U.S.S.G. § 4A1.2, comment. (n. 1). If the defendant has been convicted but not yet sentenced, he will receive one criminal history point for that conviction. U.S.S.G. § §4A1.2(a)(4). At a subsequent sentencing for the new conduct, the court may consider the fact that the defendant committed a new offense while awaiting trial or sentencing as a basis for an upward departure. U.S.S.G. § 4A1.3(d); see also U.S.S.G. § 5G1.3 (rules for determining the sentence for a defendant subject to an undischarged term of imprisonment). If a state rather than a federal prosecution were to ensue, a state court can certainly consider that the defendant committed the offense after having pleaded guilty in another case. But at least in those instances, before being penalized for the new offense the defendant will have been formally charged and had an opportunity to plead or go to trial, with the full panoply of constitutional rights afforded to someone who is accused of a crime.

If, on the other hand, there is merely an allegation of wrongdoing, such allegations ought not to be part of the calculus for acceptance of responsibility when sentencing for an unrelated offense. It complicates the sentencing proceeding when allegations unrelated to the offense of conviction have to be resolved in what amounts to a mini-trial. See e.g., Custis v. United States, 114 S. Ct. 1732 (1994) (ACCA defendant not allowed to challenge prior conviction except where there was a Gideon violation); Taylor v. United States, 495 U.S. 575 (1990) (apply categorical approach when determining whether a prior was a crime of violence). It also implicates the defendant's fifth amendment right to remain silent as that silence cannot be used to infer that he in fact committed the alleged wrongdoing. See Mitchell v. United States, 119 S. Ct. 1307 (1999) (defendant's silence at the sentencing hearing regarding drug amounts cannot be used as an adverse inference against her to find a higher amount). Moreover, Mitchell recognized the 5th Amendment conundrum with respect to this guideline noting that

> [w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 ... is a separate question. It is not before us, and we express no view on it.

Mitchell at 1311-16 (1999). Based on the principle of constitutional doubt, therefore, the Commission ought not adopt an option that may run afoul of the Fifth Amendment or that places a burden on the defendant's assertion of that right particularly where the criminal history guideline already accounts for such conduct. See Almendarez-Torres v. United States, 523 U.S. 224, 250, 118 S.Ct. 1219, 1234 (1998) (Scalia, J. dissenting) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

We therefore recommend that the Commission adopt commentary that provides that allegations of new wrongful conduct, not related to the offense of conviction, be addressed as part of criminal history rather than as part of the determination of whether the defendant is eligible for a downward adjustment under §3E1.1.

The Commission's proposal goes too far for other reasons, also. There is a split among the circuit courts of appeal as to whether a court may deny a reduction for acceptance of responsibility when the defendant commits a new offense unrelated to the offense of conviction. The First, Second, Third, Fourth, Fifth, Seventh, Tenth and Eleventh Circuits have held that the sentencing court can consider new criminal conduct, such as drug use or the commission of a new offense, when determining whether an adjustment for acceptance of responsibility is warranted. United States v. O'Neil, 936 F.2d 599, 600-01 (1st Cir. 1991); United States v. Fernandez, 127 F.3d 277, 285 (2nd Cir. 1997); United States v. Ceccarani, 98 F.3d 126, 128-31 (3rd Cir. 1996); United States v. Kidd, 12 F.3d 30, 34 (4th Cir. 1993); United States v. Watkins, 911 F.2d 983, 984-85 (5th Cir. 1990); United States v. McDonald, 22 F.3d 139, 142-44 (7th Cir. 1994); United States v. Byrd, 76 F.3d 194, 196-97 (8th Cir. 1996); United States v. Prince, 204 F.3d 1021, 1023 (10th Cir. 2000); United States v. Pace, 17 F.3d 341, 343 (11th Cir. 1994). The Sixth Circuit, the sole minority circuit, has held that the court may not look at post-indictment conduct unrelated to the offense of conviction when assessing the defendant's acceptance of responsibility for the underlying offense. United States v. Morrison, 983 F.2d 730, 735 (6th Cir. 1993). None of the circuits have held that a positive drug test or the commission of another offense automatically requires a denial of acceptance of responsibility for the unrelated offense of conviction without regard to the individual circumstances of the case.

The proposed amendment will add language to § 3E1.1, comment (n.4) functionally equating the commission of a new offense while on pretrial release with obstruction of justice, except in extraordinary circumstances. A defendant in this situation would ordinarily not be entitled to a reduction for acceptance of responsibility. The proposal goes well beyond the majority holdings. None of the majority opinions relied on application note four or equated new criminal conduct (such as a positive drug test while on pretrial release) with obstruction of justice. Most of the majority opinions are based on §3E1.1, comment (n. 1(b)), which states that the defendant's "voluntary termination or withdrawal from criminal conduct or associations" is an appropriate consideration for the district court when determining acceptance of responsibility. O'Neil, 936 F.2d at 600-01; Fernandez, 127 F.3d at 285; Ceccarani, 98 F.3d at 129-30; Watkins, 911 F.2d at 984-85; McDonald, 22 F.3d at 142-44; Byrd, 76 F.3d at 196-97; Prince, 204 F.3d at 1023. The Fourth and the Eleventh Circuits do not rely on any particular provision in §3E1.1 in deciding the issue. Kidd, 12 F.3d at 34; Pace, 17 F.3d at 343.

Nor have any courts held that it should be rare for such a defendant to receive the reduction for acceptance of responsibility. To the contrary, the circuit courts have held that the sentencing court is in the best position to determine whether the new conduct should preclude the reduction. In fact, several of the majority circuits explicitly stated that such

conduct does not necessarily preclude a reduction for acceptance, it is merely a factor for the court's consideration:

> We can find nothing unlawful about a court's looking to a defendant's later conduct in order to help the court decide whether the defendant is truly sorry for the crimes he is charged with. The fact that a defendant engages in later, undesirable, behavior does not *necessarily* prove that he is not sorry for an earlier offense; but it certainly could shed light on the sincerity of a defendant's claims of remorse.

O'Neil, 936 F.2d at 600 (emphasis in the original); accord Ceccarani, 98 F.3d at 129-30); Byrd, 76 F.3d at 197; McDonald, 22 F.3d at 144.

In addition, the proposed amendment has significant policy implications. By directing that acceptance be awarded only in rare cases, the amendment has the substantial potential to reduce the number of cases that will be resolved by plea. Many defendants test positive for drug use while on pretrial release, some are arrested for minor offenses and others are accused of more serious conduct. If the district court is instructed to deny acceptance in essentially every such case, these defendants will have absolutely no reason to plead guilty absent a charge reduction by the government. Indeed, defense attorneys will be bound to inform clients that have a history of drug use that there is nothing to be gained by entering a plea and nothing to lose if they choose to go to trial.

If the Commission adopts the amendment as currently proposed, it will change the law in every circuit, not just the minority Sixth Circuit and will very likely result in a new circuit split as the questions of which cases are extraordinary and which are not and how much discretion the district courts can exercise in making that call – particularly with respect to positive drug tests – are resolved by the circuits. Further, the current proposal strips the sentencing court's discretion in evaluating whether, given all of the facts and circumstances of each individual case, the defendant has accepted responsibility. Instead, it substitutes a bright-line rule which will preclude a large number of defendants from receiving the acceptance of responsibility reduction.

Although this alternative is less preferable than the Sixth Circuit rule, the Commission can better adopt the reasoning of the majority of circuit courts by adding clarifying language to application note 1(b) indicating that the sentencing court may consider new criminal conduct unrelated to the offense of conviction when assessing whether the defendant accepted responsibility but only as one of the several factors to be considered. This language would make clear that such conduct is a factor for consideration but does not in and of itself preclude the court from awarding the reduction nor automatically trigger the obstruction enhancement if the court finds the defendant has accepted responsibility.

With respect to positive drug tests, the Commission should also insert language in the commentary to §3E1.1 similar to that included by Congress in the probation and supervised release statutes which provide that the Court must consider substance abuse treatment programs before it takes action against someone who fails a drug test.[4]

Conclusion

For all the reasons stated, the Federal Defenders oppose the particular proposals to amend §3E1.1(b)(1) and to resolve the circuit split. Both proposals eliminate rather than guide judicial discretion placing the proposals at odds with the notion that the "sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." U.S.S.G. § 3E1.1, comment. (n.5). Eliminating the additional one-level reduction for those defendants who confess at the early stages but take more time to plead guilty has the added fault that it elevates concern with saving prosecutorial resources above what should be the primary concerns of the acceptance of responsibility guideline – whether the defendant's acceptance of responsibility is sincerely made and whether the defendant's confession "ensures the certainty of his just punishment in a timely manner." U.S.S.G. § 3E1.1, comment. (backg'd). Timeliness in this context should not require that the defendant forego his constitutional right to counsel and other due process protections.

Defenders recommend that the Commission resolve the circuit split by directing that new criminal conduct be ordinarily considered for what it is, an issue of criminal history with uncharged allegations left to be considered in any subsequent criminal proceedings.

As to both proposals, we recommend that the Commission defer modifications this year and instead convene an ad hoc working group, including members of the defense bar, to consider comments and data relating to any disparity or unfairness that may be affecting the application of the acceptance of responsibility guideline.

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[4] 18 U.S.C. § 3563(e) provides in pertinent part:

> The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3565(b), when considering any action against a defendant who fails a drug test.

See also 18 U.S.C. § 3583(d) (conditions of supervised release).

CULTURAL HERITAGE OFFENSES – § 2B1.5

Amendment 1 proposes to create a new guideline, § 2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. Federal Defenders agree with the Sentencing Commission that crimes involving cultural heritage resources present unique issues different from general property crimes covered by the guidelines. For this reason, we do not oppose the Commission's decision to consider these types of offenses. We believe, however, that this proposal should be deferred until the Ad Hoc Committee on Native American Issues that is being established by the Commission is functioning and able to assist in formulating the proposals.

Indeed no one disputes that these sites should be protected. Native American members of the Ad Hoc Committee and counsel who regularly practice in this unique area of the law will bring necessary perspectives and expertise to bear on the mater of designing offense levels, specific offense characteristics and the other sentencing particulars. The Ad Hoc Committee could address issues that may not be apparent to the Commission or covered in § 2B1.5. For example, the appropriate punishment to assign to the theft of a Zuni mask or other artifacts is complicated by cultural factors and practices that may make an offense more or less damaging than might otherwise be perceived. Likewise, an offender who knowingly and wilfully violates a sacred tribal site prohibited to nontribal members may merit a different penalty than an individual who impulsively picks up artifacts at a national park. At times, there exists an inherent conflict between the interests of the Department of Interior and those of the Native American communities that may impact the workings of this guideline but that may be best resolved only after input from the Ad Hoc Committee.

If the Sentencing Commission goes forward with the enactment of § 2B1.5, without first obtaining input from the Ad Hoc Committee, it should not adopt § 2B1.5(b)(4)(B), which provides for an increase of two offense levels if the offense involved a pattern of similar violations. The Commission should also not adopt Application note 5, which defines "pattern of similar violations" to include "two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of Federal, states, or local provision, rule, regulation, ordinance, or permit." A civil or administrative adjudication is an unreliable indicator for sentencing purposes. An offender charged with a similar administrative adjudication, is not entitled to an attorney. Moreover, usually such adjudications are made without the benefit of a jury and initially may be made by an administrative law judge. Thus, this enhancement disadvantages the poor, who do not have the resources to contest these adjudications. The proposed § 2B1.5(b)(4)(B) would have the same impact as a two level increase in the offenders' criminal history category. However, civil and administrative adjudications are more analogous to those types of proceedings whose outcomes are not counted for the purposes of criminal history under § 4A1.2. It would be more appropriate to treat civil or administrative adjudications related to § 2B1.5 offenses in the same fashion as elsewhere in the guidelines – a potential basis for an upward departure

under U.S.S.G. § 4A1.3(c). Such discretion will permit courts to avoid disparity in treatment – that would otherwise result from wholesale application of this provision – stemming from adjudications that do not meet due process standards and that adversely impact persons lacking the financial resources to retain lawyers or otherwise defend themselves at adjudicative proceedings. Under the current proposal, a "pattern of prior adjudications" which is defines as two or more adjudications overly affects the guideline range in that the existence of a such a pattern has the same impact on the offender's sentence as five criminal history points.

Application Note 7 encourages an upward departure in cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. Application Note 7 gives the example that an upward departure may be warranted if, in addition to cultural heritage resources, the offense involved the theft of or damage to items that are not cultural heritage resources. As an example of when an upward departure may be warranted, the note describes a situation where in addition to historical grave markers from a national cemetery, lawnmowers and other administrative property are stolen. This example places an unwarranted emphasis on factors related to the Department of Interior. The focus of this guideline should be limited to the theft of, damage to or the destruction of items that have cultural heritage value. Other items, such as lawnmowers or administrative materials should not be singled out as the basis of enhancements or upward departures. If anything, they should be the basis for a downward departure as they would not appear to be as valuable as items having cultural significance. It is unclear why this option is necessary as a offense involving a destruction of non-cultural items would be its own offense and thus would be already covered in the guidelines. To the extent that destruction of such items would not be an independent criminal offense, and counted under another guideline, an upward departure should not exceed the corresponding number of levels from the loss table in § 2B1.1. As noted by the Sentencing Commission, the greater loss would be that of the cultural heritage, not the replaceable items which are run-of-the-mill losses of the type normally considered in burglary or theft offenses.

It is doubtful that Application Note 2 would underestimate the actual value of a lost object. If anything, it will overstate the harm. For example, Application Note 2 (C)(iii) could unduly increase the punishment of an offender who damages a minor or insignificant artifact. Also, it could impermissibly bring into the determination of the sentence religious factors. See U.S.S.G. § 5H1.10 ("These factors [creed and religion] are not relevant in the determination of a sentence."). Some cultures may require elaborate reburial ceremonies to be performed while others may not. Differing religious practices should not drive the sentencing guidelines under the claim that they are necessary for the "appropriate reburial of" artifacts. As an example, the Sandia Pueblo does not have any reburial ceremonies where other tribes do.

Many cases charged in federal court are not commercial in nature. They are crimes of opportunity by curious hikers or hunters. Often the cases involve artifacts of limited significance or commercial value. Application Note 2(c)(iii) will greatly overstate the harm in this type of case.

While Application Note 7 provides for an upward departure if the harm caused is not adequately reflected by the calculation under this guideline, it should include a comparable provision for a downward departure in cases where the calculation under the guidelines overstates the harm caused particularly because it is likely as we noted above that Application Note 2(C)(iii) may result in a calculation of loss that greatly overstates the harm or the historical significance of the artifacts taken. Also, what may be appropriate as an award of restitution might not be appropriate for punishment under the sentencing guidelines.

It is appropriate for the Sentencing Commission to have an increase if a dangerous weapon was brandished during the course of the commission of this offense. However, § 2B1.5(b)(5)(B) should only apply if the defendant possessed the firearm in direct aid of the offense. For example, a significant number of historical sites are in rugged country that are infested with rattlesnakes and other dangerous animals. Additionally, some sites are also places where hunters legitimately ply their sport. A hitchhiker with a "snake gun" or a hunter who comes across a site and impulsively takes an artifact should not be subject to the enhancement under § 2B1.5(b)(5)(B). Thus, the guidelines should differentiate between a hunter who comes across a site and takes an artifact and someone who goes into a museum or national memorial with the purpose of using the firearm in connection with the offense.

Finally, there is no need to add an enhancement in the event the offense involved an explosive device unless the incidence of explosive devices in these cases falls within the heartland of this guideline. This factor is otherwise currently covered by a number of encouraged upward departures, i.e., U.S.S.G. § 5K2.6 (Weapons and Dangerous Instrumentalities).[5] See also U.S.S.G. §§ 5K2.1 (Death); 5K2.2 (Physical Injury); and 5K2.5 (Property Damage or Loss). In addition, if the Commission were to add such language it should do so with language that focuses only on the acts of the defendant rather than by any broader reference that also would net not merely the person responsible for the use or plan to use the explosives but also those less culpable who may have had little or no involvement with the explosive but whose sentence will end up substantially increased without sufficient justification.

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[5] U.S.S.G. § 5K2.6 provides:

> If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

Conclusion

Notwithstanding these comments, Defenders recommend that the Commission should defer action on proposed § 2B1.5 until the Ad Hoc Advisory Committee on Native American Issues is in place and has the opportunity to provide its comments. We believe that comments from the Ad Hoc Advisory Committee would be instructive and would help the Commission to write a more responsive guideline. While the Department of Interior may address some of the harms of the crime, we believe that input from the Native American tribes and the other experts who make up the membership of the Committee would be at least as valuable in this highly specialized area. Additionally, Application Note 2(C)(iii) should be omitted as a means of calculating value under § 2B1.5(b)(1). While this calculation may be appropriate for issues of restitution, it can lead to unwarranted disparities and an overstatement of the harm caused or the significance of the artifact taken and consequently, the sentence received by the defendant.

