ECSTASY

The Practitioners' Advisory Group urges the Commission not to again increase the penalty for ecstasy in the form of changing the typical dosage unit weight. We strongly advocated not significantly increasing the penalty for MDA because its pharmacological properties are far less harmful than many other illegal substances. The Commission should amend application note 11 to explicitly include MDMA, MDEA and PMA in the "Typical Weight Per Unit (Dose, Pill, or Capsule) Table" to the same extent and with the same typical weight as MDA is currently listed, namely 100 mg. This would treat each of these substances in the same manner to conform to the amendment that the Commission promulgated last year which treated all of these substances identically.

CONCLUSION

Significantly lowering the crack penalties and re-emphasizing violence and weapons as sentencing factors are achievable goals for this amendment cycle, but must be accompanied by a 2-level table reduction to create a fully equitable and neutrally based sentencing system for drug defendants. These are changes which can be realized. With the proper education and in the aftermath of September 11, the Congress will not reject amendments which more stringently punish violence and weapons use to further drug trafficking.

ALTERNATIVES TO IMPRISONMENT (AMENDMENT #9)[4]

INTRODUCTION

Option 1 in Proposed Amendment 3 (Jan. 17, 2002) to the United States Sentencing Guidelines[5] (the "Amendment") is a reasoned first step in increasing the discretion available to district judges in sentencing offenders whose relatively low offense level places them within current Zones B or C of the sentencing table.

The PAG supports Option 1 because it maximizes the available options to district judges, providing increased options for sentencing for offenders across both race and offense of conviction, while avoiding undue complication in the determination of sentencing options. Option 1 gives district judges maximum flexibility to fashion sentences that give offenders a real opportunity to make amends for their crimes and become positive, productive members of society. Option 1 is a proposal that has long been recognized by both practitioners and judges as

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4 This section was drafted primarily by PAG member Timothy W. Hoover.

5 67 Fed. Reg. 2456-01, 2002 WL 58097 (Jan. 17, 2002).

a welcomed mechanism to increase sentencing discretion for low level offenders. At the same time, it in no way takes away the option of incarceration for appropriate offenses and offenders, an option that is regularly used for offenders in both Zone B and Zone C. Option 1 promotes flexibility and rehabilitation, not leniency.

The PAG recommends that the Commission adopt Option 1 in the Amendment, and combine Zone B and Zone C so that the sentencing alternatives to incarceration currently available in Zone B are available to those offenders at Levels 11 and 12.

PAG's support of Option 1 of the Amendment does not, however, exist in a vacuum. We encourage the adoption of Option 1 as a first step in the Commission's comprehensive examination of the current Chapter 4 criminal history structure. We also believe that the Commission should carefully consider in the next amendment cycle the expansion of current Zone C (Zone B if Option 1 is passed) for offenders within Criminal History Category I, in order to more fully implement the Congressional directive at 28 U.S.C. § 994(j).

THE PAG POSITION: OPTION 1 SHOULD BE ADOPTED

By collapsing Zones B and C, and making all of the options available in Zone B available to judges while sentencing defendants who are in Zone C, Option 1 maximizes the flexibility available to sentencing judges. Flexibility in this context has a number of components, all of which weigh in favor of the proposal.

First, flexibility is more than just a watchword – in the context of low-level, first-time offenders who often are found in Zone C, increased flexibility will allow the sentencing judge to focus exclusively on the offense and offender in determining what sentence is appropriate. In current Zone C, the sentencing judge is required to impose a split sentence for a first time, low level offender for whom probation with significant conditions may well be the best option to turn that offender around.

Second, the sentencing judge will have increased flexibility to issue a probation or imprisonment sentence with community confinement component, with the ability to take into account local halfway house availability. Unfortunately there is often a lack of bed space at halfway houses that are under contract to the Bureau of Prisons. As a result, when defendants receive split sentences in Zone C with a halfway house component, the purpose of the split sentence is frustrated while the defendant sits in a local facility awaiting the opening of a halfway house beds. District judges are keenly aware of the space limitations and crowding issues in their districts. If, in a particular case, there is a space/crowding issue, and the District judge knows about it, rather than being required to fashion a split sentence which may well be frustrated by the unavailability of a halfway house for the first part of the split sentence, the district judge can impose a probationary or imprisonment sentence with a home confinement component instead.

With this increased flexibility, Option 1 will also simplify the preparation of Presentence Investigation Reports. Nearly all defense attorneys can recall cases where, either right before or right after the District Court formally pronounced sentence, the Court, defense counsel, Probation Officer and prosecutor engage in a head-scratching colloquy regarding navigating the split sentence maze that is in the present Zone C. Option 1 will eliminate these difficulties because the district judge will have no question what she can and cannot do in sentencing in the combined Zone B and Zone C.

Importantly, flexibility does not mean leniency, and Option 1 does not eliminate a district judge's ability to impose a straight term of imprisonment in the appropriate cases. In 44.1% of Zone B sentencings in Fiscal Year 2000, and in 50.3% of Zone C sentencings, district judges imposed prison only sentences. The adoption of Option 1 will not in any way eliminate the ability for prison only sentences where appropriate. Even where a probation sentence with community confinement or home confinement is ordered, the sentence is not necessarily more lenient, as the Judicial Conference of the United States has recognized that "[e]xperience with home confinement programs shows that alternatives to imprisonment can be as tough and punishing as prison itself." Judicial Conference of the United States, Report and Recommendation for Amendments to the Sentencing Guidelines, at 19 (Aug. 21, 1991). And, in appropriate case, a split sentence could still be imposed; under Option 1, a split sentence remains an option, not a requirement.

The call for the greater flexibility in dealing with first-time and low level offenders is not new. In August 1991, the Judicial Conference of the United States authored a detailed Report and Recommendation (the "Report") calling for greater sentencing flexibility for offenders who fall in Zone C. Recommendation #2 of the Report encouraged the Commission to "combine the zones on the Sentencing Table where community alternatives and split sentences are now available. It would permit probation with community confinement or home detention conditions to substitute for imprisonment in 10 additional guideline cells." Report, Appendix A, at 2. This recommendation is essentially the change that would be made by the present Option 1.

In recommending the change that is included in present Option 1, and the other changes recommended in the Report, the Judicial Conference made some observations that supported adoption of the their recommendations then, and support the adoption of Option 1 now. First, the judges recognized "most offenders who would potentially be affected by the Judicial Conference recommendations fit . . ." this definition of a first offender who has not been convicted of a crime of violence or otherwise serious offense, as set forth in 28 U.S.C. § 994(h).