CAREER OFFENDER DESIGNATION FOR § 924(c) OFFENSES

The proposed amendment to make the career offender enhancement applicable to persons convicted of §924(c) offenses is too complicated to be workable.[6] This is not because the Commission suddenly has lost the ability to formulate a more workable guideline. The difficulty stems from the fact that §924(c) is itself an enhancement provision that not only requires imposition of a mandatory minimum sentence but more importantly for purposes of this amendment, requires the sentence to be consecutive to any other sentences.[7]

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[6] The proposed amendment to U.S.S.G. § 4B1.1 creates a complex set of rules within the career offender guideline with multiple provisions for determining how to calculate the career offender portion of the §924(c)enhancement. In pertinent part, it states:

> (c) If the defendant (1) was convicted of violating 18 U.S.C. § 924(c) ... and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under subsection (a):
>
> (A) The offense level shall be—
>
> (i) in the case of a conviction only of an offense under 18 U.S.C. § 924(c) ...: level 37, decreased by the number of levels corresponding to any adjustment under §3E1.1(Acceptance of Responsibility) that applies; or
>
> (ii) in the case of multiple counts of conviction: the greater of (I) the offense level applicable to the counts of conviction other than the 18 U.S.C. § 924(c) ... count, or (II) level 37, decreased by the number of levels corresponding to any adjustment under §3E1.1 that applies.
>
> (B) The criminal history category shall be Category VI.
>
> (C) The amount of the mandatory term of imprisonment that is imposed to run consecutively shall be determined as follows:
>
> (i) A consecutive sentence of imprisonment shall be imposed on any count of conviction under 18 U.S.C. § 924(c) or .... The length of such consecutive sentence shall be at least the minimum term required by law.
>
> (ii) After taking into account the required statutory minimum consecutive sentence under subdivision (i), the balance of the total punishment shall be allocated and imposed, to the extent possible, on the counts of conviction, other than 18 U.S.C. §§ 924(c) and 929(a), in accordance with the rules in §5G1.2 (Sentencing on Multiple Counts of Conviction), as applicable.
>
> (iii) If the statutory minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) together with the sentence imposed on the remaining counts is less than the total punishment, then the minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) shall be increased to the extent necessary to achieve the total punishment.
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> * * * *

[7] In United States v. Gonzales, 117 S. Ct. 1032 (1997) , the Supreme Court held that the statutory language mandating a consecutive five-year term of imprisonment that "shall [not] ... run concurrently with any other term of imprisonment" contains no ambiguity and means any other term

In addition, because §924(c) already stacks punishment atop the predicate crime, the Commission ought not to stack even more punishment absent a clear statement from Congress requiring the additional punishment. We do not believe that 28 U.S.C. § 994(h), the statutory directive for career offenders, clearly requires the broad amendment that the Commission has proposed. Consequently, we recommend that the Commission defer action on this amendment, as it did in the spring of 2000, to study the issues further. At that time, the Commission "preserve[d] the status quo as it existed prior to the statutory changes to 18 U.S.C. § 924(c) . . . that established a statutory maximum of life for all violations of the statute." U.S.S.G. App. C, amendment 600. We recommend that the Commission take the same course of action at this time and go back to the drawing board to come up with a more workable and fair guideline taking into account concerns raised by the submitted comments.

Proposed Guideline Is Not Required by 28 U.S.C. § 994(h)

Section 994(h) directs the Commission to "assure" that for adult offenders who commit their third felony drug offense or crime of violence, the Guidelines prescribe a sentence of imprisonment "at or near the maximum term authorized." United States v. LaBonte, 520 U.S. 751,757 (1997), quoting, 28 U.S.C. § 994(h). In response, the Commission created the career offender guideline.

Section 994(h) defines a "career offender" as an adult who has been convicted of a felony that is either "a crime of violence" or one of a number of enumerated trafficking offenses, including 21U.S.C. § 841and four other federal drug trafficking offenses. Section 924(c) is not one of the enumerated drug offenses, however.

If the Commission chooses, as it proposes to do in the current amendment, to define 924(c) as a "drug offense" for purposes of the career offender guideline, it is doing so based on its own discretionary authority to promulgate guidelines and not because it is required to do so by the congressional mandate in 994(h). We recognize that the Commission has in other cases expanded the drug felony definition in the career offender guideline for example, to reach inchoate offenses such as attempts and conspiracies to commit the enumerated drug felonies. See U.S.S.G. § App. C (amendment 528). But in that instance, the Commission had a much stronger basis for doing so. As it explained, the Commission wanted to

> focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct...." 28 U.S.C. § 991(b)(1)(B)....

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of imprisonment, state or federal including the state term of imprisonment for the underlying crime of violence which triggered the §924(c) conviction).

U.S.S.G. § 4B1.1, comment. (backg'd.).[8] Here, those policy reasons do not apply because 924(c) is itself an enhancement that already stacks additional punishment atop the predicate crime and already quite broadly reaches felons who have not engaged in violent conduct or are held vicariously liable for the acts of others. Rather than avoid unwarranted disparities, the proposed amendment will result in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability.

Indeed, any defendant convicted of a 924(c) offense would likely be subject to prosecution and conviction for the underlying drug or violent felony. The underlying drug or violent felony should more properly trigger designation as a career offender. So that the primary effect of the Commission's proposal is to increase dramatically the career offender sentencing ranges of a class of defendants who may be held vicariously liable for the possession of firearms by co-conspirators where their own culpability is much less serious. For example, a low-level member of a drug conspiracy who never personally handled a firearm but is convicted of conspiracy to possess a firearm in furtherance of a drug offense and has two predicate felonies would be looking at a sentencing range of 360 months to life, before acceptance. Whereas if he were designated a career offender based on his drug offense, his sentencing ranges depending on the severity of his drug conviction could be 210 to 262 months (drug offense maximum of 20 years) or as high as 262 to 327 months (drug offense maximum of 40 years). Under these circumstances, we do not believe that there are sound policy reasons for the Commission to extend the 994(h) definitions of felony drug and violent offenses beyond the statutory mandate.

The congressional mandate also leaves room for the Commission to define a "crime of violence" for career offender purposes. In the career offender guideline, the Commission currently defines "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 (a). We believe this definition has worked well whereas the current proposal to expand it will not.

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[8] The background commentary to the career offender guideline states:

> Section 994(h) of Title 28, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to

Under the current definition, many §924(c) offenses would be crimes of violence because some cases do in fact involve the use or threat of physical force by the defendant or involve conduct that presents a serious risk of injury to another. But not all §924(c) offenses are crimes of violence under the current definition. Indeed, a significant number of §924(c) offenses involve no violence or threat of violence by the defendant, particularly as the elements of §924(c) were amended by Congress in 1998, interpreted by the courts and in light of coconspirator liability. See , e.g., Smith v. United States, 508 U.S. 223 (1993) (holding that defendant "used" a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c) when he offered to trade a firearm to an undercover agent in exchange for cocaine but did not otherwise use the firearm as a weapon).

A person can be convicted of a § 924(c) offense, if he "uses" or "carries" a firearm during and in relation to a crime of violence or drug trafficking offense or if he "possesses a firearm" in furtherance of any such crime. Yet, as interpreted by the courts, neither physical force of any kind nor even the risk of physical injury to another is an element of a violation under the "use" prong of § 924(c). See Smith v. United States, 508 U.S. 223 (1993). Justice O'Connor, writing for the Supreme Court in Smith, rejected the notion that Congress intended the term "use" in § 924(c) to mean that the firearm be used in an offensive manner as a weapon.

> Even if we assume that Congress had intended the term "use" to have a more limited scope when it passed the original version of §924(c) in 1968, ... we believe it clear from the face of the statute that the Congress that amended §924(c) in 1986 did not. Rather, the 1986 Congress employed the term "use" expansively, covering both use as a weapon....and use as an item of trade or barter, as an examination of §924(d) demonstrates. Because the phrase "uses ... a firearm" is broad enough in ordinary usage to cover use of a firearm as an item of barter or commerce, Congress was free in 1986 so to employ it. The language and structure of §924(c) indicates that Congress did just that. Accordingly, we conclude that using a firearm in a guns-for-drug trade may constitute "us[ing] a firearm" within the meaning of §924(c)(1).

Smith, 508 at 236.

Similarly, a § 924(c) conviction for carrying or possessing a firearm need not involve any of the elements of a "crime of violence" as defined in the career offender guideline when the firearm is carried in relation to a drug offense. See e.g., Muscarello v. United States, 524 U.S. 125 (1998). In Muscarello, Justice Breyer writing for the Court explained that a defendant "carries" a firearm in violation of §924(c) even when the handgun is not immediately accessible but is found in a locked glove compartment or trunk of a car.

> No one doubts that one who bears arms on his person "carries a weapon." But to say that is not to deny that one may also "carry a weapon" tied to the saddle of a horse or placed in a bag in a car.

Id. at 130. Congress did not intend that a defendant be "packing" or bearing the firearm on his person to be convicted for carrying a firearm under 18 U.S.C. § 924(c). Id.

A defendant may also be found guilty of a §924(c) offense merely under a vicarious liability standard of reasonable foreseeability without having acted in a way that involved "the use, attempted use, or threatened use of physical force against the person of another" or that "otherwise involves conduct that presents a serious potential risk of physical injury to another." E.g., United States v. Shea, 150 F.3d 44, 50 (1st Cir. 1998) (defendant may be convicted of §924(c) offense on the basis of Pinkerton liability for the acts of others that are reasonably foreseeable to him rather than under higher mens rea standard as aider or abettor, which requires knowledge to a reasonable certainty). The typical jury instruction on a Pinkerton theory states:

> If you find that any or all of the defendants were members of a conspiracy, you may find each defendant guilty of carrying or using a firearm during and in relation to drug trafficking offense if any of their fellow con-conspirators committed this offense during the existence of the conspiracy and in furtherance of the conspiracy. This is because each member of a conspiracy is considered to be responsible for any offense committed by a co-conspirator that could have been reasonably expected or anticipated as a necessary or a natural consequence of a conspiracy.

United States v. Washington, 106 F.3d 983, 1011 (D.C. Cir. 1997). For example, in United States v. Martinez, the 7th Circuit upheld a defendant's conviction for "carrying" a firearm in connection with a narcotics trafficking offense based on the fact that a fellow coconspirator, riding in a separate car on a trip to pick up drugs carried a firearm.

As a practical matter, what this means is that a courier who transports a shipment of drugs for a small fee or a girlfriend who takes messages for her drug-dealing boyfriend about a shipment of drugs may be held liable under §924(c) if the kingpin or any other co-conspirator has a firearm locked in a closet where he also keeps his stash of drugs. If that hypothetical courier or girlfriend, also happens to have two qualifying felony priors – which could range from felony drunk driving, larceny from a person, pickpocketing charged under a state robbery statute, burglary of a hotel guest room, to a sale of a small quantity of marijuana – she would be subject as a career offender to a sentencing range of 360 months to life, with some part of that being reduced according to formulas proposed by the

Commission to take into account the consecutive mandatory sentence required under §924(c).[9]

Because §924(c) is not – as a categorical matter – a crime that involves actual violence or the serious threat of violence, the statutory directive does not require the Commission to do what it proposes to do which is to expand the definitions in the career offender guideline by inserting an application note that states:

> A violation of 18 U.S.C. § 924(c) ... is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense."

U.S.S.G. § 4B1.2, comment. (n. 1) (proposed). That expanded definition goes beyond what §994(h) requires and ignores the reality of vicarious liability. Further, the career offender designation generates extremely severe penalties because the statutory maximum for 924(c) cases is life, which generates a career offender sentencing range, before acceptance, of 360 months to life with a consecutive term for the 924(c) offense. Whereas a career offender designation triggered by felony drug offenses would generate sentencing ranges of 210 to 262 months (for drug offenses with statutory maximum of 20 years) and 262 to 327 months (for drug offenses with statutory maximum of 40 years). In light of the very severe penalties that will come into play for persons whose 924(c) convictions trigger the career offender designation, the Commission should not go beyond the congressional directive, should not draw this definition with such a broad-brush, and should provide for a case-by-case analysis to determine whether the defendant's conduct involved "the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 (a).

The Commission should also require a case-by-case, individualized analysis by the sentencing court to determine whether the §924(c) offense is a crime of violence. A case-by-case analysis is not unduly burdensome because it would involve consideration of the very conduct for which the defendant is being convicted and sentenced. This approach is consistent with the approach that the Commission has already established in career offender cases:

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[9] See e.g., United States v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995) (felony drunk driving is crime of violence); United States v. Payne, 163 F.3d 371 (6th Cir. 1998) (larceny from the person); United States v. Wilson, 951 F.2d 586 (4th Cir. 1991) (robbery conviction based on pickpocketing); United States v. McClenton, 53 F.3d 584 (3d Cir. 1995) (burglary of a hotel room). Under the current proposal, the adjusted offense level is 37 for a career offender whenever the instant offense of conviction that triggers the career offender designation is §924(c) because the career offender offense level is based on the statutory maximum penalty for §924(c), which is life.

> in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), **the offense of conviction (i.e.,the conduct of which the defendant was convicted) is the focus of inquiry.**

U.S.S.G. § 4B1.2, comment. (n. 3) (emphasis added). It also is the approach the Commission adopted for diminished capacity departures which are precluded whenever the "offense involved actual violence or a serious threat of violence." U.S.S.G. § 5K2.13. Hence, if the Commission designates §924(c) as a trigger offense for the career offender guideline, it should, at a minimum, provide a mechanism for district judges to review the charge and the actual conduct to determine if the offense involved actual violence or a serious threat of violence before the offense would be deemed a crime of violence for career offender purposes.

LaBonte Does Not Mandate the Current Proposal

The Supreme Court's opinion in LaBonte is inapposite to the issue before the Commission. United States v. LaBonte, 520 U.S. 751 (1997). LaBonte involved application of the career offender guideline where the instant offenses were controlled substance offenses. Noting that Congress has delegated "significant discretion" to the Commission to formulate sentencing guidelines, the Supreme Court held that the Commission's discretion had "to bow to specific directives of Congress." LaBonte, 520 U.S. at 757. Because 28 U.S.C. § 994(h) directs the Commission to prescribe a sentence "at or near the maximum term authorized," the Commission could not disregard the recidivist enhancements that increase the statutory maximum in drug trafficking offenses when designating the statutory maximum penalties under the career offender guideline. Id. at 757-58.

But there are no "specific directives" in 994(h) that circumscribe the Commission's discretion to define a crime of violence or that require the Commission to expand the definition of felony drug offense beyond that included in 994(h). There are also no "specific directives" that address whether 924(c) offenses should trigger designation as a career offender. Section 994(h) also does not include any specific directive as to whether offenses that are not categorically "crimes of violence" should trigger treatment as a career offenders when the defendant's conduct was neither violent nor presented a serious risk of violence. Nor does LaBonte or 994(h) offer the Commission guidance on how to write a workable guideline that can incorporate the consecutive, mandatory enhancement penalties required by §924(c), with a guideline scheme that is inconsistent with mandatory minimum penalties, and with the fact that not all §924(c) offenses are crimes of violence. In sum, §994(h) does not provide any "specific directives" with respect to the classification of 924(c) offenses as crimes of violence or drug offenses nor does it require the Commission to ignore the Smith and Muscarello decisions in deciding how to resolve the application of the career offender guideline to 924(c) offenses.

Bailey-fix Legislation Does Not Require the Current Proposal[10]

Congress' decision to include §924(c) offenses in the enumerated list of 'serious violent felonies" in the 3-Strikes enhancement provision also does not resolve the questions before the Commission. See 18 U.S.C. § 3559(c)(2)(F). Congress is obviously free to impose a mandatory life sentence on any offense based on nothing more that its considered political judgment and limited by nothing less than due process, the 8th Amendment prohibition against cruel and unusual punishment and any other applicable constitutional prescriptions. The Commission, on the other hand, has more limited discretion, circumscribed by the organic law and by other guidelines provisions. Congress' statutory change in response to Bailey merely affected the treatment of §924(c) offenses with respect to the 3-Strikes provision.

The Bailey-fix amendment does not purport to define a crime of violence or otherwise extend the terms and definitions contained in 3559(c) beyond that subchapter to other federal statutes or the guidelines as a whole. Indeed, there is no uniform definition applicable throughout the federal criminal code for what constitutes a drug offense or a violent felony, with various definitions scattered through the different congressional acts. Compare, e.g., 18 U.S.C. § 924(e)(2) (for purposes of Armed Career Criminal Act, "serious drug offense" is a drug trafficking offense punishable by a term of 10 years or more; "violent felony" includes certain juvenile adjudications) with 18 U.S.C. § 3559 (c)(2)(H) (defining "serious drug offense" by reference to the enumerated 10-year mandatory minimum federal drug trafficking offenses). As a result, a federal drug trafficking offense involving 5-grams of crack is a "serious drug offense" for purposes of the Armed Career Criminal Act because it carries a maximum penalty in excess of ten years but is not one for purposes of the 3-Strikes enhancement because it is not subject to the 10-year mandatory minimum penalty.

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[10] In 1995, the Supreme Court issued an opinion in a 924(c) cases that started the changes that the Commission is now addressing. Holding that § 924(c) which criminalizes "use" of firearm during and in relation to drug trafficking offense requires evidence that defendant actively employed the firearm, the Supreme Court reversed the §924(c) convictions of two defendants. Bailey v. United States, 116 S. Ct. 501 (1995). One defendant who was stopped for a traffic offense was found to have cocaine in the driver's compartment of his car while the firearm was found inside a bag in the locked trunk of his car; the other defendant had the firearm in a locked foot locker in a bedroom closet; neither had actively employed the firearm in relation to the drug offense. Id. at 151. In 1998, Congress amended §924(c) in what is sometimes referred to as the Bailey-fix to add a provision that makes it unlawful to also "possess" a firearm "in furtherance of" a crime of violence or drug trafficking offense. The penalty structure was also changed. It had been a definite, mandatory, consecutive sentence of 5 years (or in cases involving more dangerous firearms or subsequent convictions, a greater determinate term). Currently, the statute provides for mandatory sentences of "not less than 5 years"; or for brandishing, not less than 7 years; if the firearm is discharged, not less than 10 years, and so on with no stated maximum penalty.

Significantly, the Commission has not proposed an amendment to apply the 3-Strikes' definition of "serious drug offense" – mandatory minimum 10-year drug offenses – throughout the guidelines replacing the definitions currently in use.

Further, Congress may have recognized that the mandatory consecutive provisions of §924(c) are incompatible with the career offender guideline, which provides for a combined total offense. The problem of incorporating the §924(c) consecutive mandatory is not implicated with the 3-Strikes enhancement, which mandates a sentence of life making eliminating the need to combine multiple offenses. More telling also is that while Congress included §924(c) in the 3-Strikes statute, it did not similarly amend the career offender directive. Congress may have decided that the mandatory life enhancement suffices to take care of repeat offenders who meet the requirements of the 3-Strikes statute, which, among other things, is not self-executing but reposes discretion in the prosecutor whether to enhance the punishment by filing an information giving notice of the predicate offenses.

Conclusion

In sum, the current proposal should not be adopted by the Commission. The current definitions in the career offender guideline are appropriate. Because 924(c) is itself an enhancement that already stacks additional punishment atop the predicate crime and already quite broadly reaches felons who have not engaged in violent conduct or are held vicariously liable for the acts of others, the proposed changes are likely to in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability. That notwithstanding, if the Commission adopts all or part of the proposed amendment it should, at a minimum, add commentary to exclude from the career offender designation those §924(c) offenses that do not involve actual violence or a serious threat of violence. The Commission also needs to rework the proposal to come up with a more workable and user-friendly guideline.