Second, the Judicial Conference explained that the "Judicial Conference recommendations would not disproportionately exclude minorities from consideration for alternatives to incarceration." Report at 17. The Judicial Conference compared the characteristics of offenders eligible for sentencing alternatives under the policies in effect at the

time, and the characteristics of offenders who would be eligible for alternatives under the Judicial Conference recommendation, explaining that "there is very little difference in the distribution of offender characteristics" of defendants who were eligible for alternatives at that time and who would eligible under the proposals. *Id.* The Judicial Conference concluded that "these proposed policies to expand the availability of alternatives do not favor one particular type of offender any more than do current policies."

PAG encourages Option 1 for all these reasons, and for the additional reason that Option 1 maximizes sentencing flexibility and makes a real change in ways that Option 2 and Option 3 of the Amendment do not.

Option 2 is a proposal without any clear rationale or purpose -- it would simply mandate a split sentence with a halfway house component for at least half of the sentence of defendants whose Guideline range minimum is 8 months. Rather than promoting flexibility, Option 2 actually maintains the status quo or even takes flexibility away. For those offenders, by mandating an imprisonment component, Option 2 simply would mirror present practice by which District judges may make recommendations to the Bureau of Prisons for the service of the term of imprisonment to be in a halfway house component. This is no change at all, and is not supported by any rationale consistent with increasing sentencing options and flexibility for low level offenders. In fact, it could lead to (or maintain present) unwarranted disparity and complication for defendants sentenced to a split sentence in districts where halfway house beds are not available, requiring a de facto significant prison term for no reason other than the rigidity of Option 2 combined with the lack of a halfway house bed. As seen by the lengthy amendments and changes that would have to be made, Option 2 would be extremely complicated to implement and handle in practice; it promotes inefficiency, not efficiency, and rigidity in sentencing, not flexibility.

Option 3 is similarly flawed. By limiting the combination of Zone B and Zone C to those offenders in Criminal History Category I, Option 3 would introduce a level of arbitrariness to the determination of the appropriate sentence and sentence alternatives. Under Option 3, a defendant who had one or two extremely minor state misdemeanor convictions, and thus fell in Criminal History Category II, with offense level 10, would not be eligible for a probation with conditions sentence. At the same time, a defendant with one misdemeanor conviction, who fell in Criminal History Category I, with a *higher* offense level of 12, *would* be eligible for a probation with conditions sentence. There is no justification for such a surgical amendment that does little to increase sentencing flexibility. Unlike Option 1, there is no guarantee with Option 3 that it would positively impact sentencing options for both majority and minority offenders. Option 3 would promote sentencing disparity across offense levels and possibly across race, not sentencing consistency.

CONCLUSION

The PAG recommends that the Commission adopt Option 1. It is an important first step in increasing the flexibility of District judges in sentencing low level offenders. It increases flexibility while promoting efficiency in the sentencing of offenders across districts, offenses and race. It is not, however, a leniency provision.

Consistent with the principles that are served by Option 1, we hope that this will be a positive first step in the Commission's upcoming consideration of the structure, purpose and efficacy of Chapter 4, and the reconsideration of the expansion of the combined Zone B/C for offenders with no criminal history at all.[6] By considering these issues and further changes in the coming amendment cycles, the Commission will promote an informed discussion of ways to ensure that the Guidelines promote rationality, flexibility and fairness in sentencing, and stay consistent with the congressional directive of 28 U.S.C. § 994(j).

DISCHARGED TERMS OF IMPRISONMENT (PROPOSED AMENDMENT # 10)[7]

The Practitioners' Advisory Group commends the Commission's willingness to consider changes to U.S.S.G. § 5G1.3. We believe that such a re-examination is warranted, given the large number of defendants who are affected by this guideline, and the various inequities that have arisen in its application.

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[6] *See, e.g.*, Submission of the Practitioners' Advisory Group to the United States Sentencing Commission Regarding Implementation of 28 U.S.C. § 994(j) (2000).

[7] This section was drafted primarily by PAG member Greg Smith.

Background

As an overview, we believe that U.S.S.G. § 5G1.3, as currently adopted, is inconsistent with both statutory authority and this Commission's longstanding opposition to mandatory minimum sentencing. Subsection (a), for example, sets forth situations in which "the instant offense shall be imposed to run consecutively to [an] undischarged term of imprisonment."

The underlying statutes do not support the mandatory nature of current U.S.S.G. § 5G1.3(a)'s adjustment. 18 U.S.C. § 3584(a) expressly provides as follows:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(emphasis added). It is true that Congress directed the Commission to insure that the guidelines reflect the appropriateness of imposing "an" incremental penalty for each offense under certain, very limited circumstances. See 28 U.S.C. § 994(l). The guideline as written, however, is far broader than the limited directive contained in § 994(l). Nor did the directive suggest that all (as opposed to only part) of one sentence needed to be imposed consecutive to another in order to accomplish this objective of "an" incremental penalty—as § 5G1.3(a) now requires. Finally and most importantly, 28 U.S.C. § 994(l) simply cannot be read as overriding the broadly discretionary language of 18 U.S.C. § 3584(a). Both of these provisions were adopted as a part of the same law, Pub. L. 98-473, and must be read in pari materia.[8]

The current U.S.S.G. § 5G1.3 is thus inconsistent with Congress' statutory authorization of concurrent sentences in this context. It also is inconsistent with this Commission's policy positions against mandatory minimum sentencing. For well over a decade, this Commission has consistently argued that mandatory minimum sentencing

[8] The same is true of 18 U.S.C. § 3147, also adopted as part of Pub. L. 98-473. Section 3147 is quite narrow; it applies only to new federal crimes committed while under federal pretrial release. Moreover, only the new, incremental penalty (of at most 10 years) specifically added by § 3147, and not the entire sentence, that "shall be consecutive to any other sentence."

that completely eliminates judicial discretion is inappropriate. Yet the mandatory "shall" language in U.S.S.G. § 5G1.3(a) has yielded similar results.

The original background statement to U.S.S.G. § 5G1.3 fails to adequately explain why this mandatory language was adopted. The Commentary cites 18 U.S.C. § 3584's discretionary admonition, but then says simply that the general factors outlined in 18 U.S.C. § 3553(a) must be followed. No explanation is given why a judge who considers those same § 3553(a) factors, and who nevertheless believes that a concurrent or partially concurrent sentence is warranted, must nevertheless impose a consecutive sentence that this Commission decrees "shall" be imposed. Indeed, one of § 3553(a)'s factors that a Court is required to consider is "the kinds of sentences available;" yet this "available" concurrent sentence expressly authorized under § 3584 has somehow been written out of the guidelines in § 5G1.3.[9]

Section 5G1.3's requirement of consecutive time should also be considered in the overall context of the Sentencing Guidelines. A defendant who has committed other offenses already typically gets a higher criminal history score than others, and § 4A1.1(d) specifically adds two points to one's criminal history score in this exact same context. The Guidelines thus already impose an incremental penalty on many of these defendants, even without § 5G1.3(a).

In sum, we appreciate the Commission's reconsideration of this issue, as we believe modifications to § 5G1.3 will better bring it into line with the Commission's statutory mandate and general policy positions.

Specific Recommendations

The Practitioner's Advisory Group recommends the following specific changes to U.S.S.G. § 5G1.3:

1. Proposed Changes to U.S.S.G. § 5G1.3(a) and (b)

We believe that subsection (a) should be modified to broaden the discretion afforded judges to do justice in appropriate cases. At the very least, the final phrase should be modified to read, "it is recommended that some or all of the sentence for the instant offense should be imposed to run consecutively to the undischarged term of imprisonment."

If the Commission desired to add further guidance or explanation, we would not object to the following phrase being added at the end of the above: ", in order to impose

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[9] The commentary's citation of 18 U.S.C. § 3584 has made it difficult, however, to obtain any departures from § 5G1.3(a)'s consecutive requirement. No § 5K adjustment encourages such a departure, and it is difficult to persuade a judge under § 5K2.0 that the Commission "failed to adequately consider" this issue, when it cited § 3584 and explicitly adopted this "shall" language in § 5G1.3(a), in contrast to the discretion it explicitly adopted in § 5G1.3(c).

on the Defendant some incremental penalty, taking into account the adjustments already provided under § 4A1.1."

We would not object to analogous language being added to § 5G1.3(b). Alternatively, subsections (a) and (b) could simply be eliminated altogether, since a modified subsection (c) would provide courts with maximum flexibility, as 18 U.S.C. § 3584 seems to permit.

2. Proposed Changes to § 5G1.3(c)

We also recommend either eliminating this guideline's designation as a Policy Statement, or according § 5G1.3(a) and (b) similar Policy Statement status. We see no basis for subsection (c)'s diminished status, and fear it has only had the effect of convincing judges that the mandatory provisions of (a) and (b) are stronger recommendations that are can never be overridden by the discretion encouraged herein, contrary to the authority provided in § 3584. In order to effectuate 18 U.S.C. § 3584's focus on judicial discretion, we frankly believe the best course of action may be to change all of subsections (a), (b) and (c) to Policy Statement status.

3. U.S.S.G. § 7B1.3(f)'s Policy Statement

For similar reasons, we also recommend that the Policy Statement contained in U.S.S.G. 7B1.3(f), and cross-referenced in U.S.S.G. § 5G1.3 Application Note 6, should be modified to establish a presumption (rather than a mandate) that revocation sentences (or at least some part thereof) should be imposed consecutively in order to establish an incrementally higher sentence upon revocations, and to achieve a reasonable punishment under the circumstances of each case.

4. Proposed Addition

Although it perhaps is obvious, the Commission may wish to add a guideline clarifying that there are certain, Congressionally-mandated situations in which consecutive sentences are mandatory, and that the guidance provided in the Guidelines does not override these statutory requirements. This addition could be designated as a new § 5G1.3(d).

5. Departures for Special Situations

Finally, we ask that the Commission examine and address certain special situations in which federal judges' beliefs, and even rulings, that concurrent sentences are warranted have been undermined by bureaucratic quirks in the criminal justice system. In our experience, we have encountered situations in which a federal judge's very ability to impose a concurrent sentence has been unfairly usurped. These are among the most frustrating and intractible problems faced by federal criminal defense lawyers—frustrating, because the results have little to do with justice; intractible, because there is often nothing

that can be done to correct these situations. We strongly urge the Commission to consider specifically addressing these issues.

There are at least two situations in which justice is essentially hijacked by bureaucracy. The first is the so-called "state custody" issue. The timing of the interplay between a defendant who starts in federal custody and one who does not can lead to incredible disparity in sentences among defendants otherwise similarly situated. This is because Bureau of Prisons generally gives a defendant no credit for time spent in state custody, whereas state systems typically give full credit for time spent in federal custody.

Accordingly, if Defendant A starts in the federal system, he or she typically faces no problem. The federal system gives Defendant A full credit for any time spent in pretrial detention, and any judges who sentence Defendant A retain their full historical power to declare that subsequents sentences may be imposed either concurrent or consecutive to any prior sentence.

If Defendant B begins in state custody, however, he or she may get bureaucratically hammered. A new federal case may cause Defendant B to get writted into the federal system, where Defendant B might be in pretrial detention in the same cell with Defendant A; yet, it is our understanding that the Bureau of Prisons will give Defendant B no credit for this time, even if spent in the cells of a United States Penitentiary, based on a fiction that Defendant B actually remains in "state" custody and is only "borrowed" by the federal facility on a federal writ.

The situation is particularly acute when a defendant is serving a lengthy state sentence. If a person writted in from such a sentence faces a federal judge on a new matter, the federal judge may find that justice warrants the imposition of a concurrent or partially concurrent federal sentence. *Even if ordered, however, the concurrent decree does no good.* The Bureau of Prisons will decline to credit the judge's order, ruling that the federal sentence cannot even "begin" until the defendant finishes his state sentence and "enters" federal custody. The impact is sometimes quite dramatic, as when an inmate finds that his 10-year supposedly "concurent" federal sentence must start anew once a lengthy state sentence is over.

Not only is this bureaucratic glitch harsh, but it is inequitable--sometimes leading to a scramble to figure out some creative way to get a defendant moved from state to federal custody. Defendants with money who find themselves in this pretrial situation may avoid this problem entirely by bonding out of state custody over into federal custody, where they can start earning federal credit; poor defendants (or those who have already been written over into the federal system and cannot get back before a state judge) are often stuck. Those who find themselves under a lengthy state sentence can ask their State to parole them over to the federal sentence; again, however, the results are often based on position and influence, are unpredictable, and may turn more on the importance a particular state places on saving money by paroling a defendant over to federal custody rather than on any real, considered sense of what combined sentences are

just. Most importantly, we fundamentally do not believe that the Bureau of Prisons should have this ability to bureaucratically negate a federal judge's ability to order a concurrent sentence that is warranted. We find the injustice, inequity and illogic of this situation extremely difficult to explain to our clients.