Amendment to U.S.S.G. § 2K2.4, note 1(B)

The Commission should also not adopt the proposed amendment to U.S.S.G. § 2K2.4, comment (n.1(B)), which states that an upward departure may be warranted "to reflect the seriousness of the defendant's criminal history, in a case in which the defendant is convicted of a[] ... §924(c)... offense but is not determined to be a Career Offender under §4B1.1." The language that is being deleted, to be replaced by the proposed language, identified the possibility of an upward departure where a defendant would otherwise be a career offender except for the fact that the Commission had excluded §924(c) as an instant offense that could trigger a career offender enhancement. It is not clear what purpose is served by this new encouraged upward departure.

As proposed, an upward departure is indicated in all cases where the defendant is not a career offender, even presumably in a case where a defendant is not a career offender because he has a single prior. We see no need to encourage upward departures for criminal history beyond those identified in U.S.S.G. § 4A1.3. In the context of a §924(c) conviction, which in itself is an enhancement provision, this is an unnecessary invitation to pile even more punishment atop the already enhanced sentence. The departure would be based on past criminal conduct for which the defendant has already been convicted and served his sentence. Indeed, any criminal history departure is of concern because the entirety of the criminal history scheme serves to increase a defendant's sentence for the instant offense based on conduct for which the defendant has already paid his debt to society and for which, the double jeopardy clause of the Constitution would preclude additional punishment. Under those circumstances, upward departures for criminal history should be very rare.

Criminal history is already an imperfect score, as the Commission has acknowledged. See U.S.S.G. § 4A1.1, comment. (backg'd). It also is rife with whatever inequities are present in state and federal sentencing schemes. See United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998) (granting one-level downward departure where criminal history V was based on seven criminal history points for traffic violations that overrepresented the relatively minor and non-violent nature of record and replicated disparities in state sentencing scheme particularly racial disparities; relied on studies that reflect the incidence of pre-textual traffic stops, the offense of "driving while black," and fact that defendant's offenses received points based on jail sentences for more than 30 days for offenses involving nothing more than erratic driving). To encourage an upward departure in a guideline that already stacks additional punishment on the predicate offense without identifying any guiding principles is an invitation for an unwarranted triple-counting of criminal history, when it already is accorded weight beyond its verified value.

It is particularly unbalanced to propose upward departure language without also proposing that similar language be inserted in U.S.S.G. § §2K2.4, comment. (n.1(C)) noting that a downward departure may be warranted where a career offender designation for a defendant convicted of a §924(c) violation overrepresents the seriousness of the defendant's criminal history. Granted, the mandatory minimum sentence for a §924(c) is not subject to a guideline downward departure but a downward departure may be considered as an offset to any upward departure that the sentencing court might consider. A downward departure certainly might be warranted where a defendant is having his sentence enhanced under two other enhancement provisions, §924(c) and the career offender guideline. Language that a downward departure may be warranted where the career offender designation overrepresents the seriousness of defendant's criminal history should also be inserted in the career offender guideline, U.S.S.G. § 4B1.1.

In our view, the proposal to amend the commentary by inserting language that an upward departure may be warranted is unnecessary and in any event, should not be inserted without balancing it by adding a reference to the availability of downward departures.

Amendment 1 - Cultural Heritage

Federal Public Defenders (FPD)
Jon Sands, Chair, Sentencing Guidelines Subcommittee
Phoenix, Arizona 85004

While the FPD agrees that crimes involving cultural heritage resources present unique issues different from general property crimes covered by the guidelines, they recommend deferring this proposal until the Ad Hoc Committee on Native American Issues that is being established by the Commission is functioning and able to assist in formulating the proposals. The Ad Hoc Committee will be able to address issues that may not be apparent to the Commission or covered in § 2B1.5. At times, there exists an inherent conflict between the interests of the Department of Interior and those of the Native American communities that may impact the workings of this guideline and that may be best resolved only after input from the Ad Hoc Committee.

If the Commission goes forward with the enactment of § 2B1.5, the FPD opposes the adoption of § 2B1.5(b)(4)(B), which provides for an increase of two offense levels if the offense involved a pattern of similar violations. They also recommend oppose the adoption of Application Note 5 because a civil or administrative adjudication is an unreliable indicator for sentencing purposes. The proposed version of § 2B1.5(b)(4)(B) would have the same impact as a two level increase in the offenders' criminal history category. However, civil and administrative adjudications are more analogous to those types of proceedings whose outcomes are not counted for the purposes of criminal history under § 4A1.2. It would be more appropriate to treat civil or administrative adjudications related to § 2B1.5 as a potential basis for an upward departure.

The FPD also opposes the language in Application Note 7 suggesting an upward departure in cases in which the offense level understates the seriousness of the offense. The example given is if the offense also involved the theft of or damage to items that are not cultural heritage items. The destruction of non-cultural items would already be covered in the guidelines or, to the extent that destruction of such items would not be an independent criminal offense, they could serve as the basis for an upward departure. The extent of such an upward departure should not exceed the corresponding number of levels from the loss table in §2B1.1.

The FPD argues that it is more likely that Application Note 2 will overstate than understate the harm involved in the offense because not all tribes require elaborate burial ceremonies. Thus, Application Note 7 should provide for a downward departure when the harm is overestimated.

The FPD also recommends that §2B1.5(b)(5)(B) only apply when the firearm was used in direct aid of the offense. The guidelines should differentiate between a hunter who comes across a site and takes an artifact and someone who goes into a museum or national memorial with a firearm.

The FPD argues that there is no need for an enhancement for the use of a destructive device because it is already covered by a number of encouraged upward departures, i.e., U.S.S.G. § 5K2.6 (Weapons and Dangerous Instrumentalities). See also U.S.S.G. §§ 5K2.1 (Death); 5K2.2 (Physical Injury); and 5K2.5 (Property Damage or Loss).

Amendment 3 - Career Offenders and Convictions under 18 U.S.C. §§ 924(c) and 929(a).

Federal Public Defenders
Jon Sands, Chair, Sentencing Guidelines Subcommittee
Phoenix, Arizona 85004

The FPD recommends that the Commission defer action on this amendment to study the issues further.

The FPD states that the proposed amendment to make the career offender enhancement applicable to persons convicted of §924(c) offenses is too complicated to be workable, indicating that this difficulty stems from the fact that §924(c) is itself an enhancement provision that not only requires imposition of a mandatory minimum sentence but requires the sentence to be consecutive to any other sentences.

In addition, because §924(c) already stacks punishment atop the predicate crime, the FPD requests that the Commission not to stack even more punishment absent a clear statement from Congress requiring the additional punishment. The FPD does not believe that 28 U.S.C. § 994(h), the statutory directive for career offenders, clearly requires the broad amendment that the Commission has proposed.

Proposed Guideline Is Not Required by 28 U.S.C. § 994(h)

The FPD suggests that if the Commission chooses to define 924(c) as a "drug offense" for purposes of the career offender guideline, the Commission is doing so based on its own discretionary authority to promulgate guidelines and not because it is required to do so by the congressional mandate in 994(h). The FPD states that, rather than avoid unwarranted disparities, the proposed amendment will result in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability. Thus, the FPD does not believe that there are sound policy reasons for the Commission to extend the 994(h) definitions of felony drug and violent offenses beyond the statutory mandate.

The FPD believes the current definition of "crime of violence" in the career offender guideline has worked well, whereas the current proposal to expand it will not because not all §924(c) offenses are crimes of violence under the current definition. The FPD states that, in fact, a significant number of §924(c) offenses involve no violence or threat of violence by the defendant, particularly as the elements of §924(c) were amended by Congress in 1998, interpreted by the courts and in light of coconspirator liability.

The FPD states that because §924(c) is not – as a categorical matter – a crime that involves actual violence or the serious threat of violence, the statutory directive does not require the Commission to expand the definitions in the career offender guideline. The FPD suggests that the proposed expanded definition goes beyond what §994(h) requires and ignores the reality of vicarious liability. Further, the career offender designation generates extremely severe penalties because the statutory maximum for 924(c) cases is life, which generates a career

offender sentencing range, before acceptance, of 360 months to life with a consecutive term for the 924(c) offense. Whereas a career offender designation triggered by felony drug offenses would generate sentencing ranges of 210 to 262 months (for drug offenses with statutory maximum of 20 years) and 262 to 327 months (for drug offenses with statutory maximum of 40 years). The FPD requests that, in light of the very severe penalties that will come into play for persons whose 924(c) convictions trigger the career offender designation, the Commission not go beyond the congressional directive. Instead, the FPD suggests that the Commission provide for a case-by-case analysis to determine whether the defendant's conduct involved "the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 (a).

The FPD also suggests that the Commission require a case-by-case, individualized analysis by the sentencing court to determine whether the §924(c) offense is a crime of violence. They state that a case-by-case analysis is not unduly burdensome because it would involve consideration of the very conduct for which the defendant is being convicted and sentenced. Further, this approach is consistent with the approach that the Commission has already established in career offender cases.

The FPD suggests that if the Commission designates §924(c) as a trigger offense for the career offender guideline, it should, at a minimum, provide a mechanism for district judges to review the charge and the actual conduct to determine if the offense involved actual violence or a serious threat of violence before the offense would be deemed a crime of violence for career offender purposes.

LaBonte Does Not Mandate the Current Proposal

The FPD states that the Supreme Court's opinion in LaBonte is inapposite to the issue before the Commission. United States v. LaBonte, 520 U.S. 751 (1997). LaBonte involved application of the career offender guideline where the instant offenses were controlled substance offenses. Noting that Congress has delegated "significant discretion" to the Commission to formulate sentencing guidelines, the Supreme Court held that the Commission's discretion had "to bow to specific directives of Congress." LaBonte, 520 U.S. at 757. Because 28 U.S.C. § 994(h) directs the Commission to prescribe a sentence "at or near the maximum term authorized," the Commission could not disregard the recidivist enhancements that increase the statutory maximum in drug trafficking offenses when designating the statutory maximum penalties under the career offender guideline. Id. at 757-58.

The FPD also asserts that there are no "specific directives" in § 994(h) that circumscribe the Commission's discretion to define a crime of violence or that require the Commission to expand the definition of felony drug offense beyond that included in § 994(h), and there are also no "specific directives" that address whether § 924(c) offenses should trigger designation as a career offender.

The FPD states that neither LaBonte nor § 994(h) offer the Commission guidance on how to write a workable guideline that can incorporate the consecutive, mandatory enhancement

penalties required by §924(c), with a guideline scheme that is inconsistent with mandatory minimum penalties, and with the fact that not all §924(c) offenses are crimes of violence.

Bailey-fix Legislation

The FPD argues that the current definitions in the career offender guideline are appropriate and that the Commission should not adopt the proposal changes. Because 924(c) is itself an enhancement that already stacks additional punishment atop the predicate crime and already quite broadly reaches felons who have not engaged in violent conduct or are held vicariously liable for the acts of others, the proposed changes are likely to result in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability. If the Commission adopts all or part of the proposed amendment it should, at a minimum, add commentary to exclude from the career offender designation those §924(c) offenses that do not involve actual violence or a serious threat of violence. The FPD also recommends that the proposal should be revised to be more workable and user-friendly.

Amendment to U.S.S.G. § 2K2.4, note 1(B)

The FPD argues that the proposal to insert language that an upward departure may be warranted is unnecessary. As proposed, an upward departure is indicated in all cases where the defendant is not a career offender, even presumably in a case where a defendant is not a career offender because he has a single prior. The FPD sees no need to encourage upward departures for criminal history beyond those identified in U.S.S.G. § 4A1.3. To encourage an upward departure in a guideline that already stacks additional punishment on the predicate offense without identifying any guiding principles is an invitation for an unwarranted triple-counting of criminal history, when it already is accorded weight beyond its verified value. Additionally, the FPD argues that it is balanced to propose upward departure language without also proposing that similar language be inserted in U.S.S.G. § §2K2.4, comment. (n.1(C)) noting that a downward departure may be warranted where a career offender designation for a defendant convicted of a §924(c) violation overrepresents the seriousness of the defendant's criminal history.

Amendment 5 - Acceptance of Responsibility

Federal Public Defender
Jon Sands, Chair, Sentencing Guidelines Subcommittee
Phoenix, Arizona 85004

The FPD opposes the proposed amendment because it limits the flexibility of district court judges and makes the guideline less fair and more subject to challenge. The FPD argues that by eliminating the court's discretion to consider the defendant's timely confession, the proposal shifts the focus from rewarding acceptance of responsibility and remorse to penalizing the exercise of constitutional rights to due process, assistance of counsel, and the other protections guaranteed by the 4th, 5th and 6th amendments to the U.S. Constitution.

In addition, the FPD believes the Commission should not make changes to a guideline that was applied in 90% of cases last year in this piecemeal fashion. According to the FPD, the guideline should be amended, if at all, only after adequate study of Commission data including consideration of the various defense requests for adjustments that have been submitted over the years. Therefore, the FPD recommends that the Commission defer modifications and convene an ad hoc working group, with participation by the defense bar, to study whether disparity or unfairness affects application of the guideline and to recommend changes where appropriate.

The FPD believes that under the proposed amendment, judges will no longer be able to award an additional one-level reduction to defendants who confess at the time of arrest but who, for sound legal reasons, do not immediately plead guilty. These situations frequently occur because counsel is reviewing or waiting for discovery, conducting an investigation or otherwise studying the client's legal options or because the defendant is waiting for the court to rule on a motion that asserts a violation of a legal or constitutional right. The FPD states that when viewed against the backdrop of the realities of federal sentencing, the proposal elevates the conservation of resources above the exercise of constitutional rights.

It is the FPD's view that a system in which fewer than 5% of defendants go to trial is not in urgent need of yet more and earlier guilty pleas. It states that at the same time it penalizes defendants, the proposed amendment will give freer rein to prosecutors even in cases where their inactivity in producing discovery and Brady materials or insistence on admissions to crimes not committed may be the primary cause holding up the accused's decision to plead, and even where the prosecutor's conduct may impinge on the due process and 6th Amendment rights of the accused.

Furthermore, the FPD believes substantial judicial and prosecutorial resources are already conserved under a guideline scheme that relies on relevant conduct applied on the basis of hearsay evidence without the benefit of confrontation. Therefore, the FPD recommends that the proposed amendment should clarify that delays relating to pretrial motions, and the production of discovery and Brady material should not be used to deprive a defendant of the additional one-level reduction under §3E1.1(b)(2).
Additionally, the FPD opposes the proposed circuit conflict fix because it goes well beyond the

findings of the majority of circuits, raises significant policy concerns and sets the stage for a new conflict on this same issue. In its view, by directing that acceptance be awarded only in rare cases, the amendment has the substantial potential to reduce the number of cases that will be resolved by plea. As with the first part of this amendment, the FPD recommends the Commission put off this amendment until it can fully review this guideline based on data and the input of an ad hoc working group, including members of the defense bar.

The FPD also agrees with the Sixth Circuit that whether a defendant has committed or been accused of committing an offense, distinct from the offense of conviction, after he enters a plea of guilty, should not determine whether the defendant has accepted responsibility for the offense of conviction, particularly where the alleged wrongful conduct is a failed drug test. In the view of the FPD, such post-plea offenses are better treated as an aspect of criminal history and are addressed in Chapter 4 of the guidelines; a conviction that has become final whether it arises out of conduct committed before or after the defendant pleaded guilty counts as criminal history, and if the defendant has been convicted but not yet sentenced, he will receive one criminal history point for that conviction. At a subsequent sentencing for the new conduct, the court may consider the fact that the defendant committed a new offense while awaiting trial or sentencing as a basis for an upward departure.

The FPD argues that the Commission ought not adopt an option that may run afoul of the Fifth Amendment or that places a burden on the defendant's assertion of that right particularly where the criminal history guideline already accounts for such conduct. Therefore, it recommends that the Commission adopt commentary providing that allegations of new wrongful conduct not related to the offense of conviction be addressed as part of criminal history rather than as part of the determination of whether the defendant is eligible for a downward adjustment under §3E1.1.

In addition, the FPD disagrees with the addition of the language to Application Note 4, which functionally equates the commission of a new offense while on pretrial release with obstruction of justice, except in extraordinary circumstances. None of the majority opinions relied on application note four or equated new criminal conduct (such as a positive drug test while on pretrial release) with obstruction of justice. Nor have any courts held that it should be rare for such a defendant to receive the reduction for acceptance of responsibility. To the contrary, the circuit courts have held that the sentencing court is in the best position to determine whether the new conduct should preclude the reduction. The FPD argues that several of the majority circuits explicitly stated that such conduct does not necessarily preclude a reduction for acceptance, it is merely a factor for the court's consideration.

Instead, the FPD argues the Commission can better adopt the reasoning of the majority of circuit courts by adding clarifying language to application note 1(b) indicating that the sentencing court may consider new criminal conduct unrelated to the offense of conviction when assessing whether the defendant accepted responsibility but only as one of the several factors to be considered.

Additionally, the FPD argues the Commission should insert language in the commentary similar to that in the probation and supervised release statutes which provide that the court must consider substance abuse treatment programs before it takes action against one who fails a drug test.

Received 2/14/02 KH

January 30, 2002

To: Sentencing Commission

Re: Public Comment – Proposed guidelines – Cultural Resources Crimes

To Whom It May Concern:

My name is Cecil E. Pavlat Sr. I am the Cultural Repatriation Specialist for the Sault Tribe of Chippewa Indians. Thank you for the opportunity to comment on the proposed guidelines.

First of all, I am concerned that there is an effort to place "value" on our "Ancestral Remains" and that they are considered a Cultural Resource. I realize that this is the terminology that is used in these situations, but please show some respect to our "Ancestors" and at least address them as " Ancestral Remains". How do you place value on the remains of your Grand Father or Grand Mother?

Also, There is no language to discuss "intent" The reason this concerns me is a recent court ruling in Alaska, Where a man was not prosecuted because he did not intentionally violate the NAGPRA law because he was not aware of the law. I have always thought, "ignorance of the law is no excuse" generally applies.

There also is no mention of any Tribal properties in Sub-section 2B1.5 (b) (2). Only Federal properties are mentioned; I would like to see Sacred Burial or Significant Tribal Properties mentioned as well.

As to the issue of use of explosives; Obviously use of these types or any types of destructive means is a concern to our Tribe. We believe this issue should be adduced in the proposed guidelines. The destruction of any "Tribal Ancestral Remains" or any objects of Cultural importance to us is very a "Desecration" and should be treated as such. How do you replace these, There can be no price put on our "Ancestors" or their "Sacred objects".

To the issue of prior convictions and misconduct, That has not resulted in any adjudication. Again, obviously, if there is any indication of prior misconduct whether adjudicated or not. It leads one to believe there is a connection and I believe this should be considered within sentencing guidelines.