A similar situation can arise when there is a delay in bringing a new federal case against a defendant serving another sentence. While this situation is not limited to the revocation area, we often see federal revocation petitions filed against a defendant based on new criminal conduct. Some of these revocations are heard rather quickly. Others, however, are delayed. If the sentence on the underlying sentence is completed before a defendant is brought to court to answer the revocation petition, a prosecutor or probation officer essentially can negate the judge's ability to run the federal revocation sentence concurrent or partially concurrent to the sentence served for the new criminal conduct. We sometimes even see this happening when a petition has been outstanding for a lengthy period of time, and this result is not just.

We recognize that the Commission cannot rewrite the Bureau of Prisons' rules, or require that defendants be charged at a particular time. But what we do believe this Commission can and should do is to adopt a guideline expressly permitting a downward departure in this context—preferably as a new § 5G1.3(e) with an Application Note that explains such circumstances:

> If the sentencing court believes that the timing of either the nature of the defendant's detention or the initiation of a federal case renders some or all of a concurrent sentence (which would otherwise be warranted) impossible or unlikely to be enforced, the court may grant a downward departure. The extent of any such downward departure should be equal to the time that would otherwise have been ordered to run concurrent.

Without an encouraged ground for this departure currently, many judges do not see the wisdom or need to go outside the guidelines in this context, perhaps believing or hoping that their "concurrent" order will be honored. We urge the Commission to adopt a new guideline that places justice over bureaucracy, alerts unwary litigants of the potential need to address this situation on the front end, and encourages judges not to assume—mistakenly—that that they lack such power, or that their concurrent sentences in this context will somehow be enforced.

As always, we appreciate the opportunity afforded us to present our views to the Commission and remain available to meet with the Commission if there are any questions or if we can be of any further assistance.

Sincerely,

Barry Boss
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March 19, 2002

Via Facsimile No. (202) 502-4699 and Federal Express
Mr. Michael Courlander
United States Sentencing Commission
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Washington, D.C. 20002-8002

Dear Mr. Courlander:

Enclosed please find a hard copy of the Comments of the NYCDL regarding adjustments for mitigating role in an offense and to the proposal to increase sentencing options in Zone C.

Very truly yours,

Brian E. Maas

BEM:mcw
Enclosure

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NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING THOSE PORTIONS OF THE PROPOSED JANUARY 2002 AMENDMENTS TO THE SENTENCING GUIDELINES RELATING TO WHETHER AND HOW THE COMMISSION SHOULD RESOLVE CIRCUIT CONFLICTS PERTAINING TO ADJUSTMENTS FOR MITIGATING ROLE IN AN OFFENSE, PURSUANT TO SECTION 3B1.2 AND TO THE PROPOSAL TO INCREASE SENTENCING OPTIONS IN ZONE C

Respectfully submitted,

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Victor J. Rocco, President
Brian E. Maas, Chairman, Sentencing Guidelines Committee

March 19, 2002

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NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING THOSE PORTIONS OF THE PROPOSED JANUARY 2002 AMENDMENTS TO THE SENTENCING GUIDELINES RELATING TO WHETHER AND HOW THE COMMISSION SHOULD RESOLVE CIRCUIT CONFLICTS PERTAINING TO ADJUSTMENTS FOR MITIGATING ROLE IN AN OFFENSE, PURSUANT TO SECTION 3B1.2 AND TO THE PROPOSAL TO INCREASE SENTENCING OPTIONS IN ZONE C

We would like to thank the Sentencing Commission for the opportunity to present our views on certain of the January 2002 proposed amendments to the Sentencing Guidelines. Specifically, we are submitting comments on the three separate Circuit Conflicts relating to the mitigating role adjustment set forth in USSG § 3B2.1 identified by the Commission as well as comments on the Commission's proposal to increase sentencing alternatives in Zone C.

The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address certain of the issues raised by the Commission in the proposed amendments published in the Federal Register on January 17, 2002.

The contributors to these comments, members of the NYCDL's Sentencing

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Guidelines Committee, are Brian Maas, Chairman, and Amy E. Millard, Nicholas Gravante, and Michael Miller.

I. Request for comment as to whether, in determining if the defendant is substantially less culpable than the "average participant," the court should assess the defendant's conduct in relation not only to conduct of co-conspirators, but also to the conduct of a hypothetical defendant who performs similar functions in similar offenses involving multiple participants.

Section 3B1.2 of the Sentencing Guidelines, Application Note 3, provides that a range of adjustments is available for a defendant who plays a part in committing an offense that makes him substantially less culpable than the average participant. As the Commission notes in its request for comment, the circuits are split however, as to the meaning of average participant. While some circuits have held that a court may grant an adjustment for minor or minimal role in the offense on the basis of the defendant's conduct in comparison to that of co-participants in the charged criminal activity, see, e.g., United States v. Rojas-Millan, 234 F.3d 464, 473 (9th Cir. 2000) (rejected the consideration of comparisons against the hypothetical "average participant" in the type of crime involved); also United States v. Scroggins, 939 F.2d 416 (7th Cir. 1991), other circuits have found that it may not make such an adjustment unless it additionally finds that the defendant's conduct is minor or minimal in comparison with participants in a hypothetical or typical crime similar to that in which the defendant is charged. See e.g., United States v. Ajmal, 67 F.3d 12, 18 (2d Cir. 1995) (holding that defendant only played a minor role in the offense if he was less culpable than his co-conspirators as well as the average participant in such a crime); also United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991); United States v. Caruth, 930 F.2d 811, 815 (10th Cir. 1991); United States v. Daughtrey, 874 F.2d 811, 815 (10th Cir. 1991); United States v. Rotolo, 950 F.2d 70, 71 (1st Cir. 1991); United States v. Owusu, 199 F.3d 329, 337 (6th Cir. 2000); United States v. Westerman,

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973 F.2d 1422 (8th Cir. 1992). The Commission invites us to comment on whether this apparent circuit conflict should be resolved and, if so, how.