Thank You Very Much,
Sincerely,

Cecil E. Pavlat Sr.
523 Ashmun St.
Sault Ste. Marie, Mi 49783 Phone 906-635-6050 Fax 635-4969

richard crane

attorney at law • corrections & sentencing law
2200 hillsboro road • suite 310
nashville, tennessee 37212
(615) 298-3719 • FAX 298-2467

email • rfreebird@aol.com

February 13, 2002

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
1 Columbus Circle NE
Suite 2-500
Washington, DC 20002

RE: Comment -- Proposed Amendment Number 4

Dear Judge Murphy:

Proposed Amendment Number 4 addresses expansion of the official victim enhancement of the Sentencing Guidelines. (§3A1.2). Therein, the Commission requested comment on the scope of the enhancement, particularly asking whether the enhancement should cover individuals who perform functions within a prison under contract.

It does not appear that persons retained as corrections officers by a private prison company would be covered by the guideline under the proposed definition of "prison employee." That definition limits coverage to individuals "retained or designated by a prison or other correctional facility to perform any duty or function." Private correctional employees under contract would normally not be designated or retained by the prison, but rather by the prison system (e.g. Bureau of Prisons). Failure to cover private corrections officers will result in offenders having their sentence enhanced two levels for attacking a private prison nurse, but receiving no such enhancement for assaulting the prison's warden or correctional officers.

Sincerely,

Richard Crane

RC/mpf

PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS JIM FELMAN & BARRY BOSS
C/O ASBILL, MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
202 234 9000 (BARRY BOSS)
813 229 1118 (JIM FELMAN)
202 332 6480 (FACSIMILE)

February 4, 2002

VIA HAND DELIVERY
The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Comment on November 27, 2001 proposed amendments and issues for comment

Dear Judge Murphy:

I am writing to provide the Commission with the PAG's position on the proposed amendments and issues for comment published in the Federal Register on November 27, 2001. We are submitting comments relating to the proposed amendments regarding acceptance of responsibility (proposed amendment #5); career offenders (proposed amendment #3); official victims (proposed amendment #4); cultural heritage resources (proposed amendment #1); and the Foreign Corrupt Practices Act (proposed amendment #2). We look forward to appearing before the Commission later this month.

Acceptance of Responsibility (proposed amendment #5)[1]

The PAG opposes the proposed revision to U.S.S.G. § 3E1.1 that would limit judges' discretion to award a third offense-level reduction for acceptance of responsibility. The PAG believes the Commission should not so revise Chapter 3 at this time.

Denying judges the discretion to award defendants a third offense level reduction in select cases would add unnecessary further rigidity to the guidelines. Moreover, this unwelcome change would be in service of solving a problem that has

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[1] This section was drafted primarily by PAG member Eugene Illovsky.

been described only anecdotally. We are not aware of any statistical analysis or detailed study that supports the proposition that judges have too much discretion in awarding the third point for acceptance of responsibility.

Under U.S.S.G. §3E1.1, certain defendants may have a third level deducted from their offense level if they have: (1) "timely provid[ed] complete information to the government" about their own involvement in the offense, §3E1.1(b)(1); or (2) "timely notif[ied] authorities of [their] intention to plead guilty," §3E1.1(b)(2). The proposed revision would eliminate subsection (b)(1) and make concomitant changes to the Commentary.

The Federal Guidelines now allow a judge the discretion to give a defendant the third level reduction, even if she pleads guilty close to trial, depending on the facts and circumstances of the particular case, if she has otherwise satisfied subsection (b)(1). This rule seems to recognize the unfairness in penalizing a defendant who has good reasons explaining the delay in pleading guilty and to embody the well-settled proposition that judges stand in the best position to evaluate those reasons. The proposed revision would eliminate that discretion and require the sentencing court to deny defendants the third level reduction, regardless of what delayed their guilty plea and despite their being forthcoming about their involvement.

The impetus for the proposed revision appears to be a concern mentioned in one paragraph of the Justice Department's January 2, 2001 letter report to the Commission. In that paragraph, DOJ's Criminal Division complains about the guideline because in some undefined number of cases "an offender who makes a timely disclosure [of information about her involvement in the offense] but, nevertheless, waits until the eve of trial to plead guilty may receive this third level of reduction in the offense level." This set of circumstances causes prosecutors concern because it makes it supposedly "difficult" to achieve U.S.S.G. § 3E1.1(b)(2)'s express goal of "permitting the government to avoid preparing for trial." Thus, DOJ insists that removing judicial discretion to give the extra one level reduction would create "an incentive for early guilty pleas that permit the government to avoid preparing for trial."

The PAG views the proposed revision as a (suboptimal) solution in search of a problem. DOJ's anecdotal statement about its resources being sapped by defendants who strategically delay their guilty pleas raises many questions. First, how widespread is the purported problem? How many cases are there nationally in which a defendant "waits until the eve of trial" to plead guilty? Second, of those cases, how many late guilty pleas are the defendant's fault and in how many is the lateness attributable to the government (or to no one in particular)? It would be unfair to penalize defendants whose guilty plea decision is delayed because they cannot get timely discovery or

other information from the government (which is probably not an uncommon occurrence). Third, what is the real resource drain associated with the class of "eve of trial" cases caused by defendants -- and is it enough of a cost to justify the curtailing of a sentencing judge's discretion? As previously noted, we are unaware of any statistical analysis supporting the position taken by the proponents of this amendment.

We note that DOJ's description of the problem elicits other questions. What, exactly, is the "eve of trial"? How much more incentive to plead guilty early do the guidelines really need? And, do prosecutors already control incentives in a way that makes any added incentive undesirable? For instance, during plea discussions in many cases, the government sets a deadline by which more favorable offers will be withdrawn. So, negotiating defendants who wait typically get a worse deal than those who decide to plead earlier. Often, the government will not recommend, and may even oppose, the third-level reduction for those who make their deals later. Given that the government can control plea incentives in this fashion, is it clear that the guidelines should be changed to add more? What systemic benefit will be had by removing the judges' discretion to give the reduction in appropriate cases?

To put it more pointedly, defendants in the federal criminal justice system already face myriad pressures to plead guilty as soon as possible. These pressures are almost entirely exerted by the government, in conjunction with its utilization of both charge-bargaining and the provisions of U.S.S.G. § 5K1.1. *See, e.g.*,Sterngold, James, New York Times, Court May Narrow Disparity in Way Illegal Re-entry is Handled, Sec. A, p. 6 (Apr. 1, 2000) (discussing disparities between handling of illegal re-entry cases by United States Attorneys' offices in San Diego and Los Angeles). Defendants also face multiple pressures to waive their rights, including the right against self-incrimination (through proffers) and the right to move for downward adjustments/departures and to receive exculpatory information (through plea agreements). *See, e.g. United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), *cert. granted*, No. 01-595, 2002 WL 10621 (U.S. Jan. 4, 2002). The government often applies these pressures not just in the name of justice or truth-seeking, or of alleviating court congestion, but to reduce its workload. This amendment only increases these pressures.

Under the proposed amendment, a defendant with a legitimate issue that required a motion to suppress would face a Hobson's choice: either challenge unconstitutionally seized evidence, or forego the challenge to lock in the third acceptance point and a reduced sentencing range. This is an exceedingly difficult decision for a defendant to make, and for defense counsel to provide informed and effective counsel. Placing more power in the government's hands could render it

almost impossible, in certain cases with close suppression issues, for defense counsel to provide effective assistance.

This should be a concern for all in the criminal justice system. A reduction in the number of suppression hearings and challenges to the seizures of evidence should be sought only if doing so serves the ends of justice. The beneficial effects of such proceedings – to expose questionable law enforcement actions to the scrutiny of the Court – are far too important to be sacrificed at the altar of prosecutorial efficiency. Without further explanation, study or a satisfactory rationale, it seems that the proposed amendment serves only the interests of the government, not the interests of justice.

In sum, the PAG believes it would be unwise to tamper with this exceptionally important guideline simply to respond to the Department of Justice's passing, anecdotal claim that "eve of trial" guilty pleas are causing a substantial misallocation of government resources. A more compelling reason is required where the price for such a revision is a reduction of judicial discretion and the addition of an unwelcome rigidity to the guidelines.

The PAG believes U.S.S.G. § 3E1.1(b)(1) is working satisfactorily and should not be deleted. However, if the Commission wishes to pursue DOJ's concern, the PAG proposes that a statistical and economic analysis of the problem first be conducted. A working group could be formed to study and prepare a report (similar to the comprehensive 1991 Acceptance of Responsibility Working Group Report). Once the scope -- and even existence -- of the problem mentioned by DOJ is confirmed, then the proposed revision can be properly considered and weighed against its potential impact on defendants and courts.

We also oppose the second part of the proposed amendment that seeks to resolve a circuit split regarding whether a defendant must be denied the downward adjustment for acceptance of responsibility when he or she engages in any new criminal conduct before sentencing. We join the Defenders position in opposing this proposal. Sentencing judges are best equipped to determine whether in a particular case new criminal conduct justifies depriving a defendant of credit for acceptance of responsibility.

Career Offender (proposed amendment # 3)[2]

I. Introduction

Proposed Amendment 3 to the United States Sentencing Guidelines ("Amendment 3")[3] would work an unreasoned, uncalled for change to the current rules under U.S.S.G. §4B1.1 (career offender) for classifying 18 U.S.C. § 924(c) or § 929(a) convictions, allowing them to count as the present (or third) conviction needed to make a defendant a career offender for sentencing purposes. The Practitioners Advisory group opposes Amendment 3.

The only proffered justification for the proposed Amendment – to comply with the statutory command in 28 U.S.C. § 994(h) as construed in *United States v. LaBonte*, 520 U.S.C. 751 (1997) – is flawed. Neither § 994(h) or *LaBonte* require the amendment.

Additionally, we are aware of no outcry regarding any problem that Amendment 3 is needed to correct. Nothing has changed since the passage of Amendment 600 (effective November 1, 2000), in which the Commission decided "that such offenses do not qualify as a crime of violence or controlled substance offense for Career Offender purposes, except as a prior conviction." Indeed, if a court ever felt that the present treatment of § 924(c)/929(a) convictions is problem in a particular case, it has the ability to depart upward in the appropriate circumstances.

Finally, Amendment 3 is, at its core, an Amendment grounded in the criminal history section of the Guidelines -- it deals with the interaction between a current offense and past convictions and how they mix (and how a certain group of defendants should be treated) at sentencing. In light of the ongoing recidivism study by the Commission staff which is to be completed in fall 2002, the amendment is, at best, premature. If the Commission does not reject the Amendment, it should at least delay consideration until the 2003 or 2004 amendment cycles so that the Amendment can be considered in light of the results of the final recidivism study, comments on that study, and congressional action (if any) on this issue.

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2 This section was drafted by Timothy Hoover

3 66 Fed. Reg. 59,330, 59, 334, 2001 WL 1487654 (2001).

II. The Backdrop: the current treatment of 18 U.S.C. § 924(c) or § 929(a) convictions for Career Offender purposes

Under U.S.S.G. §4B1.1 (2001), a defendant is classified as a career offender if, *inter alia*, "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense" and "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

Presently, a prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a "prior felony conviction" for purposes of the career offender guideline, "if the prior offense of conviction established that the underlying offense was a 'crime of violence' or 'controlled substance offense.'" U.S.S.G. §4B1.2, comment. (n.1).

However, if the only current "offense of conviction is for violating 18 U.S.C. § 924(c) or § 929(a)," the current conviction will not count as a crime of violence or controlled substance offense, and the defendant will not be sentenced as a career offender. U.S.S.G. §4B1.2 comment. (n.3).

Where a defendant is convicted only of violating 18 U.S.C. § 924(c) or § 929(a), but has two prior convictions for crimes of violence/controlled substance offenses, courts can depart upward per U.S.S.G. §2K2.4 comment. (n.1), which provides, in pertinent part:

> A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses. *See* Application Note 3.

As the introductory comments to Amendment 3 reflect, Amendment 3 would "reverse[] the decision made by the Commission in Amendment 600 (effective November 1, 2000) that such offenses [present convictions for 18 U.S.C. § 924(c) or § 929(a) only] do not qualify as a crime of violence or controlled substance offense for Career Offenders purposes, except as a prior conviction." Amendment 3 (introductory comments).

III. The proposal: Amendment 3 has *two* key components

A clear understanding of what exactly Amendment 3 does is essential to understanding why it should not be enacted. Amendment 3 does two things.

A. First -- and key -- change: reclassification

First, it changes the treatment of defendants who are convicted of violating only 18 U.S.C. § 924(c) or § 929(a). The amendment revises the current Guidelines such that current convictions under 18 U.S.C. § 924(c) or § 929(a) will be treated as "a felony that is either a crime of violence or a controlled substance offense." Thus, for these defendants who have two prior felony convictions for crimes of violence or controlled substances convictions, they will be treated as Career Offenders and subject to the enhanced sentencing provisions in the Career Offender Guidelines. This first major change may be referred to as its *reclassification* of current 18 U.S.C. § 924(c) or § 929(a) convictions for career offender purposes.

B. Second change: a litany of rules

Having reclassified these convictions, a litany of special rules are set out to determine the sentence for this newly minted category of career offenders as a result of 18 U.S.C. § 924(c) or § 929(a) convictions. The key provision of these special rules is that for these career offenders, under the reconstituted U.S.S.G. §4B1.1(b)(1), §4B1.1(c), the offense level will begin at 37 and the criminal history category will be VI, providing for a sentencing range of 360 months-life.

IV. The PAG position: amendment 3 should be rejected

Amendment 3 is a solution in search of a problem. It is not based on any empirical study or call for action by Congress or any of the players in the federal criminal justice system, and the only identifiable reasoning behind it is flawed. For these reasons, Amendment 3 should be rejected.

A. Justification flawed

The only justification that PAG could locate for Amendment 3 is found in the introductory comments to the proposed amendments, which provide that:

> Some have expressed doubt about whether that decision [in Amendment 600] complies with the statutory command in 28 U.S.C. § 994(h), as construed by the United States Supreme

Court in *United States v. La[B]onte*, 520 U.S. 751 (1997).

Amendment 3. Neither 28 U.S.C. § 994(h), nor its construction in *LaBonte*, require or support Amendment 3. The introductory comments to Amendment 3 do not cite any statistics, court decisions or particular court cases to support the amendment.

28 U.S.C. § 994(h) is the statutory framework for the Career Offender guidelines, and provides, in pertinent part:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years or older and–
>
> (1) has been convicted of a felony that is–
>
> (A) a crime of violence; or
>
> (B) . . . [a specifically defined controlled substance offense]; and
>
> (2) has been previously been convicted of two or more prior felonies, each of which is–
>
> (A) a crime of violence; or
>
> (B) . . . [a specifically defined controlled substance offense].

28 U.S.C. § 994(h).

At issue in *LaBonte* was the meaning of "maximum term authorized" in 28 U.S.C. § 994(h) and whether the Commission's interpretation of this term was inconsistent with the plain language of 28 U.S.C. § 994(h). In Amendment 506, the Commission interpreted the term to mean the maximum term available without statutory sentencing enhancements (such as those found in 21 U.S.C. § 841(b)(1)(A), (B)). *LaBonte*, 520 U.S. at 754-55. Resolving a circuit split, the Supreme Court held that the Sentencing Commission exceeded its authority in promulgating Amendment 506, because 28 U.S.C. § 994(h) is unambiguous, and "maximum term authorized" refers to the maximum term "available once all relevant statutory sentencing enhancements are

taken into account." *LaBonte*, 520 U.S. at 757 n.3, 762.

LaBonte dealt solely with this discreet issue of statutory interpretation related to going about determining the sentences of career offenders. In other words, once persons are determined to be career offenders, how do we treat them? *LaBonte* does not in any way touch on the initial question of what offenses are or are not considered crimes of violence or drug offenses for career offender purposes. The issue was not before the *LaBonte* court; indeed, there was no dispute that the three defendants whose cases were consolidated in *LaBonte* were all career offenders.

The seminal change in Amendment 3 is the first of its two major changes -- the reclassification of current 18 U.S.C. § 924(c) or § 929(a) offenses as crimes of violence/controlled substances offenses such that those defendants would now be career offenders. This reclassification has nothing to with *LaBonte* and is in no way required by *LaBonte*.

LaBonte does not direct the Commission in any manner regarding how to determine what offenses are crimes of violence or controlled substance offenses. While 28 U.S.C. § 994(h) defines controlled substance offenses, it does not in any manner define "crime of violence."

PAG believes that the total disconnect between *LaBonte*/28 U.S.C. § 994(h) and the heart of Amendment 3 is of major significance in evaluating Amendment 3, because this is the *only* posited basis for the enactment of Amendment 3, so far as we can tell. No other basis supporting Amendment 3 has been proposed.[4] If Amendment 3 is to stand or fall on what is required by *LaBonte*, then it *must* fall, because the drastic redefinition of 18 U.S.C. § 924(c) or § 929(a) offenses neither flows from or is suggested by *LaBonte*. Without the need for reclassification, the myriad new rules (the

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[4] The available statistics – not relied on in support of Amendment 3 as published – in fact indicate *that the amendment is not necessary*. With 979 defendants convicted of drug trafficking, and 50 convicted of firearms offenses being sentenced as Career Offenders in fiscal year 2000 (and constituting *over 75% of all defendants who received Career Offender status*), it appears that the current Career Offender classifications and rules are satisfactorily achieving lengthy sentences for a wide group of recidivist gun and drug offenders. United States Sentencing Commission, *2000 Sourcebook of Federal Sentencing Statistics*, Table 22 (2000); *see also id.* Table 14. Nevertheless, any analysis of the statistics ultimately is related to the rules that are put into place once an offense is classified as a crime of violence or drug trafficking offense – not whether it should be so classified in the first place.

second part of Amendment 3) are rendered unnecessary.

B. No reason for change

In opposing Amendment 3, PAG also finds it significant that there has not been any call, so far as well can tell, for the changes made in the amendment.[5] We could locate no court opinion, position paper or other monograph lamenting the current treatment of these convictions or calling for the changes outlined in Amendment 3.[6] There has been no congressional directive or legislation requiring such a change.

That there is no call for change should not *necessarily* be controlling, but here we believe it is especially significant given that the Commission's last review of the treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions *was just over one year ago*, when it passed Amendment 600. This is an extremely brief period of time for any significant problematic trend to develop; as would be expected, none has.

Conversely, if there was a significant problem or objection to Amendment 600 that was missed during that amendment cycle, one would expect an immediate, forceful outcry. Again, none has occurred.

The treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions is not viewed as a significant problem by the professionals in the federal criminal justice system or Congress.

C. If not rejected, then Amendment 3 should at least be held for consideration in a future amendment cycle in light of the recidivism study

The members of the PAG, among others, anxiously await the completion of the Commission's ongoing recidivism study. The format of the study, the data relied on, and its conclusions will guide not only future amendment proposals, but will shape the

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5 *See, e.g.*, Letter from Ellen S. Moore, Chair, Probation Officers Advisory Group, to The Honorable Diane Murphy regarding issues that POAG suggests should be clarified or addressed by the Commission (Aug. 5, 2001) (available at http://www.ussc.gov/POAG/position_jun.PDF) (last accessed January 29, 2002) (no mention of treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions for career offender purposes).

6 For example, performing the terms and connectors query "Amendment 600" in the Westlaw database ALLFEDS on January 30, 2002 returns no documents.

debate regarding those amendments and, possibly, the entire structure of Chapter Four of the Guidelines. It is PAG's understanding that consideration of the structure of Chapter Four and the general rules of scoring prior convictions, found at U.S.S.G. §§4A.1.1, 4A1.2 and 4A1.3, has been deferred until after the study is finalized.

Amendment 3 is fundamentally a provision that deals with criminal history issues. If it is not rejected by the Commission, it should at least be held for consideration after the recidivism study is received. Given the lack of an identifiable problem that Amendment 3 is designed to address, and given that Amendment 3 was proposed just over one year after the effective date of Amendment 600, cautious, careful consideration of Amendment 3 could only help to identify whether there is any actual problem that would be served by the proposal in Amendment 3. Consideration of this amendment with at least some information as to why a change is needed could only serve to ensure that this proposal receives the vetting it deserves.

Without any particular problem identified, and without an informed backdrop to the amendment only one year after Amendment 600, if Amendment 3 is passed now the Commission would be "flying blind" – making a change the need for which is uncertain, the fairness of which is unknown, and the effects of which, while certainly harsh, would be unjustified.

V. Conclusion

Without question, the passage of Amendment 3 would have a significant effect on sentences for a small, limited class of persons with two prior qualifying felonies who are convicted only of 18 U.S.C. § 924(c) or § 929(a).[7] But while this would be a result of passing Amendment 3, it is not a reason to pass it, at least in the absence of any evidence of a problem with the current Guidelines treatment of such offenders. The effect is a result, not a justification.

Defendants now facing, for example, a 60 month (five year) or 120 month (ten year)[8] sentence under the current scheme would, for example, suddenly be looking at

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7 Of course, situations where the defendant with two prior crime of violence/controlled substance convictions somehow manages to escape conviction on substantive drug trafficking counts, but is nonetheless convicted of 18 U.S.C. § 924(c), appear to be rare.

8 Notably, the hands of the district judge *are not* tied in sentencing such a defendant who would otherwise receive 60 or 120 months or other statutory sentence. Significant upward departures are available for the exceptional case and have been utilized by district judges where

U.S. Department of Justice

Federal Bureau of Prisons

Washington, DC 20534

March 1, 2002

Charles Tetzlaff, General Counsel
United States Sentencing Commission
Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002

Re: Bureau of Prisons' Comments on Proposed Amendment to U.S.S.G. §3A1.2, Official Victim.

Dear Charles,

This responds to the most recent version of the proposed amendment of U.S.S.G. §3A1.2, Official Victim.

Private Prisons and Community Corrections/Treatment Facilities

The disincentive for assault created by the enhancement should apply to official staff of private (contract) correctional facilities, including community detention and/or treatment centers. This can be accomplished by expressly defining in the Application Notes the terms "prison or other correctional facility" as including "private prisons, and contract community correction and/or treatment facilities."

Volunteers

Because volunteers are a valued part of the Bureau's workforce, they should also be covered by the enhancement. While the January 17, 2002, version of the proposed amendment included volunteers as "prison employees," we suggest they be included under the current version's definition of "prison official."

Assaults Committed Off Prison Grounds

Finally, prison officials often supervise inmates during community activities, away from the prison grounds. Assaults contemplated by the enhancement may occur at these times. However, neither the guideline nor the Application Notes make

clear that the enhancement applies when an assault occurs off prison property. This could be remedied by amending the last portion of (b)(2) to read "in the custody or control of prison or other correctional facility authorities." However worded, the criteria for applying the enhancement should be two-fold: the person is in official detention, and the defendant was under the personal control of detention authorities at the time of the assault.

Thank you for the opportunity to provide input on this very important matter. For further discussion, please call either me, at 202-307-3062, or Jeff Toenges, Associate General Counsel, at 202-307-2105.

Sincerely,

Christopher Erlewine
Assistant Director/General Counsel

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

April 16, 2002

Memorandum

To: Tim McGrath
Frances Cook
Ken Cohen
J. Deon Haynes
Pam Montgomery
Lou Reedt
Judy Sheon
Charlie Tetzlaff
Susan Winarsky
Joyce Routt

From: Mike Courlander

Subject: Attached is a recent piece of public comment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, N. Y. 11201

CHAMBERS OF
RAYMOND J. DEARIE
U. S. DISTRICT JUDGE

April 15, 2002

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

Dear Judge Murphy:

I am pleased to enclose a joint statement from a number of our colleagues addressing the important issue of the cocaine/crack sentencing ratio which we understand is under review by the Commission. We urge the Commission's consideration of the views expressed and stand ready to respond to any inquiries.

Thank you.

Very truly yours,

Raymond J. Dearie /kmz

Raymond J. Dearie
United States District Judge

enclosure
bc: Judge Sterling Johnson, Jr.

STATEMENT TO THE UNITED STATES SENTENCING COMMISSION CONCERNING THE PENALTIES FOR POWDER AND CRACK COCAINE VIOLATIONS SUBMITTED BY CERTAIN UNITED STATES CIRCUIT COURT OF APPEALS AND DISTRICT COURT JUDGES WHO PREVIOUSLY SERVED AS UNITED STATES ATTORNEYS

The undersigned are Judges of the United States Circuit Courts of Appeals and District Courts -- Republicans and Democrats -- each of whom has previously served as United States Attorney. Having served as federal prosecutors, we believe we have a well-founded understanding of the factors that must be weighed in establishing the appropriate sentences for criminal conduct. We write to set forth our considered judgment concerning the penalties for the distribution of powder cocaine and crack cocaine.

It is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society's interest.

Having regularly reviewed presentence reports in cases involving powder and crack cocaine, we can attest to the fact that there is generally no consistent meaningful difference in the type of individual involved. At the lower levels, the steerers, lookouts and street-sellers are generally impoverished individuals with limited education whose involvement with crack rather than powder cocaine is more a result of the demand in their neighborhood than a conscious choice to sell one type of drug rather than another. Indeed, in some cases, a person who is selling crack on one day is selling powder cocaine the next. At the higher levels in the distribution chain, it is generally of no concern to the individuals involved whether the cocaine that they sell is ultimately distributed in the form of powder or is transformed through a relatively simple cooking

process into crack. At either end of the distribution chain, the substantially greater sentences for those who are involved with crack cocaine do not appear to have any greater deterrent impact than that achieved by the lower powder cocaine penalties.

Thus, the differences in the current mandatory minimums and guidelines for powder and crack cocaine result in the imposition of overly severe sentences on those who are involved with relatively small amounts of crack at the lowest level of the distribution chain, without providing any corresponding benefit to society.

We disagree with those who suggest that the disparity in treatment of powder and crack cocaine should be remedied by altering the penalties relating to powder cocaine. The penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased.

In enacting the mandatory minimums, it was the view of Congress that "the Federal government's most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs. . . ." H.R. Rep. No. 99-845, at 11, 99th Cong. (1986). Thus, the quantities adopted to trigger the application of the mandatory minimum were "based on the minimum quantity that might be controlled or distributed by a trafficker in a high place in the processing and distribution chain." Id. at 12.

Experience since the adoption of these mandatory minimums indicates that, as a result of aggregating small quantities of drugs distributed over an extended period of time and conspiracy charges linking those who play a minor role in the distribution network with the major traffickers by whom they are employed, the mandatory minimum sentences are often applied to lower level

violators, which was not Congress' intent. Any lowering of the amount of powder cocaine that would trigger the application of the mandatory minimum would only exacerbate this problem.

Thus, there is no reason to increase the severity of the mandatory minimum provisions for powder cocaine by lowering the amount that would trigger the application of the mandatory minimum. The disparity should be remedied only by raising the amount of crack cocaine that would trigger the application of the mandatory minimum.

Finally, it is important to note that to the extent mandatory minimum or guideline sentences, for either powder or crack cocaine, result in the imposition of sentences that are greater than justice requires, it is not only the defendants and their families that suffer. Our prisons are overcrowded and it currently costs approximately $23,000 per year to maintain an individual in prison. Thus, the imposition of lengthy prison terms on those who play a minor role in a powder or crack cocaine distribution network places an unwarranted cost on the American taxpayer. This is particularly true in the case of the many alien defendants who will be deported upon completion of their prison sentence.

In sum, we do not believe there is any reason to increase the severity of the penalties for those who deal in powder cocaine and we strongly recommend that the disparity between the penalties for crack and powder cocaine be eliminated, or, at a minimum, significantly reduced.

Respectfully submitted,

Hon. Michael Daly Hawkins
Ninth Circuit Court of Appeals

Hon. Gilbert S. Merritt
Sixth Circuit Court of Appeals

Hon. Boyce F. Martin, Jr.
Sixth Circuit Court of Appeals

Hon. Jon O. Newman
Second Circuit Court of Appeals

Hon. Raymond L. Acosta
District of Puerto Rico

Hon. Sarah Evans Barker
Southern District of Indiana

Hon. Walter E. Black, Jr.
District of Maryland

Hon. Catherine C. Blake
District of Maryland

Hon. Clarence A. Brimmer
District of Wyoming

Hon. Robert J. Cindrich
Western District of
Pennsylvania

Hon. John T. Curtin
Western District of New York

Hon. Glen H. Davidson
Northern District of
Mississippi

Hon. Raymond J. Dearie
Eastern District of New York

Hon. Gustave Diamond
Western District of
Pennsylvania

Hon. Peter C. Dorsey
District of Connecticut

Hon. John Hannah, Jr.
Eastern District of Texas

Hon. William W. Justice
Eastern District of Texas

Hon. William C. Lee
Northern District of Indiana

Hon. William T. Moore
Southern District of Georgia

Hon. Frederick J. Motz
District of Maryland

Hon. Alan H. Nevas
District of Connecticut

Hon. Manuel L. Real
Central District of California

Hon. James M. Rosenbaum
District of Minnesota

Hon. Barefoot Sanders
Northern District of Texas

Hon. Fred J. Scullin, Jr.
Northern District of New York

Hon. Donald E. Walter
Western District of Louisiana

Hon. Rodney S. Webb
District of North Dakota

Hon. George E. Woods
Eastern District of Michigan

PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

Ellen S. Moore
Chairperson, 11th Circuit

U.S. Probation Office
P.O. Box 1736
Macon, GA 31202-1736

Phone # 478-752-8106
Fax # 478-752-8165

March 13, 2002

The Honorable Diana E. Murphy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C., February 19 - 21, 2002, to discuss and formulate recommendations to the United States Sentencing Commission regarding the *Sentencing Guidelines* proposed amendments that were published in the *Federal Register* November 27, 2001, and January 17, 2002. We are submitting comments relating to the following proposed amendments:

- Proposed Amendment One -- Cultural Heritage;
- Revised Proposed Amendment Three -- Career Offenders and Convictions Under 18 U.S.C. §§ 924(c) and 929(a);
- Proposed Amendment Four -- Expansion of Official Victims Enhancement;
- Revised Proposed Amendment Five -- Acceptance of Responsibility;
- Proposed Amendment Seven -- Terrorism;
- Proposed Amendment Eight -- Drugs;
- Proposed Amendment Nine -- Alternatives to Imprisonment; and
- Proposed Amendment Ten -- Discharged Terms of Imprisonment.

Proposed Amendment One -- Cultural Heritage

The Probation Officers Advisory Group supports the creation of this new guideline which recognizes the special harm caused by theft, damage, or destruction of items of cultural heritage as many of these objects are priceless and irreplaceable. It is apparent that the current guidelines do not address the severity of harm these offenses may cause to Native American cultures, national memorials, archeological resources, national parks, and national historic landmarks. Offenses of these types of crimes are dissimilar to property crimes due to the special significance of the artifacts, the non-pecuniary harm associated with the resources, and the fact that many of the items cannot be replaced. Other property crimes are currently covered by USSG §2B1.1. POAG is of the opinion that offenses of this type should be held separate and distinct from the ones ordinarily governed by §2B1.1.

POAG does not have a position with respect to the enhancement for pattern of similar violations or for use of explosives. However, it is our opinion that an application note regarding the applicability of an upward departure is appropriate "if the value of the cultural heritage resource underestimates its actual value". We found that many of the specific offense characteristics were straightforward and application would not appear burdensome. However, there was concern regarding determination of the value of the object. It was suggested by Paula J. Desio, Deputy General Counsel to the United States Sentencing Commission, that this information would be provided by the prosecutor. POAG is of the opinion that this may be an area of litigation at the sentencing hearing with defense attorneys filing objections and presenting their expert witnesses. However, it is recognized that this issue, likewise, occurs in many loss-related cases.

Additionally, POAG identified a potential grouping problem with this offense. If an individual is charged with multiple counts wherein the Chapter Two guideline is §2B1.5, it appears these counts would be grouped together under §3D1.2(d). It is suggested that this guideline be specified as an offense covered under §3D1.2(d).

If an individual is charged with a cultural heritage offense as well as theft/destruction of other government property at the same time, the counts may or may not group in accordance with USSG §3D1.2(c) based on the aggregate loss amount. We are of the opinion that cultural heritage offenses present an unique societal harm differing from other theft related offenses. Therefore, it is suggested that an application note relative to potential grouping problems/solutions be considered when this guideline is promulgated.

Revised Proposed Amendment Three -- Career Offenders and Convictions Under 18 U.S.C. §§ 924(c) and 929(a)

Please note that the following comments are in response to the revised proposed amendment of March 7, 2002.

POAG was told that the origin for development of this proposed amendment was based on the statutory directive at 28 U.S.C. §994(h) in conjunction with the decision in *U.S. vs Labonte*, 520 USC 751 (1997). Recognizing the considerable efforts that have already been expended and the Commissioners' desire to provide a guideline that adheres to the philosophy and justification for the amendment, POAG has identified several problematic issues to include: (1) the need to complete multiple sets of calculations in every case;

(2) the complexity of the procedure for imposition of sentence in conjunction with §5G1.2; (3) imposition of sentence with respect to multiple counts of 18 U.S.C. §924(c) convictions; and (4) concern of the impact if a defendant was successful on appeal regarding the §924(c) conviction and an imprisonment sentence of only one day was imposed on the underlying offense of conviction. Furthermore, it is our opinion that probation officers will have a difficult task when explaining the application of the proposed amendment to their respective judges and fellow practitioners.

As the proposed amendment distinctly connects USSG §2K2.4 with USSG §4B1.1, it is POAG's recommendation that the Commission defer this amendment until the results of the recidivist study are available. Furthermore, this will allow additional time for consideration of the issues that have been identified as problem areas. POAG supports the Commission in their endeavor to ensure that the *Federal Sentencing Guidelines* are harmonious with statutory directives as well as Supreme Court and Circuit case law.

Proposed Amendment Four -- Expansion of Official Victims Enhancement

POAG recognizes the need for an expansion of the enhancement for official victims at §3A1.2(b). We agree that a victim should include injury to non-correctional officers. It is our opinion that the proposed amendment accomplishes the intended purpose and that the proposed definition for the term "prison employee" will be helpful when applying this guideline.

Revised Proposed Amendment Five -- Acceptance of Responsibility

The Probation Officers Advisory Group reiterates our previous position as set forth in our position paper dated August 5, 2001. It is our experience that there is no uniformity in the application of USSG §3E1.1. Many courts require the defendant to address offense issues with the probation officer, whereas other courts do not hold the defendant to that same requirement. It is difficult for the probation officer to make a proper analysis of the defendant's acceptance of responsibility without engaging in such a discussion with the defendant. However, it is an adjustment that appears to be applied in the majority of cases that enter guilty pleas.

It is the majority view of POAG members that the timeliness component for the additional one-level decrease is best left to the recommendation of the government and the discretion of the court. It has been our experience that the timeliness of a defendant's plea may be attributable to a number of factors, some of which are not directly caused by the defendant. It is our opinion that the proposed amendment is successful in resolving the existing circuit conflict as to whether or not the court may deny acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction. It is perceived that this clarification will decrease the current disparity concerning this issue.

For these reasons, POAG supports Option Two of the revised proposed amendment.

Proposed Amendment Seven – Terrorism

POAG recognizes the extensive efforts that have been put forth by the various work groups in fashioning this proposed guideline amendment. These guidelines are evolving and driven primarily by statute. At this time, POAG does not have the prior experience with these type of offenses to formulate an informed response to the proposed amendment.

Proposed Amendment Eight – Drugs

The Probation Officers Advisory Group strongly supports the Commission's attempt to generally improve the overall operation of the drug guidelines and decrease the reliance on drug quantity as a means of calculating the penalty levels. Furthermore, we strongly support a change in the crack/cocaine ratio but do not take a position on the specifics of the ratio. POAG recognizes that the proposed specific offense characteristics for violence is a distinguishing factor in separating the violence associated with the more serious drug traffickers. After reviewing the proposed amendment in its entirety, POAG generally found the proposed amendment to be straightforward with the exception of several areas which are later addressed. POAG is concerned about the impact this amendment may have on guideline sentencing if the proposed amendment is passed without a corresponding decrease in the crack/cocaine ratio. The group has routinely maintained that many aggravating adjustments are not supported by the courts when determining the defendant's guideline sentencing range in an attempt to lower the lengthy sentences to which drug defendants are exposed.