In United States v. Scroggins, 939 F.2d 416, 423 (7th Cir. 1991), the Seventh Circuit noted that the plain wording of USSG § 3B1.2 dictates that in comparing a defendant's role in an alleged conspiracy to that of his co-conspirators and "to the average participant" in such conspiracy, "the ultimate focal point must be on conduct of the defendant," yet the "trial judge must take into account the broad context of the defendant's crime. Section 3B1.2 'turns on culpability' and 'culpability is a determination requiring sensitivity to a variety of factors.'" Id. at 423 (citations omitted). The court explained:

> This comprehensive assessment must include a comparison of the acts of each participant in relation to the relevant conduct for which the participant is held accountable... It must also measure 'each participant's individual acts and relative culpability against the elements of the offense of conviction.' In assessing the defendant's conduct against this 'objective standard,' the sentencing judge's knowledge of previous cases necessarily plays a role.

Id. (Citations omitted). Thus, in Scroggins, the Seventh Circuit leaves the court in its traditional role of assessing all relevant factors in making sentencing determinations without mandating a requirement that it compare a defendant's conduct with an artificially created "typical role" or "typical crime."

The problem with the rigid and artificial requirement of comparing a defendant's conduct to that of a hypothetical role or crime is that it necessarily leads to differing results from court to court. Where a court focuses on the facts of the particular case before it, including the scope of the criminal activity, the length of the defendant's participation in the activity, the particular ways in which the defendant and other participants actually carried out the criminal activity, and the elements of the offense of conviction, the result fairly rewards or punishes a defendant for the role

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he or she played in an offense involving other participants. However, an approach which looks to a "typical" or "hypothetical" defendant in a crime "similar" to the charged crime becomes dependent on a particular court's subjective notion of the typical defendant or similar crime. While one court may decide that in a "typical" case, a courier is always essential because he fully understands the scope of the group's activity and regularly delivers drugs for the organization, another court might find that a typical courier recruited for a single delivery is deserving of minor role adjustment. Similarly, one court might define a middleman generally as an essential link between suppliers and organizations in a "typical" drug case, while another court may view middleman as minor participants who merely introduce two participants. Such a disparity is inconsistent with the goals of the Guidelines and is best avoided by determining the relative importance of the defendant being sentenced to the actual scheme in which he/she participated.

An example of the disparities created by basing a role adjustment, on a single judge's notion of the structure of a typical conspiracy is presented in United States v. Sanchez, 925 F. Supp. 1004, 1013-14 (S.D.N.Y. 1996). In that case, the court, when sentencing a middleman in a narcotics conspiracy, attempted to define a typical conspiracy and the role played by a typical middleman convicted of conspiracy. It concluded that the most culpable conspirator is usually the supplier, and that the courier also ranks high on the culpability scale. The next most culpable was found to the buyer, and the least culpable the facilitator, or middleman. Id. at 1013. Thus, the court concluded that the defendant, a middleman, was by definition less culpable than the typical offender convicted of conspiracy to distribute drugs and applied the two point minor role adjustment of § 3B1.2. Id.

In contrast, in United States v. Cox, 2000 U.S. App. LEXIS 30123 (2nd Cir. 2000), the court found that a middleman who facilitated a deal in a manner similar to the defendant in Sanchez was not entitled to minor role status. Such a disparate result is endemic in a system based

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on the motion that a particular role is by definition somehow automatically entitled or not entitled to an offense level reduction and is inconsistent with the prescription in the Guidelines that the determination be made not with regard to status in the abstract but rather with regard to the defendant's culpability in the context of the facts of the case.

Indeed, the Commission's own request for guidance in this area highlights the problems inherent in the hypothetical approach. The Commission asks whether, if it resolves the circuit split, it should also "provide guidance on whether particular drug offenders who perform certain drug trafficking functions (e.g. courier or mule) should or should not receive a mitigating role adjustment." Although the NYCDL believes that drug couriers or mules should generally receive a minimal role adjustment[1], we are concerned that an effort to apply the "hypothetical" approach to couriers or other categories of lesser participants, will require the Commission to analyze every category of participant in every offense to provide guidance whether that particular activity in a "typical" case may receive role adjustment status. For instance, should a cold-caller or assistant in a typical boiler-room operation or a secretary in a small firm involved in fraud receive a mitigating role adjustment? Although, participants such as these are often minor or even minimal participants in a criminal scheme so that application of the hypothetical approach would require all such participants to receive a mitigating role adjustment, we recognize that the variety of criminal schemes and the relative roles of the participant is endless and that such variety does not lend itself

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[1] In this regard, in the past, the NYCDL has strongly advocated that drug couriers or mules should generally receive a minimal role adjustment. They are generally paid small amounts of money, told little if anything about the overall conspiracy and met by another person on arrival. They are frequently recruited from impoverished rural areas of the Latin America and Africa and have little or no awareness of this country's drug problems or the impact of their actions. They are generally non-violent people who will be deported and not permitted to re-enter the United States. Thus, they present little threat of future damage to the public and meet the criteria for a minimal role adjustment.

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to a rigid determination that a particular hypothetical role is always minor.

Thus, we urge the Commission to reject the more rigid approach and determine mitigating role status in a manner similar to that in which aggravating role status is determined – by examining the defendant's conduct in comparison to that of his co-participants in the charged activity.

II. Request for comment as to whether, in determining if a mitigating role adjustment is warranted, the court should consider only the relevant conduct for which the defendant is held accountable at sentencing, or whether it may also consider "expanded" relevant conduct (additional conduct that would appear to be properly includable under § 1B1.3 but was not considered in determining the defendant's offense level).