Base Offense Level -- Mitigating Role Enhancement

POAG has concerns regarding the consideration of what is considered normally a Chapter Three adjustment when calculating a Chapter Two specific offense characteristic. This application is contrary to the instructions at USSG §1B1.2 and the methodical approach that has been used since the inception of the guidelines. Additionally, POAG has concerns regarding the problematic application of mitigating role as an adjustment under USSG §§ 3B1.2(a) and (b) and is of the opinion that application of the adjustment is too nebulous to warrant level reductions exceeding the normal two to four levels. It is our recommendation that the Commission first address the circuit conflicts pertaining to mitigating role before proceeding with the specific proposed amendment at USSG §2D1.1(a)(3).

Enhancement -- Protected Locations, Underage or Pregnant Individuals

POAG supports the specific offense characteristic; however, it is noted that a potential application problem was identified with respect to attempts or conspiracies charged under 21 U.S.C. §846. To simplify application, POAG recommends that violations of 21 U.S.C. §846 be considered a charge statute when used in conjunction with the other listed statutes.

Enhancement - Violence

As previously noted, POAG is in favor of the specific offense characteristic if there is a corresponding change in the cocaine/crack ratio. We are concerned about the specific offense characteristic involving

firearms. These specific offense characteristics appear in two forms: "defendant specific" versus "offense related". Possibly an inequity exists in the specific offense characteristics in a case where a defendant does not actually discharge the weapon but is held accountable for possessing a dangerous weapon and the bodily injury caused by the shooting. It is our opinion that there may be some confusion surrounding the application of relevant conduct with respect to these enhancements. A commentary note that addresses the distinction between the two concepts and its dissimilarity to USSG §1B1.3 -- Relevant Conduct -- may clarify this issue.

Enhancements -- Prior Criminal Conduct

POAG opposes the proposed amendment that provides a floor offense level of 26 at USSG §2D1.1(b)(3). We support the two-level enhancement for defendants who possess a felony conviction of either a crime of violence or a controlled substance offense. It is our opinion that this application is consistent with the approach taken in §2K2.1 and provides an enhancement for the repeat drug trafficker.

Reduction For No Prior Conviction

POAG does not support this reduction and is of the opinion that the current Safety Valve reduction provides sufficient consideration. However, we encourage the Commission to look at this proposal in connection with possible changes in Chapter Four and the potential creation of a new criminal history category for a true first-time offender. Furthermore, this relief should be awarded to all defendants who fall within this category and not just defendants who commit drug violations.

Proposed Amendment Nine -- Alternatives to Imprisonment

Of the three options presented, POAG supports Option One. Option Two provides for lengthy commitments in a community correctional center and may confuse practitioners when attempting to implement a sentence which involves serving at least half of the minimum in a form of confinement other than home detention. It is our experience that probation officers, attorneys and judges already find a "split sentence" option to be confusing. Implementing the additional requirement in Option Two may cause additional problems/ confusion when executing the sentence.

We find that Option Three limits expansion of sentencing alternatives to those offenders in Criminal History Category I. POAG has previously expressed concerns that there appear to be a significant number of defendants who fall within Criminal History Category II based on minor misdemeanor offenses and petty offenses. If Option Three is selected, these defendants absent a departure would be excluded from receiving an alternative sentencing option even though their criminal history points may be for offenses less significant and less violent than an individual found to be in Criminal History Category I. Again, it is our recommendation that further review of the problems identified within Chapter Four may address some of the Commission's concerns.

Although information has been presented to the Commission that community correctional centers are universally available, this is not the case in every district. Many of the community correctional centers that

have been identified are actually county jails and are not as effective in re-integrating offenders back into the community. Generally, it is our opinion that a period in excess of six months under either home confinement or in a community confinement center loses its impact and effectiveness. Additionally, many of the local jails used as community confinement centers do not allow the defendants to work unless the defendant is able to provide his or her own transportation. These facilities are not equipped, staffed, or have the available resources to accomplish the desired result. POAG would discourage the use of community correctional center placement as a condition of probation.

Proposed Amendment Ten -- Discharged Terms of Imprisonment

It is the consensus of POAG that Option One would provide the clearest application of the guideline amendment proposal. The plain and simple addition of language including "discharged terms of imprisonment" was preferred over Option Two. However, POAG has identified a potential application problem in cases that may require minimum mandatory sentencing when the court, absent a substantial assistance motion, would be incapable of departing below the minimum mandatory sentence. For example, a defendant convicted of a drug conspiracy offense which has a minimum mandatory term of five years imprisonment and as part of the conspiracy, a substantive drug sale occurred, where the defendant has already served a two-year sentence. The defendant is not eligible for a safety valve reduction because his criminal history category is II. Based on a total offense level of 26, the guideline imprisonment range is 70 to 87 months. Absent the filing of a §5K1.1 motion, how does the defendant receive credit for the two-year state sentence he has already served? POAG also notes that the meaning of "conduct taken fully into account" was questioned, as many districts appear to have difficulty applying this guideline when the conduct was only partially considered. We recommend consideration be given to an explanation as to the intent of this concept.

Closing

We trust you will find our comments and suggestions beneficial during your discussions of these proposed amendments. We appreciate the opportunity to provide the Commission our perspectives on guideline sentencing issues. Should you have any questions or need clarification, please do not hesitate to contact us.

Respectfully,

Ellen S. Moore

Ellen S. Moore
Chair

Cathy A Battistelli

Cathy Battistelli
Chair Elect

ESM:CBB/amc

COMMENTS OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE UNITED STATES SENTENCING COMMISSION'S PROPOSED TERRORISM-RELATED AMENDMENTS

The National Association of Criminal Defense Lawyers (NACDL) respectfully submits these comments on the Sentencing Commission's proposed terrorism-related amendments, set out at 67 Fed. Reg. 2456 (Jan. 17, 2002). Those amendments address issues raised in the so-called USA PATRIOT Act, Pub L. No. 107-56 ("the Act"). Although NACDL opposes the proposed amendments in a number of respects--as discussed in more detail below--we appreciate the Commission's effort to clarify the sentencing of terrorism offenses.

I. THE APPRENDI PROBLEM.

The terrorism amendments, like other aspects of the guidelines, do not comply with Apprendi v. New Jersey, 530 U.S. 466 (2000). In our view, Apprendi requires that the key factual elements which determine the guidelines sentence must be charged in the indictment and found by the jury beyond a reasonable doubt.

Before Apprendi, the Supreme Court appeared to recognize a distinction between elements of an offense--which, under the Fifth Amendment Due Process Clause and the Sixth Amendment right to trial by jury had to be found by the jury beyond a reasonable doubt--and so-called "sentencing factors," which could be found by the judge post-verdict by a preponderance of the evidence. See, e.g., Almendarez-Torres v. United States,

523 U.S. 224, 228-29 (1998); McMillan v. Pennsylvania, 477 U.S. 79, 84-91 (1986). In Apprendi, however, the Court rejected the proposition, central to Almendarez-Torres, that the label attached to the statute at issue had decisive significance. The Court declared that "[a]s a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains"--that is, the right to a jury determination beyond a reasonable doubt--"should apply equally to the two acts"--the underlying weapons possession offense for which the jury found him guilty and the hate crime statute that the court used to enhance his sentence--"that New Jersey has singled out for punishment. Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." 530 U.S. at 476. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

To date, the federal courts of appeals have held that Apprendi does not apply to determinations under the sentencing guidelines as long the sentence falls within the statutory maximum. We respectfully disagree with this analysis. Apprendi itself rejected a similar formalism--reliance on the purported distinction between "sentencing factors" and elements of the

offense. 530 U.S. at 477-79. It is contrary to the entire thrust of Apprendi to create a new formalism that finds a difference of constitutional dimension between a statutory maximum and a guidelines maximum. The distinction implies that if Congress had enacted the guidelines as statutes--instead of directing the Sentencing Commission to propose them, 28 U.S.C. § 994(a), with a provision for Congress to disapprove the Commission's proposals, id. § 994(p)--then Apprendi would apply. Such a distinction elevates form over substance and ignores Apprendi's central point--that, under the Fifth and Sixth Amendments, specific facts that, as a matter of law (rather than solely as a matter of judicial discretion), significantly affect the defendant's sentence must be found by the jury beyond a reasonable doubt.

The guidelines "have the force and effect of laws, prescribing the sentences criminal defendants are to receive." Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting); cf. United States v. R.L.C., 503 U.S. 291 (1992) (holding that the phrase "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" in 18 U.S.C. § 5037(c)(1)(B) refers to the maximum sentence under the sentencing guidelines, rather than to the statutory maximum). By statute, courts "shall impose a sentence of a kind, and within the range, [prescribed by the guidelines],

unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (emphasis added). If the trial court incorrectly applies the guidelines or unreasonably departs from them, the court of appeals "shall" set aside the sentence, remand for further sentencing proceedings, or both. 18 U.S.C. § 3742(f) (emphasis added).

As these provisions make clear, from the perspective of a trial judge imposing sentence and a defendant receiving it, the guidelines cannot be distinguished from statutes. The sentencing range produced by the base offense level, criminal history category, and sentencing table under the guidelines is precisely analogous to the unenhanced sentencing range for weapons possession in Apprendi, and for carjacking in Jones v. United States, 526 U.S. 227, 232-33 (1999). The specific offense characteristics and Chapter Three adjustments under the guidelines--including, for example, an adjustment such as § 3A1.4 and a specific offense characteristic such as whether, under proposed § 2A5.2(a), the defendant acted "intentionally" or "recklessly"--are precisely analogous to the hate crime enhancement provision in Apprendi and the serious bodily harm enhancement in Jones. Just as the enhancements in those cases

required a jury finding beyond a reasonable doubt, so should the guideline adjustments and specific offense characteristics in the terrorism package and elsewhere in the guidelines.

We submit the following specific comments on the proposed terrorism amendments subject to this broad objection to a sentencing regime that leaves critical factual determinations to the judge rather than the jury and permits those determinations to be made by a preponderance of the evidence rather than beyond a reasonable doubt.

II. PART A--NEW PREDICATE OFFENSES TO FEDERAL CRIMES OF TERRORISM.

Part A of the proposed terrorism amendments proposes revisions to certain existing guidelines. We take no position on the majority of the specific issues on which the Commission requests comment. With respect to hoaxes, we suggest that the attempt guideline (§ 2X1.1) be applied, rather than the guideline for the underlying substantive offense. This will reflect the generally less culpable nature of hoaxes.

III. PART B--PRE-EXISTING PREDICATE OFFENSES TO FEDERAL CRIMES OF TERRORISM NOT COVERED BY THE GUIDELINES.

We agree in principle with the Commission's proposal to create Chapter Two guidelines for offenses that are enumerated in 18 U.S.C. § 2332b(g)(5) as "federal crimes of terrorism." We address below several issues of concern to us with respect to those proposed amendments.

1. The proposed new guideline for material support offenses--§ 2M6.3--does not adequately take into account the wide variety of conduct that may be covered by the underlying statutes (18 U.S.C. §§ 2339A, 2339B). That conduct may range from providing what the donor intends to be a charitable contribution, see, e.g., Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000), to the purchase of explosives for a suicide bombing. The charitable donor and the explosives purchaser obviously should not be treated alike. The proposed offense level for § 2M6.3--26 or 32--is, in our view, far too high for persons at the low end of the culpability scale. We suggest that the material support guideline have a relatively low base offense level--perhaps 16 or 18--with specific offense characteristics to account for more culpable behavior.

2. The commentary to the proposed material support guideline states that "[a]n offense covered by this guideline is not precluded from" application of the § 3A1.4 adjustment or, if § 3A1.4 does not apply, from an upward departure under application note 3 to the proposed § 3A1.4. We do not believe that the § 3A1.4 adjustment should apply to offenses directed specifically at terrorism-related offenses, because the Chapter Two guideline and associated specific offense characteristics should take into account the "terrorism" aspect of the

defendant's conduct. To apply both the Chapter Two guideline and the Chapter Three adjustment would amount to double-counting.

IV. PART C--INCREASES TO STATUTORY MAXIMUM PENALTIES FOR PREDICATE OFFENSES COVERED BY THE GUIDELINES.

The Commission requests comment in Part C of the proposed terrorism amendments on whether guideline penalties should be increased for certain offenses in light of increased statutory maximum penalties for those offenses. In each case, we believe that the current guideline adequately (or, in some instances, more than adequately) punishes the conduct at issue.

V. PART D--PENALTIES FOR TERRORIST CONSPIRACIES.

The Commission requests comment in Part D of the proposed terrorism amendments on the proper means of implementing the provisions of § 811 of the Act relating to conspiracies to commit certain offenses. In our view, Congress did not mandate in § 811 that conspiracies to commit the enumerated offenses must receive the same guidelines sentence as the underlying substantive offense; Congress merely provided that the statutory maximum penalty for the conspiracy offense is the same as for the underlying substantive offense. Nothing in the statute requires the Commission to deviate from its usual approach, set forth in § 2X1.1, to the sentencing of conspiracy offenses. We suggest that all conspiracies, including those to commit the offenses listed in § 811, be sentenced under § 2X1.1.

VI. PART E--TERRORISM ADJUSTMENT IN § 3A1.4.

Part E of the proposed amendments relates to the terrorism adjustment set forth at § 3A1.4. We have a number of comments on this provision.

1. As a general matter, § 3A1.4--with its extraordinary minimum sentence of 210 months--represents far too blunt an instrument for addressing the wide range of conduct that has come to be labeled "terrorism." The adjustment in effect dictates a statutory maximum sentence for almost all offenses that have any connection to terrorism. We suggest that the Commission abandon § 3A1.4 and address those aspects of the defendant's conduct that cause it to be labeled "terrorism" through specific offense characteristics attached to the Chapter Two guideline for the offense or, in the alternative, that the Commission refine § 3A1.4 to provide a range of adjustments depending on the culpability of the defendant's conduct. At a minimum, in our view, the Commission should confine the adjustment to an increase of a fixed number of levels and eliminate the level 32 "floor" and the requirement that the defendant's criminal history category be set at VI, regardless of his actual criminal history.

2. We oppose application of the § 3A1.4 adjustment to offenses that are "intended to promote" a federal crime of terrorism, but do not "involve" such an offense. In our view, the § 3A1.4 adjustment should apply (if at all) only when the

defendant has been convicted of a "federal crime of terrorism," as listed at 18 U.S.C. § 2332b(g)(5)(B). See United States v. Graham, 275 F.3d 490, 529-37 (6th Cir. 2001) (Cohn, J., dissenting).

In § 120004 of the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA"), Congress directed the Sentencing Commission to "amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Pub. L. No. 103-322, § 120004, 103d Cong., 2d Sess., 108 Stat. 1796, 2022 (1994). In response, the Commission adopted § 3A1.4, which initially provided an adjustment when "the offense is a felony that involved, or was intended to promote, international terrorism." United States Sentencing Commission, Federal Guidelines Manual, Appendix C, amendment 526 (effective Nov. 1, 1995).

In § 730 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress directed the Commission to revise § 3A1.4 so that it "only applies to Federal crimes of terrorism, as defined in section 2332b(g) of Title 18, United States Code." Pub. L. No. 104-132, § 730, 104th Cong., 2d Sess., 110 Stat. 1214, 1303 (1996). The legislative history of AEDPA

provided in part with respect to § 730: "In amendments to the Sentencing Guidelines that become effective November 1, 1996, a new provision substantially increases jail time for offenses committed in connection with a crime of international terrorism. This section of the bill will make that new provision applicable only to those specifically listed federal crimes of terrorism, upon conviction of those crimes with the necessary motivational element to be established at the sentencing phase of the prosecution, without having to wait until November 1996 for the change to become law." H. Conf. Rep. 104-518, at 123, 104th Cong., 2d Sess., reprinted in 1996 U.S. Code Cong. & Ad. News 944, 956 (emphasis added). The Commission amended § 3A1.4 in response to this directive effective November 1, 1996 and made the amendment permanent effective November 1, 1997. United States Sentencing Commission, Federal Guidelines Manual, Appendix C, amendments 539 (effective Nov. 1, 1996), 565 (effective Nov. 1, 1997). As amended, § 3A1.4 now provides an adjustment for any felony that "involved, or was intended to promote, a federal crime of terrorism." Application note 1 provides that "federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g); the proposed revised application note 1 spells out that definition in more detail.

In our view, the language of § 730--which directed the Commission to amend § 3A1.4 so that the adjustment "only applies

to Federal crimes of terrorism, as defined in" § 2332b(g)--and the accompanying legislative history establish that Congress intended § 3A1.4 to apply only when the defendant is convicted of an offense listed in § 2332b(g)(5)(B). Because § 3A1.4 appears to apply even when the defendant is convicted of a non-listed offense, as long as the court determines that the non-listed offense was intended to promote a listed offense, we oppose § 3A1.4 both in its present form and as amended.

3. As noted above, the Sentencing Commission adopted § 3A1.4 in response to § 120004 of the VCCLEA. In that statute, Congress directed the Sentencing Commission to "provide an appropriate enhancement for any felony . . . that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Pub. L. No. 103-322, § 120004, 103d Cong., 2d Sess., 108 Stat. 1796, 2022 (1994) (emphasis added). The Commission omitted the underscored language from § 3A1.4 and its application notes. We believe that § 3A1.4 should expressly include the limitation that Congress mandated.

4. For the reasons discussed in Part I, we believe that the Apprendi principles require that the elements of the § 3A1.4 adjustment be found by the jury beyond a reasonable doubt. At a minimum, however, under United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990), and its progeny, see, e.g., United States v.

Jordan, 256 F.3d 922, 927-29 (9th Cir. 2001); United States v. Mezas de Jesus, 217 F.3d 638, 642-43 (9th Cir. 2000), those elements should be subject to proof by a clear and convincing evidence standard, see Graham, 275 F.3d at 540-41 (Cohn, J., dissenting).

5. As § 3A1.4 stands now, it exceeds the statutory authority that Congress gave the Commission under VCCLEA and AEDPA, and it imposes far too severe an adjustment on many defendants whose conduct may be labeled as terrorism. Because § 3A1.4 is already more sweeping and draconian than it should be, we oppose the proposal (in application note 3) to permit an upward departure for offenses that do not "technically" fall within § 3A1.4.

VII. PART F--MONEY LAUNDERING OFFENSES.

We agree with the proposal that "terrorism" be defined in application note 1 of § 2S1.1. Although we remain opposed to the definition of "domestic terrorism" in 18 U.S.C. § 2331(5) because of its potential for punishing civil disobedience with undue severity, the unfairness of the definition can be ameliorated through more carefully calibrated adjustments and specific offense characteristics for offenses that relate to terrorism. In addition, we suggest that a new application note should be added to § 2S1.1 which makes clear that, where the terrorism specific offense characteristic in § 2S1.1(b)(1)

applies, the court should not also apply the § 3A1.4 adjustment. In our view, application of both § 2S1.1(b)(1) and § 3A1.4 would produce impermissible and unwarranted double-counting.[1]

VIII. PART G--CURRENCY AND COUNTERFEITING OFFENSES.

With respect to terrorism-related offenses, the Commission inquires in Part G whether §§ 2B1.1(b)(8)(B) and 2B5.1(b)(5) should be amended to provide enhancements if the offense was intended to promote terrorism. We believe that such specific offense characteristics would be appropriate, with two caveats. First, we suggest that a six-level increase would be appropriate, consistent with § 2S1.1(b)(1). Second, if the Commission adopts a terrorism specific offense characteristic for §§ 2B1.1 and 2B5.1, it should make clear that the court cannot also apply the terrorism adjustment in § 3A1.4.

IX. PART H--MISCELLANEOUS AMENDMENTS.

In Part H, the Commission requests comment on the proper sentencing of offenses under 18 U.S.C. § 1001, particularly such offenses that are committed in connection with acts of terrorism. We suggest that § 1001 offenses continue to be sentenced under § 2B1.1 (or another Chapter Two guideline if specifically applicable to the underlying conduct), with a specific offense characteristic for offenses that relate to

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[1] We offer the same comment with respect to the proposal in Part H that a definition of "terrorism offense" be added to § 2L1.2.

terrorism. If the Commission adopts such a specific offense characteristic, it should make clear that courts cannot apply both that enhancement and the § 3A1.4 adjustment.

April 3, 2002

MEMORANDUM:

TO: Chair Murphy
Commissioners
Tim McGrath
Frances Cook
Charlie Tetzlaff
Ken Cohen
J. Deon Haynes
Pam Montgomery
Lou Reedt
Judy Sheon
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment/Testimony

Attached for your review is public comment/testimony recently received by the Commission.

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118
Phone: 212-290-4700
Fax: 212-736-1300
e-mail: hrwnyc@hrw.org
W[redacted]http://www.hrw.org

HUMAN RIGHTS WATCH

HUMAN RIGHTS WATCH PRESENTATION TO THE UNITED STATES SENTENCING COMMISSION

Human Rights Watch welcomes the decision of the United States Sentencing Commission to review once more the federal sentencing structure for cocaine offenses. The public health, social, and economic consequences of the use and sale of cocaine in any form, and crack cocaine in particular, warrant public concern. But they do not justify penal sanctions that are disproportionately harsh and racially discriminatory. They do not justify prison sentences that violate common sense, basic principles of criminal justice, and internationally affirmed human rights.

In 1995, the Commission urged an equalization of sentences for federal crack and cocaine offenders, realizing crack sentences were unfairly severe and long crack sentences were imposed primarily on minority defendants. Unfortunately, Congress failed to heed its wise counsel. Today, the Commission has another opportunity to remind the country that sentences for crack offenders must be changed. We hope this time Congress will listen.

We urge the Commission to restore proportionality to federal cocaine sentences and to reduce their racially disparate impact by:

1) Amending the guidelines to lower sentences for low-level crack offenses;
2) Amending the guidelines to reduce disparities in the sentencing of crack and powder offenses;
3) Urging Congress to eliminate or dramatically modify the mandatory minimums for crack and powder cocaine.

I. Background

Federal crack offenders face sentences that are uniquely severe compared to other federal drug offenders, drug offenders sentenced under state law and drug offenders convicted in other constitutional democracies. The Commission's statistics reveal that the average federal sentence in 2000 for a street-level dealer

of crack is 103.5 months, while the average sentence for a powder cocaine dealer is 55.6 months. The average maximum sentence for persons convicted of drug trafficking felonies under state law in 1998 was 54.5 months.[1] Among European countries, the average length of sentences for persons convicted of drug trafficking was 33 months.[2]

The current sentencing structure for cocaine offenses reflects Congressional choices made in the Anti-Drug Abuse Act of 1986. Congress established five- and ten-year mandatory minimums triggered by specific minimum quantities of cocaine. In what has come to be known as the 100-to-1 quantity ratio, it takes one hundred times as much powder cocaine as crack cocaine. Congress also doubled these mandatory minimums for people with a prior felony conviction. The Sentencing Commission used those drug quantity levels—and the 100-to-1 ratio—to develop sentencing guidelines for the full range of other powder and crack cocaine offenses. In 1988 Congress also made crack cocaine the only substance the simple possession of which triggered a mandatory prison sentence. Under the Anti-Drug Abuse Act of 1988, simple possession of more than 5 grams of crack—an amount that would translate into somewhere between ten and fifty individual doses of crack—is punishable by a minimum of five years in prison. In contrast, simple possession of any quantity of powder cocaine by first time offenders is a misdemeanor punishable by no more than one year in prison.

Supporters of the remarkably harsh sentences for crack offenders insist that crack poses uniquely serious harms compared to other drugs and that long prison sentences are needed to put major traffickers behind bars, offer prosecutors leverage for securing cooperation from offenders, deter prospective offenders, and enhance community safety and well being. Opponents point to an abundance of empirical data showing that the inherent dangers of crack are not dramatically different from those of powder cocaine, and that harsh federal sentences have had little impact on the demand for or the availability of the drug. Instead, the federal sentencing structure has resulted in the incarceration of thousands of low-level offenders, excessively severe sentences for such offenders, marked racial disparities in prison sentences, a staggering growth in federal prison populations, and a waste of public resources.

We believe the facts support the critics. Indeed, the data and arguments marshaled by the Commission in its 1995 report remains the most cogent and powerful case against higher sentences for crack offenders created by the 100-to-1 differential.[3] The Commission correctly concluded that there is no empirical or principled basis for subjecting offenders who deal in or possess crack to dramatically higher sentences than offenders who deal in or possess powder cocaine.

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[1] Matthew Durose and Patrick Langan, *Felony Sentences in State Courts, 1998*, Bureau of Justice Statistics, U.S. Department of Justice (1998), Table 3.

[2] Martin Killias et al., "Sentencing in Switzerland in 2000," *Overcrowded Times* vol. 10, no. 6 (1999), p. 1, 18-19, citing figures from the Council of Europe's 1990 *Bulletin d'informacion pénologique*, no. 15.

[3] United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy, 1995,* Washington, D.C., 1995.

II. International Human Rights and Sentencing

International human rights limit a government's exercise of its coercive and penal powers. Those rights are affirmed in the Universal Declaration of Human Rights—the magna carta of international human rights—and fleshed out in several subsequent treaties, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[4] The United States is a party to all of these treaties.[5] Under the Supremacy Clause in Article VI of the U.S. Constitution, these treaties are part of the "supreme law of the land" and as such are binding on all public officials—including members of the Sentencing Commission. These treaties are not self-executing, and in the absence of implementing legislation, U.S. residents cannot turn to the courts to defend rights acknowledged by the treaties. But officials nonetheless remain obliged to respect those rights as they exercise their public responsibilities.

1. The principle that punishments should not exceed that which is proportionate to the crime reflects three basic human rights precepts: the inherent dignity of the individual, the right to be free of cruel, inhuman or degrading punishment, and the right to liberty:

- The inherent dignity of all persons is the rock upon which international human rights are built. As the preamble to the ICCPR states, "the equal and inalienable rights of all members of the human family...derive from the inherent dignity of the human person..." Respect for the intrinsic value of the human person imposes fundamental limits on the nature and quantity of punishment. A criminal conviction is not a license for the imposition of arbitrarily severe punishment.

- The ICCPR and the Convention against Torture prohibit "cruel, inhuman or degrading treatment or punishment." Excessive punishment falls within this proscription. Imprisonment becomes cruel, inhuman, or degrading if its severity (i.e., length) is greatly disproportionate to the crime for which it has been imposed.

- The right to liberty also limits the length of sentences. By analogy to U.S. constitutional law, international human rights law requires not just procedural due process, but substantive due process as well. That is, even if all requisite legal procedures have been followed, any deprivation of liberty must nonetheless still conform to principles of equity and justice.

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[4] The United States ratified the ICCPR on June 8, 1992, CAT on October 21, 1994, and CERD on October 21, 1994. See http://www.unhchr.ch/pdf/report.pdf for a list of signatories. For the text of the treaties, see http://www.unhchr.ch/html/intlinst.htm.

[5] For a more detailed discussion of these issues, see:
Human Rights Watch, "Punishment and Prejudice: Racial Disparities in the War on Drugs," A Human Rights Watch Report, vol. 12, no. 2, May 2000.
Human Rights Watch, "Cruel and Usual: Disproportionate Sentences for New York Drug Offenders," A Human Rights Watch Report, vol. 9, no. 2, March 1997.
Human Rights Watch, "Race and Drug Law Enforcement in the State of Georgia," A Human Rights Watch Report, vol. 8, no. 4, July 1996.

2. The right to be free of racial or ethnic discrimination is firmly embedded in international human rights law. The ICCPR and CERD prohibit unjustified discriminatory practices even if they have been adopted to secure otherwise valid social objectives such as reducing the sale of illicit drugs.

III. Proportionality and Federal Crack Sentences

Prison is an extremely serious punishment—the most coercive and drastic sanction that can be lawfully imposed short of capital punishment.[6] Ensuring that prison sentences are proportionate is consequently a particularly important human rights obligation. To be proportionate, a prison sentence: 1) should not exceed the gravity of the offender's specific conduct and his or her personal responsibility and culpability; 2) should be tailored to the conduct of the individual defendant and not reflect penalties for crimes or offensive conduct that offender did not in fact commit. Federal sentences for crack offenders fail to meet these requirements.

1. Harsh sentences disproportionate to offender's conduct

The average prison sentence for crack cocaine offenders is ten years. The Commission's statistics reveal the average sentence in 2000 for a street-level dealer of crack is 103.5 months—almost nine years; a courier's average sentence is even greater, 107.4 months; the average sentence of a body guard, cook, or steerer is 117 months—almost ten years.[7] Eighty-five percent of these sentences are served. By way of comparison, the mean maximum state prison sentence is one hundred months for all violent offenses. The estimated time served in state prison for violent offenses is fifty-four months. For burglary, the mean maximum state sentence is fifty-two months, and the estimated time to be served is twenty-four months.[8] As another point of comparison, in Europe the mean prison sentence for homicide is ninety-nine months, for rape sixty-two months and for robbery forty-one months.[9]

We are aware of no empirical basis for punishing low-level crack offenses (e.g., the sale of crack to an adult purchaser) with prison sentences that are commensurate with, much less exceed, most crimes of violence. While dramatic hyperbole abounds in public pronouncements about illicit drugs, a sober, impartial assessment of drug sentences in light of the principles of proportionality indicates such high federal sentences for crack offenders cannot be justified.

Generally, a severe punishment is appropriate for conduct that seriously harms, or at least has threatened to harm, important legally protected interests or rights and conduct to which the victim has not consented. So a significant prison term as a sanction for murder seems

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[6] The public and elected officials all too often overlook the significant hardships of prison. Imprisoned individuals lose their liberty, autonomy, and the free exercise of most rights. They are deprived of their families, friends, jobs, and communities. Their ability to work, plan, and express themselves is severely restricted. In many prisons, life is degrading, demoralizing, dehumanizing, and dangerous: overcrowding and violence threaten inmates' health, safety, privacy, and dignity. Sending a parent or family breadwinner to prison wreaks havoc on the financial and social stability of prisoners' families and harms children's development. Ex-offenders have enormous difficulties finding employment and housing.

[7] Data provided by the U.S. Sentencing Commission, February 2002, on file at Human Rights Watch.

[8] BJS, *Felony Sentences in State Courts*, Table 3 and Table 4.

[9] Killias, "Sentencing in Switzerland in 2000," p. 18.

appropriate. But in the case of retail drug transactions between adults or other low-level drug crimes, the nature and extent of the harm caused by an individual low-level drug offender is surprisingly difficult to identify:

- The sale of drugs to an adult does not violate a legally protected right of that adult in the way that robbery of his property or assault on his person violates his rights. We are aware of no other significant prison sentences imposed in the U.S. for participating in transactions that do not deprive a person of legally protected interests and that were engaged in knowingly and voluntarily.

- The repeated, extensive consumption of cocaine—crack as well as powder—is harmful physically and psychologically. But we are aware of no scientific data that shows every use of cocaine causes serious harm, or that all or even most adults who use cocaine cause substantial physical or psychological injury to themselves. Indeed, only about 10 percent of those who use cocaine ever become addicts. Even if each sales transaction is assumed to cause some amount of physiological or psychological harm, it is hard to discern the principled basis for punishing that conduct as though it were the equivalent of inflicting more serious harm by force upon an unconsenting adult.

- There is deep public concern about the moral injury caused by drug consumption. President Bush commented recently that drugs rob men and women of dignity and character, that they are the enemy of ambition and hope.[10] We do not believe, however, that the offense of contributing to these harms justifies years of imprisonment. If having a weak character or lacking ambition is not a crime, how can an act that contributes to such qualities be punished as a serious felony?

- The adverse social and public health consequences from the use and distribution of crack are the result of hundreds of thousands of individual actions. The contribution of any individual low-level offender to these harms is necessarily negligible. In determining the punishment that is proportional for the street-seller who engages in $20 crack sales, the harm he may have caused should not be conflated with the cumulative impact of countless other people. Severe prison sentences are disproportionate for individuals whose specific conduct in and of itself causes minimal harm, even if those same actions when undertaken by a sufficient number of other individuals results in accumulated public harm.[11] They would be proportionate, on the other hand, for drug kingpins—e.g., persons importing large amounts of cocaine into the country.

2. Harsher sentences for crack than powder cocaine not justified by conduct of crack offender
By virtue of the 100-to-1 differential, sentences for crack offenders are far higher than those powder cocaine offenders who engage in the equivalent conduct. The Commission's statistics indicate that the average sentence of a street-level dealer of crack cocaine is approximately double that of powder cocaine dealers, the same with a courier of crack compared to a courier of

[10] President George W. Bush, "Remarks from Bill Signing at CADCA's National Leadership Forum XII." December 14, 2001. http://www.cadca.org/PressGallery/Speeches/PresBushSpeaksatCADCAForum.htm (7 March 2002).
[11] Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984).

powder. The sentence for an importer or high-level supplier of crack is three times that of an importer of powder cocaine.

When Congress set mandatory minimum sentences for crack and powder, it had no empirical basis for creating the 100-to-1 ratio. By all accounts, it simply picked the figure out of the air. Certainly, it had relatively little information about crack and much of what it thought it knew was erroneous. We are unaware of any reasoned basis today for retaining sentences for crack offenses that are so much higher than sentences for powder cocaine offenses.

Certainly the difference cannot be justified by any differences inherent in the two substances. They are pharmacologically identical and have similar physiological effects, although the form of ingestion affects the rapidity of the onset of effects and their duration.[12] The principle differences between the two forms of cocaine—e.g., use by different socio-economic groups and the greater nuisance and violence accompanying crack distribution—do not reflect any inherent differences in the conduct of the individual crack offender.

Higher penalties for low-income offenders

The uniquely high sentences for crack offenders partially reflect Congress's concern about crack's use in low-income urban neighborhoods. Unlike powder cocaine, which is relatively expensive, crack is produced and sold in small "rocks" that can be bought in small, cheap quantities. While people with financial resources can and do use powder cocaine as well as crack, people with limited funds who want to use cocaine can only afford it in the form of crack. Crack's low price thus contributed to the rapid rise in its use in the 1980s.

Tailoring an individual's punishment to drug pricing does not square with the principle of proportionality. We are troubled by a sentencing structure that as a practical matter keys the severity of a sentence to the affordability of a particular drug. In essence, federal law penalizes the sale of a substance to poor people more than the sale of the equivalent substance to the affluent. It is the equivalent, were alcohol illegal, of imposing higher punishments on the sale of jug wine than on the sale of chateau neuf du pape. Similarly, by dictating far higher sentences for the possession of crack than for the possession of powder, the law penalizes more severely the poor who acquire the affordable form of a drug than the affluent who acquire the same drug in a more expensive form.

Punishment for violent offenses incorporated into sentences for nonviolent offenders

The current federal sentencing structure is crafted as if all crack offenders are violent and powder cocaine offenders are not. There is no argument that the spread of crack was accompanied by serious violence as gangs fought for control of distribution channels in the new market. During the 1980s, the number of homicides grew rapidly in inner cities, and included innocent bystanders among the victims. With the waning of the crack "epidemic" and the settling of distribution systems for crack, the levels of violence have greatly subsided. But even if it continued at previous rates, we do not believe crack offenders who have not engaged in violence should be given sentences set to reflect the violent conduct of others. As discussed above, the proportionality of a punishment must be judged with relation to the actual offense committed by the specific offender being sentenced.

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[12] *Cocaine and Federal Sentencing Policy*, p. 22.

The unfairness of incorporating violence into all crack cocaine sentences is underscored by Commission statistics that reveal that almost 80 percent of federal crack offenders had no weapon involvement in their crime in FY2000. Indeed, 74.5 percent did not even have access to a weapon, and only 2.3 percent brandished, used, or discharged a weapon in the course of committing their drug offense. Commission statistics on weapon involvement for the eight-year period 1992-2000, reveal that even in 1995, the year at which weapon involvement was highest, 70 percent of crack offenders had no weapon involvement. In FY2000, violence was involved in only 6 percent of crack offender cases—only somewhat higher than the figure of 5.3 percent in powder cocaine cases. There was no bodily harm in 88.4 percent of crack cocaine cases—again, a figure roughly equivalent to that in power cocaine cases (91 percent).[13]

We are not proposing that the Commission (or Congress) close their eyes to the violence that accompanies the distribution of drugs. Use of weapons to commit a drug offense can be considered an aggravating factor that enhances the punishment (although we would prefer that unlawful use or possession of a weapon be charged as a separate crime and proven beyond a reasonable doubt). But the baseline sentences currently set for given quantities of crack should be reduced so that every crack offender is not being sentenced as though he or she directly participated in unlawful violence.