Section 3B1.2 of the Sentencing Guidelines provides that, based on a defendant's role in the offense, his or her offense level may be decreased between two (minor participant) and four (minimal participant) levels. The circuits are split, however, as to the scope of the conduct that should be considered in making that determination. While some circuits have held that a court should consider only the relevant conduct for which the defendant is held accountable at sentencing, see, e.g., United States v. James, 157 F.3d 1218, 1220 (10th Cir. 1998) (holding that defendant's role in the offense is determined on the basis of the relevant conduct attributed to him in calculating his base offense level); also United States v. Burnett, 66 F.3d 137, 140 (7th Cir. 1995) (same); United States v. Atando, 60 F.3d 196, 199 (5th Cir. 1995) (per curiam) (same); United States v. Lampkins, 47 F.3d 175, 180 (7th Cir. 1995) (same); United States v. Gomez, 31 F.3d 28, 31 (2d Cir. 1994) (per curiam) (same); United States v. Lucht, 18 F.3d 541, 555-56 (8th Cir. 1994) (same); United States v. Olibrices, 979 F.2d 1557, 1560 (D.C. Cir. 1992), others have held that all conduct that would appear to be includable under § 1B1.3 ought to be considered, regardless whether it was considered in determining the defendant's offense level. See United States v. Assisi-Zapatta, 148 F.3d 236,

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240-41 (3d Cir. 1998) (holding that a court must examine all relevant conduct even if defendant is sentenced only for own acts citing to DeVaran); also United States v. Rails, 106 F.3d 1416, 1419 (9th Cir.), cert. denied, 520 U.S. 1282 (1997); United States v. Demers, 13 F.3d 1381, 1383 (9th Cir. 1994).

The Commission seeks comment on how to resolve this Circuit split. We urge the Commission to clarify the guidelines by providing that a defendant's mitigating role status should be determined based on the relativity of [the defendant's] conduct to the total (relevant conduct). United States v. Hedley, 923 F.2d 1079, 1085 (3d Cir. 1990). The clarification we urge the Commission to adopt is in accordance with the views of the Third and Ninth Circuits, but contrary to the views of several other circuits.

The Third Circuit's holding in United States v. Assissi-Zapata, 148 F.3d 236, 240-41 (1998), that all relevant conduct should be considered in assessing a defendant's eligibility for a role adjustment is consistent with the fundamental premise underlying the guidelines that a defendant should be sentenced for who he or she actually is and for what he or she has actually done. In essence, determining a defendant's final offense level should take into account everything that the guidelines deem "relevant" which the Commission itself defined for sentencing purposes in § 1B1.3. There appears to be little reason to ignore that distinction in assessing mitigating role status pursuant to § 3B1.2 and the Ninth Circuit's holdings are to be the same effect in that they afford sentencing judges broader discretion to look at the entire relevant picture. See United States v. Rails, 106 F.3d, 1416, 1419 (9th Cir.), cert. denied, 520 U.S. 1282 (1987) and United States v. Demers, 13 F.3d 1381, 1383 (9th Cir. 1994).

The contrary view is less flexible as it requires sentencing judges to ignore certain facts in assessing the propriety of a mitigating role adjustment, even though those facts fall within

the definition of "relevant" conduct, pursuant to § 1B1.3. This approach is generally justified on the ground that the defendant's base offense level has been determined only by considering the particular transaction(s) in which the defendant personally participated so that consideration of the defendant's role in the larger conspiracy results in a defendant becoming "a minor participant in [his] own conduct. United States v. Lomkins, 47 F.3d 175, 181 (7th Cir. 1995). However, this rationale ignores the fact that even the drug courier prosecuted only for her one transaction, or the telemarketing salesperson prosecuted only for her own sales is still a cog in a larger organization and may still be entitled to the minor role adjustment. Although there will always be differences in the way different courts apply the law to similar facts before them, there is no reason why, in making the same legal determination under the guidelines, one court should be examining all "relevant" conduct, while another is examining only a subset of that conduct.

The narrow approach presently required by the majority of circuits -- refusal to consider relevant conduct beyond that for which the defendant was convicted -- provides district court judges with less discretion than the view advocated by the Third and Ninth Circuits and is inconsistent with the general purpose of the mitigating role adjustment. Although defendants convicted of crimes in which they are the only participant are ineligible for the adjustment, it should be within the sentencing court's discretion to consider all relevant conduct in determining defendant's relative culpability in a multi-participant crime. Regardless of whether the defendant drug courier or telemarketer is convicted only for that defendant's specific conduct, the defendant is still part of a larger group engaged in broader criminal activities and the defendant's relative culpability should be judged accordingly. Moreover, any concern as to how a particular court will exercise that discretion in a particular matter should be offset by the assumption that the discretion would always be exercised to avoid an "absurd result," as the D.C. Circuit feared in United States

v. Olibrices, 979 F.2d 1557, 1560 (D.C. Cir. 1992).

It is important to note that the guideline clarification we urge the Commission to adopt would not require sentencing courts to award mitigating role adjustments based on all relevant conduct, but merely require them to examine all relevant conduct in determining whether to do so. The clarification is therefore desirable both because it will promote uniformity by ensuring that all sentencing courts are considering the same scope of conduct in determining the propriety of a § 3B1.2 adjustment and because it will insure that the mitigating role adjustment is available to those less and culpable defendants for whom it was intended.

III. Request for comment as to whether the U.S. Sentencing Guidelines should be amended to permit the Court to depart downward from the applicable guideline offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under §3B1.2.

We recommend that the Commission amend the Guidelines to provide that the court may depart downward from the applicable guideline offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under §3B1.2. We believe that this amendment should apply solely to law enforcement officials and non-law enforcement officials who are working for them or at their direction, and that the term "participant" should continue to exclude other persons involved in the offense who were not criminally responsible.

We agree with the reasoning of the Second and Third Circuits that "if a district court would have decreased the defendant's offense level under section 3B1.2 had the other person involved in the offense been criminally responsible, it should likewise have the discretion to depart downward between two and four levels, based on the defendant's culpability relative to that of the

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Government agent." United States v. Speenburgh, 990 F.2d 72, 76 (2d Cir. 1993) (citing United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990)). As the Second Circuit noted, "there is no justification for treating two equally culpable defendants involved in group criminal conduct differently simply because one defendant's offense involves only Government agents." Id. See also United States v. Valdez-Gonzalez, 957 F.2d 643 (9th Cir. 1992).

We believe that the concerns raised by the Eleventh Circuit in United States v. Costales, 5 F.3d 480 (11th Cir. 1993), do not present any obstacle to the proposed amendment. The Court in Costales was primarily troubled by the possibility that a downward departure "suggests that the Government contributed to the criminal enterprise, and that the wrongdoing in this case was not limited to the defendant," and that the Government's actions, while not rising to the level of a due process violation or entrapment, was "nevertheless wrong in some sense." Id. at 487. We disagree. The public clearly understands that, as part of criminal investigations, law enforcement officers (and those working at their direction) assume roles in criminal enterprises, and that these roles can be quite significant without rising to the level of a due process violation or entrapment. A downward departure which reflects the disparate roles played by role-playing law enforcement agents and their targets is consistent with objectives of the Guidelines to make adjustments based on the relative culpability of participants in group conduct.