3) *Sentences never intended for low-level offenders*

In 2000, Commissioner Steer pointed out that Congress had not intended to impose extremely severe prison sentences on low-level crack offenders.[14] It believed that a major trafficker (e.g. manufacturer or head of organizations dealing in very large drug quantities) should receive at least a ten-year sentence and a serious trafficker (e.g. manager of substantial retain trade business) should receive at least a five-year sentence. It then specified drug quantities in the Anti-Drug Abuse Act of 1986 that it thought were associated with the different roles in the drug business. Unfortunately, it got the numbers wrong. As the Commission's research has shown, the 5 grams of crack cocaine set by Congress as the trigger for a five-year sentence is not a quantity associated with mid-level or serious traffickers. According to the Commission's data, the median amount of crack cocaine associated with a manager or supervisor is 253 grams of crack.[15] Similarly, the 50 grams of crack that triggers the ten-year mandatory minimum is a far cry from the median quantity of 2,962 associated with importers and high-level suppliers of crack cocaine.

Few of the men and women convicted of federal crack offenses are serious or major traffickers. According to Commission data, 77 percent are lower-level offenders: 66.5 percent are street-level dealers; the other 11 percent are lookouts, courtiers, bodyguards, and cooks. Another 5.9 percent are managers and supervisors. Not surprisingly, given their function, the scope of geographic activity for these offenders is quite limited: three quarters of the crack cocaine offenders operated in their neighborhood or on a local level. In other words, less than one-fifth of crack cocaine offenders are the importers, organizers, manufacturers or wholesalers operating on

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[13] United States Sentencing Commission, "Figures 19, 20, 21." Drug Briefing Presentation. 2002, http://www.ussc.gov/agendas/drugbrief/sld006.html (7 March, 2002).

[14] Commissioner John R. Steer, "Testimony before the Subcommittee on Criminal Justice, Drug Policy and Human Resources." May 11, 2000. http://www.house.gov/reform/cj/hearings/00.05.11/SteerTestimony.htm (7 March, 2002).

[15] *Drug Briefing Presentation*, "Figure 18," http://www.ussc.gov/agendas/drugbrief/sld006.html.

the broad geographic scale on whom Congress intended to impose five- and ten-year mandatory minimums. If we assume, *arguendo*, that those five- and ten-year sentences would have been proportionate for major organizers, then they are necessarily disproportionately severe for the lower-level offenders on whom they in fact fall.

4) *The federal sentencing structure incapable of yielding proportionate sentences*
The federal drug sentencing structure combines mandatory minimum sentences by Congress and sentencing guidelines created by the Commission. By its nature, the structure precludes proportional sentences for crack offenders. Mandatory sentences applied to broad classes for criminal conduct can satisfy the principle of proportionality only if the prescribed punishment is proportional to the conduct of every individual falling within the class. The mandatory minimum set by Congress for crack offenses clearly fails that test. Harsh penalties set simply by quantity and type of drug cannot distinguish between different levels of culpability, yet they block judicial efforts to tailor sentences to the individual offender. Under the sentencing scheme created by Congress, minute amounts of drugs can yield major differences in sentences for people who are otherwise similar in conduct and culpability. For example, an amount of .01 grams above 5 grams can mean an extreme of four years in the sentence for someone convicted of first offense simple possession. Mandatory minimums also lump people together of very different levels of culpability. By setting sentences based solely on quantity, they fail to distinguish between different roles in the offense (e.g., peripheral participants or ringleader). Street-level sellers can be charged with quantities that reflect the total of numerous sales. There have been many complaints that law enforcement agents deliberately wait to make arrests until the sales total has increased enough to trigger mandatory minimums. The impact of the failure to key sentences to role is also magnified by conspiracy laws. The Anti-Drug Abuse Act of 1988 made the mandatory minimum penalties applicable to drug offenses also applicable to conspiracies to commit those offenses. Low-level participants in a drug enterprise can be sentenced on the basis of drug quantities handled by the entire undertaking. Whether through accumulated sales or conspiracy laws, a street-level crack seller can face sentences far higher than his role otherwise warrants.

The Commission has crafted sentencing guidelines with mitigating and aggravating factors that adjust the baseline sentence set by drug quantity to better reflect the individual's conduct, role, and culpability. The sentence, however, cannot be reduced below the term mandated by the mandatory minimum legislation. The mandatory minimums trump the Commission's sentencing guidelines. As Commissioner Steer pointed out in his statement before the House Governmental Reform Subcommittee on Criminal Justice in May, 2000:

> [F]or the very offenders who, arguably, most warrant proportionally lower sentences (offenders who by guidelines' definitions are the least culpable), mandatory minimums generally operate to block the sentence reflecting mitigating factors. This means that these least culpable offenders may receive the same sentences as their relatively more culpable counterparts.[16]

[16] Steer Testimony, http://www.house.gov/reform/cj/hearings/00.05.11/SteerTestimony.htm.

Commission data indicates that in 60 percent of cases in which the defendant qualified for a mitigating role reduction under the guidelines, the mandatory minimum trumped the sentence.[17]

The safety valve provision enacted by Congress provides some relief for offenders otherwise facing mandatory sentences. Higher rates of arrest in the urban areas, in which most crack cocaine arrests are made, have left most crack defendants with criminal records that preclude them from qualifying for the safety valve.

The congressional mandatory minimums have distorted the guidelines. The Commission used the five- and ten-year sentences set by Congress with the corresponding drug quantities as the basic reference points around which it constructed its drug offense guidelines. We recognize and commend the Commission's effort to secure proportionate sentences for individual defendants through various mitigating factors. But the guideline structure cannot ensure proportionate sentences because it is reflected by the excessively severe sentences mandated by Congress.

5) *Federal versus state prosecution*
The low-level offenders who constitute the bulk of federal crack offenders could have been prosecuted under state laws—and most would have received lower sentences. In 1995, the Commission repeated that only fourteen states distinguish between crack and powder cocaine for sentencing purposes.[18] The remaining states did not create statutory sentences distinguishing between crack cocaine and powder cocaine. Only one of the states, North Dakota, used a 100-to-1 quantity ratio for the threshold amounts triggering mandatory minimum penalties. We take no position on the appropriate role of the federal government with regard to counter narcotics activities and drug prosecutions. But it is extremely troubling from a proportionality perspective that the same activity—e.g., selling rocks of crack to consumers—can get very different sentences simply based on whether local or federal prosecutors take the case.

IV. The Racially Discriminatory Impact of Crack Sentences

Available evidence indicates there are more white cocaine offenders than there are black. Yet the Commission's data shows that in 2000, over 84 percent of federal crack defendants were African American, a proportion that did not vary significantly throughout the 1990s.[19] Blacks thus bear the brunt of the severe sentences uniquely meted out to crack offenders under the federal sentencing structure. As discussed above, we do not believe the far higher sentences for crack than powder cocaine offenses are justified. The lack of justification takes on added significance in light of the dramatic racial disparities in the imposition of crack sentences. An indefensible sentencing differential becomes unconscionable in light of its racial impact.

Challenges to the crack/powder sentencing differential on equal protection grounds under the U.S. or state constitutions have generally failed because of the absence of proof of discriminatory intent on the part of the lawmakers. International human rights law, however, contains no requirement of discriminatory intent for a finding of racial discrimination.

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[17] Ibid.
[18] *Cocaine and Federal Sentencing Policy*, p. 130.
[19] *Drug Briefing*, Table 34, at http://www.ussc.gov/ANNRPT/2000/table34.pdf.

CERD prohibits racial discrimination, which it defines as conduct that has the "purpose or effect" of restricting rights on the basis of race.[20] Laws that are racially neutral on their face will violate CERD if they have an unjustifiable significant disparate impact upon a group distinguished by race even in the absence of racial animus.

CERD thus raises the question of whether the racially disparate impact of the crack sentences is warranted. We believe not. The impact does not reflect racial differences in offending behavior. Rather, it reflects law enforcement practices, practices that, like the sentences themselves, cannot be divorced from underlying racial dynamics prejudicial to African Americans.

1. Crack offending by different racial groups

Available data indicates there are far more white crack offenders than black, even though blacks constitute the great preponderance of persons prosecuted for federal crack offenses. Federal data indicates blacks have a somewhat higher rate of crack use than white.[21] Given the much greater size of the white population, there are nonetheless still far more whites (2,870,000) who have ever used—and thus illegally possessed—crack cocaine than blacks (1,040,000).[22] As for crack sellers, there is no national data on their racial breakdown. The limited data on drug sellers that does exists nonetheless suggests whites constitute a preponderance of the cocaine selling population. For example, during the period 1991-1993 Substance Abuse and Mental Health Services Administration (SAMHSA) included questions about drug selling in the annual National Household Survey on Drug Abuse (NHSDA) surveys. On average over the three-year period, blacks were 16 percent of the admitted sellers and whites were 82 percent.[23] According to research on patterns of drug purchase and use in selected major cities, drug users reported that their main drug sources were sellers of the same racial or ethnic background as they were. A large study conducted in the Miami, Florida metropolitan area of powder and crack cocaine users revealed that over 96 percent of users in each ethnic/racial category were also involved in street-level drug dealing—which would suggest a racial profile of sellers that is comparable to users.[24]

Most criminal justice analysts who have looked at racial disparities in drug offender arrests and imprisonment believe demographics and law enforcement resource allocation bear principal responsibility for the disparities. Illicit drug use—and presumably sales—are higher in large metropolitan areas where drug law enforcement is also concentrated. Since more blacks, proportionately, live in these areas than whites, black drug offenders are at greater risk of arrest than white offenders. Within urban areas, the major "fronts" in the war on drugs have been low-

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[20] Art. 1 (1) of CERD states:

> In this convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

United Nations, "International Convention on the Elimination of All Forms of Racial Discrimination." (New York: United Nations, 1965), http://www.unhchr.ch/html/menu3/b/d_icerd.htm (12 March, 2002).

[21] Office of Applied Studies, "National Household Survey on Drug Abuse, Population Estimates 1998," *National Household Survey on Drug Abuse Series: H-9*, (SAMHSA: Washington, D.C., 1998), p. 38-39.

[22] *Punishment and Prejudice*, Table 14.

[23] *Punishment and Prejudice*, Table 15.

[24] Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, "Crack Use, Crime by Crack Users, and Ethnicity," in Darnel F. Hawkins, ed., *Ethnicity, Race and Crime* (New York: State University of New York Press, 1995), p. 21.

income minority neighborhoods. In those neighborhoods, drug transactions are more likely to be conducted on the streets, in public, and between strangers, whereas in white neighborhoods—working-class through upper-class—drugs are more likely to be sold indoors, in bars, clubs, and private homes and only to known buyers. Undercover operations, buy and busts, and other law enforcement activities are therefore easier and quicker to undertake in low-income neighborhoods and the likelihood of success much greater. The net result has been that people buying and selling crack and powder cocaine in more affluent neighborhoods are less likely to be arrested than people buying and selling those drugs in poor, primarily minority, urban communities.

But concentration of anti-drug efforts in low-income urban neighborhoods also reflected racial dynamics. Indeed, although crack was the least used of the major illicit drugs in the U.S.—and although more whites used illicit drugs than blacks—the "war on drugs" that began in the 1980s was targeted most notoriously at the possession and sale of crack by blacks. Crack cocaine in black neighborhoods was a lightening rod for a complicated and deep-rooted set of racial, class, political, social, and moral dynamics that resulted in extensive law enforcement activities in those neighborhoods—as well as uniquely severe federal sentences for crack offenders.

2. The racial underpinnings of crack sentences

We do not believe any honest observer of the public response to crack, including federal sentences, can ignore the role of race. Powder cocaine use by white Americans in all social classes increased in the late 1970s and early 1980s. That use, however, did not engender the orgy of media and political attention that arose when smokable cocaine in the form of crack spread throughout low-income minority neighborhoods that were already seen as dangerous and threatening. There is no question that with the spread of crack, inner city minority neighborhoods suffered from the disorder, harassment, and nuisance that accompanied increased drug dealing on the streets, increased crimes by addicts seeking to finance their addiction and violence by competing drug gangs. But the dismay of local residents was far exceeded by the censure, outrage, and concern from outsiders fanned by incessant and sensationalist media stories, by politicians seeking electoral advantage by being "tough on crime," and by some politicians who were –consciously or otherwise—playing the "race card" in advocating harsh responses to crack. We recognize that many members of Congress and the public sincerely sought to help poor minority communities. But we are convinced the federal solutions they chose—i.e., uniquely harsh sentences and the concomitant underfunding of prevention and treatment alternatives—cannot be divorced from the longstanding public association of racial minorities with crime and drugs.[25]

All of these and other factors help explain why inner cities were targeted for drug law enforcement, why Congress set higher sentences for crack offenders than for powder cocaine, and why most federal crack defendants are blacks. But they do not offer a justification that can today withstand CERD's anti-discrimination principles.

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[25] David S. Musto, *The American Disease: Origins of Narcotic Control* (New York: Oxford University Press, 1999). Also see Michael Tonry, *Malign Neglect – Race, Crime and Punishment* (New York: Oxford University Press, 1995).

The Commission cannot change law enforcement practices that target inner city communities. But it can act to eliminate or at least significantly reduce the powder/crack sentencing differential and thereto affirm the principles of justice and equal protection of the laws that should be the bedrock of U.S. law. Absent change, federal crack sentences will continue to deepen the racial fault lines that weaken the country and undermine faith among all races in the fairness of the criminal justice system.

V. Recommendations

The Sentencing Commission should recommend to Congress that mandatory minimums for drug offenses should be eliminated. If they are retained, they should be pegged to the level of the participant in the drug trade. Drug quantity should be designated as one factor to consider in determining the defendant's level of participation in the drug trade.

The Sentencing Commission should also amend its guidelines as follows:

- Guidelines should be revised to ensure that low-level crack offenders do not receive disproportionately severe sentences. Under the guidelines base sentences should be keyed to role of defendant in drug trade, with aggravating (e.g., use of violence) or mitigating (e.g., providing assistance to law enforcement) factors raising or reducing that sentence as appropriate. If drug quantities continue to play a dominant role in the guidelines, they should be seen as a proxy for the defendant's role in the offense. Where drug quantities are an inaccurate proxy (e.g., where a low-level defendant is charged with a large quantity of drugs because of the impact of conspiracy laws or multiple drug transactions) the guidelines should permit significant downward adjustments in the sentence.

- Sentences for crack cocaine offenders should be equalized with those for powder cocaine offenders who engage in equivalent conduct. The disparities should be eliminated by increasing the quantities of crack required for given sentence to those required for powder cocaine offenses. The quantities for powder offenders should not be reduced to address the crack/powder sentencing disparity. We are aware of no sound arguments that sentences for powder cocaine offenses are too low. The injustice caused by the arbitrary 100-to-1 ratio should not be cured by an equally arbitrary change to powder cocaine sentences, particularly when the change would be motivated by calculations of political appeal. Politics has already played a pernicious role in federal drug sentencing. The Commission must uphold non-political principled sentencing.

PRACTITIONERS' ADVISORY GROUP

CO-CHAIRS JIM FELMAN AND BARRY BOSS
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, DC 20009
202 234 9000 (BARRY BOSS)
813 229 1118 (JIM FELMAN)

March 25, 2002

VIA FACSIMILE
The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: PAG response to the Department of Justice's submission regarding crack

Dear Judge Murphy:

On March 19, 2002, the Deputy Attorney General of the United States testified before the Commission, presenting the Department of Justice's position that "the current federal policy and guidelines for sentencing crack cocaine are appropriate." Larry Thompson Statement at 7. The Practitioners' Advisory Group submits this response to that testimony and related submissions.

OVERVIEW

Underpinning General Thompson's entire testimony was his expressly stated premise:

> As we indicate in the national drug strategy, effective drug control policy, reduced to its barest essentials, has just two elements: modifying individual behavior to discourage and reduce drug use and addiction, and disrupting the market for illegal drugs. We think lowering crack penalties fails on both counts.

Thompson Statement at 13. Respectfully, we fundamentally disagree that "modifying individual behavior" and "disrupting the market" are the only two elements of a national drug strategy. If they were, mandatory life terms for all first offenders would be the "best" policy. While the Executive Branch's function as enforcer of the laws may properly cause it to focus on these two goals alone, this Commission's role as a body within the Judicial Branch yields a broader obligation to also consider another goal absent from the Department's presentation: adopting a sentencing process that is just, fair, and proportional.

The equities do not support the crack disparity. As this Commission is aware, the 100-to-1 ratio was not adopted in any particularly considered, scientific fashion. Rather, it was adopted in a frenzied environment in the wake of the cocaine death of Len Bias, a University of Maryland basketball star who had just been drafted by the Boston Celtics.[1] Speaker of the House Thomas ("Tip") O'Neil of Massachusetts initiated an expedited process in which various bills proceeded without Committee hearings, at breakneck speed at the end of the 1986 legislative session shortly before adjournment in an election year. At the time, "crack" was a new and barely understood drug, but early proposals for smaller ratios soon ratcheted upward with the increasing and inflamed press coverage, until the 100-to-1 ratio was finally adopted—after the Conference decided to double the 50-to-1 ratio that had made it that far in order to be "twice as tough." Although some of this history was covered in the Commission's 1995 Report, we urge the Commission to consider anew the history leading up to this ratio's passage.

It is this hastily-adopted, unscientific and barely considered ratio that the Department now surprisingly rises to fully and completely support. As noted by at least one Commissioner at the hearing, this support is wholly out of the mainstream, and is overwhelmed by the criticism the ratio has received over the years from prior Administrations, as well as the vast majority of organizations (including many highly conservative organizations) that have called for its repeal. The Administration now essentially argues that any reduction of the drug penalties (apparently regardless of the equities) would "send the wrong message." We do not believe this Commission should accept the concept that a poorly-drafted drug law is forever cast in stone, and can never be reduced. Indeed, this Commission *was created with specific statutory mandates* to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 994(b)(1)(C), and to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section [18 U.S.C. §] 3553(a)(2)." 28 U.S.C. § 991(b)(2). See also 28 U.S.C. § 994(r) (Commission "*shall recommend* to the Congress ... [changes in the] penalties of those offenses for which such an adjustment appears appropriate.") (emphasis added).

SPECIFIC ANALYSIS

Having addressed the Department's comments generally, we now turn to the specifics:

A. DOJ's Claim that Crack is Associated with Greater Dangers than Powder Can Be Adequately Addressed by the Other Proposed Guideline Changes

DOJ acknowledges that so-called "crack" and powder cocaine are "chemically similar." Thompson Statement at 7. But it then immediately turns to the differences in how the two substances are ingested and marketed, and the greater violence it claims is associated with crack.

The transition skips an important step that this Commission should not overlook. The reality—and there is no real dispute about this—is that any powder cocaine can quickly be

[1] Ironically, while Bias was believed at the time to have died from a crack cocaine overdose, it was later discovered that he had used only powder cocaine.