For these reasons, we recommend that the Commission amend §3B1.2 to provide that the Court may depart downward from the applicable guideline offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under §3B1.2.

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IV. Alternatives to Imprisonment.

The commission has proposed three options to increase sentencing options in Zone C of the Sentencing Table. The NYCDL strongly supports this initiative as it believes that there are many Zone C defendants for whom non-incarcerative punishments are appropriate. Under the current system, the requirement that all Zone C defendants serve at least a four or five month prison term imposes undue hardships on many defendants, such as loss of employment, without there being any corresponding benefit. In addition, the current distinction between Zones B and C also compels defendants to press post-conviction sentencing litigation in the effort to be sentenced at Offence Level 10 and, thereby, have the chance of avoiding jail.

Although the NYCDL believes that any of the proposed options is an improvement over the current system, it believes that Option 1 which extends the current Zone B sentencing options to all Zone C defendants is the most sensible of the options. This option is the only one of the three that transfers the final decision for whether Zone C defendants should be incarcerated from prosecutors to judges, where the decision belongs, and eliminates the need for Zone C defendants to engage in post-conviction sentencing guidelines litigation, including departure applications, which are currently burdening the courts. Such a change will benefit the entire sentencing process without damaging the underlying goals of the Sentencing Guidelines.

One of the objectives of the current guideline system is proportionality. However, the current distinction in the sentencing options for Zones B and C is often inconsistent with this goal. For instance, many of the offenses that fall into Guidelines Offense Levels 11 and 12 are financial crimes where the determination of the offense level depends in large part on the value of the loss from the offense. A defendant whose Offense Level is 11 or 12 is often a minor participant in a crime where the loss is between $120,000 and $200,000 while the defendant whose Offense

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Level is 10 may have engaged in comparable activity in a crime with a loss of $70,000 to $120,000. Under the current guideline structure, the first defendant will always receive a sentence of imprisonment while the latter defendant frequently is sentenced to a brief period of house arrest as part of a sentence of probation. However, assuming that none of the enhancements set forth in Guidelines Section 2B1.1 or 3B1.1 apply to either defendant, it is difficult to articulate why such a relatively minor difference in loss should result in such a disparity in sentencing.

The Commission's first option would allow the courts to evaluate these cases and defendants on a case by case basis to determine when the sentencing goals of deterrence and punishment will be furthered by a short sentence of incarceration and when use of alternative sentencing options such as home detention and community confinement are more appropriate. Many defendants whose crimes result in Offense Levels 11 and 12 are first offenders with solid community ties. They often are the sole support of a family and the prison sentences required under the current system are often long enough to cost people their jobs and thereby impose hardships on innocent family members with no corresponding systemic benefit.

In fact, it is this significant impact of the short prison sentence that impels many defendants faced with Level 11 or 12 dispositions to pursue pre-plea negotiations or post-plea guideline litigation to obtain the mitigation points or the departure that will result in sentencing within Zone B. Thus, the proposal in Option One will relieve this pressure to save one or two points.

By requiring community confinement as part of a Zone C sentence, the second option will not be as likely to eliminate the motivation for defendants to engage in the bargaining and litigation to achieve a Level 10. Although not as punitive as incarceration, community confinement is still sufficiently different from home detention that defendants will continue to press a disposition that will make available to them a chance at home detention as a condition of probation. It is

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difficult to see any sentencing objective furthered by such a distraction that would justify this addition burden on the process.[2]

As to the third option, the fact that the offense levels within Zones B and C change as the defendants criminal history increases makes it unnecessary to limit the consolidation of Zones B and C to first offenders. First, even with repeat offenders, certain crimes will be of insufficient severity to warrant incarceration. Moreover, even with the adoption of the first option, the sentencing court will retain the power to incarcerate the defendant for some period of time, if appropriate, given the criminal history and the nature of the offense.

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[2] Of course, if the Commission believes that there are certain circumstances where home detention is inappropriate for a defendant whose offense falls into current Zone C, such circumstances can be addressed in the Application Notes to the amended sections.

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FAMM
Families Against Mandatory Minimums
FOUNDATION

March 19, 2002

The 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 on proposed guideline amendments and issues for comment published January 17, 2002

Dear Judge Murphy:

As you know, Families Against Mandatory Minimums (FAMM) works to end mandatory sentencing laws and practices and restore sentencing discretion to judges. FAMM's members are lawyers, judges, politicians, professors, criminal justice professionals and citizens concerned about the devastating effect on individuals and their families of inflexible sentencing laws and practices. FAMM has appeared before the Sentencing Commission every year since 1992 and submitted comments to encourage you to amend the sentencing guidelines in ways that increase judicial discretion while providing appropriate penalties that fit the offense and offender. We are pleased to offer these comments on proposed guidelines and issues.

I Crack cocaine penalty (Issue for Comment, Proposed Amendment 8)

A. Introduction.

Many of FAMM's 25,000 members are either serving crack distribution sentences, or have family members who are, and they are deeply concerned about the decisions you will make regarding crack penalties.

The penalties for crack are unconscionable. They are also insupportable as was demonstrated with such care in the 1995 Special Report to Congress; as was set out so succinctly in the Issues for Comment published on January 17, 2002 and by the statistical analysis just completed by the Commission staff; and as was underscored in testimony by the experts who appeared before the Commission on February 25 and 26. *See, e.g.*, Testimony of Alfred Blumstein, Ph.D., February 25, 2002 (explaining the rise and fall of violence with the growth and maturation of crack markets); Testimony of Ira J. Chasnoff, M.D., February 25, 2002 (stating that physiology of crack and powder cocaine and their effects on fetal brain are the same); Testimony of Deborah Frank, M.D., February 25, 2002 (debunking "crack baby" myth); and Testimony of Glen R. Hanson, Ph.D., Feb. 25, 2002 (stating that "[r]esearch has not been able to validate a causal link between drug use and violence").

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FAMM has long supported equalizing crack and powder cocaine sentences at the current levels of powder cocaine. Making crack penalties the same as those for powder is not an option for the Commission, given the congressional directive to propose an amendment that establishes sentences that are generally higher for crack than powder. Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334 (1995). That said, the Commission's stated interest in doing something to fix the glaring unjustness and inequity of the penalty for crack cocaine is welcome. It is also timely, in light of congressional interest in ameliorating the harsh effects of the mandatory minimum for crack cocaine. As the expert agency charged with sentencing, the Commission is well situated to bring an amendment that will assist Congress to address the disparity in crack cocaine sentencing.

Establishing the correct sentencing structure for crack cocaine is a difficult task. *How* the Commission arrives at the appropriate penalty will be as important, if not more important, than the numbers proposed. As long as we are operating in a weight-based sentencing structure, FAMM encourages the Commission to *amend the crack guidelines by applying the same organizing principle to crack cocaine that applies to other drugs: punish a mid-level dealer with a five-year minimum sentence and a high-level dealer with a ten-year minimum sentence.* Simultaneously, the Commission should de-emphasize weight as the primary sentencing factor and focus instead on culpability and role.

B. The Commission should identify mid- and high-level dealers

The failure to use the role-based framework for crack cocaine has led to sentences grossly out of proportion to culpability. Reorienting the crack cocaine penalty to focus on mid- and high-level dealers is, as the Commission recognizes, consistent with the approach to sentencing for other controlled substances.

> In general, the statutory penalty structure for most, but not all, drug offenses was designed to provide a five year sentence for a serious drug trafficker (*often a manager and supervisor of retail level trafficking*) and a ten year sentence for a major drug trafficker (*often the head of the organization that is responsible for creating and delivering very large quantities*). . . . The drug quantities that trigger the five year and ten year penalties for crack cocaine offenses, however, are thought by many to be too small to be associated with a serious or major trafficker. As a result, many low level retail crack traffickers are subject to penalties that may be more appropriate for higher level traffickers.

Proposed Amendments to the Sentencing Guidelines, November 28, 2001 and January 17, 2002 (Reader friendly version) at 80 ("Proposed Amendments")(emphasis added):

The Commission reached the same conclusion in its 1995 report to Congress following a close examination of legislative history. Congress, the Commission said then, meant to impose

the ten-year mandatory term on major distributors and five-year terms on serious distributors "for all drug categories including crack cocaine." Cocaine Report at 119. At some point however, crack cocaine was cut out for different treatment by Congress, likely due to a widespread belief that crack was much more harmful than most other drugs, including even powder cocaine. As recognized in the Issue for Comment, the crack penalty incorporates penalties for conduct that was considered inherent in the crack trade – an association that the Commission recognizes has been discredited:

> [C]oncern has been expressed that the penalty structure does not adequately differentiate between crack cocaine offenders who engage in aggravating conduct and those crack cocaine offenders who do not. This lack of differentiation is caused by the fact that, for crack cocaine offenses, the Drug Quantity Table accounts for aggravating conduct that is sometimes associated with crack cocaine (e.g., violence). Building these aggravating factors into the Drug Quantity Table essentially penalizes all crack cocaine offenders to some degree for aggravating conduct, even though a minority of crack offenses may involve such aggravating conduct. As a result, the penalty structure does not provide adequate differentiation in penalties among crack cocaine offenders and often results in penalties too severe for those offenders who do not engage in aggravating conduct.

Proposed Amendments at 79.

Today, as your recently published analysis of crack and powder sentencing demonstrates, the vast majority (66.5 percent) of those sentenced for crack offenses, are street-level dealers.[1] U.S. Sentencing Commission, "Drug Briefing, January 2002 ("Drug Briefing"), Fig. 11. The median quantity attributed to them was 52 grams (Drug Briefing, Figure 18), for which they are sentenced at a median of 120 months. (Drug Briefing, Figure 2). Managers and Supervisors are dealing in median quantities of around 250 grams of crack cocaine, while organizers and leaders are handling roughly 500 grams and high-level suppliers are handling roughly 3,000 grams. Drug Briefing, Figure 18.

While these figures represent the quantity involved in crack convictions from the year 2000 – and are noticeably larger than the 5- and 50-gram triggers for the five- and ten-year sentences – the Commission has nearly 15 years worth of data from which to extract the average

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[1] FAMM has consistently urged that society and such street dealers, themselves often drug addicts, will benefit from drug treatment and diversion and that tax dollars are better spent in such rehabilitation. States increasingly agree and many are rolling back mandatory sentencing for such addicts in favor of treatment or considering such measures. *See* Judith Greene & Vincent Schiraldi, "Cutting Correctly: New Prison Policies for Times of Fiscal Crisis," Feb. 7, 2002, *available at* http://www.cjcj.org/cutting/cutting_es.html.

quantity of crack cocaine handled by mid- and high-level dealers (weighted for trends) to determine role-based trigger amounts. We urge the Commission to do such an analysis and thereby establish triggers that it can support with data.

As much as FAMM opposes weight-based sentencing, if, as it appears, weight remains a primary factor in establishing base sentences, then the weight must be justifiable to the public. The Commission will do more harm by picking a number out of the blue because it creates a nice sounding ratio. Should it do so, it cannot expect to gain the support of the sentencing reform community or the confidence of the public. There has to be a sound basis for the new quantity trigger. Using the mid-and high-level organizing principle intended by Congress when it enacted mandatory minimum sentences in the mid-80s, provides that justification. It will establish coherence, rationality and proportionality to crack cocaine sentencing.

C. The Commission should not change the powder cocaine penalty.

Seven years ago when the Commission voted to make crack penalties the same as those for powder cocaine, no one suggested raising powder sentences to achieve equalization. In her dissent, Commissioner Deanell Tacha proposed ratios of 5:1, 10:1, or 20:1, for reasons that were arguably valid. She did not propose raising powder penalties. In 1997, 27 federal judges who previously served as U.S. Attorneys felt compelled to send a letter to each member of the House and Senate Judiciary Committees urging Congress to lower crack cocaine penalties but *not* raise powder cocaine penalties. Specifically, they said "The penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased." Judge John S. Martin, *et al.*, 1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees, *reprinted in Federal Sentencing Reporter* 10:195 (January February 1998)

They were right. The problem is not powder cocaine penalties; it is crack cocaine penalties. The problem with crack cocaine penalties will not be fixed by changing the penalty for powder cocaine. Crack cocaine is sentenced more severely than any of the other drugs--even methamphetamine, which has the same triggering threshold. The Sentencing Commission 2000 Sourcebook of Federal Sentencing Statistics ("Sourcebook") shows that the mean quantity of crack cocaine involved in the cases of defendants sentenced at level 26, was 11.3 grams, while the mean quantity for methamphetamine defendants at the same level was 27 grams -- more than twice as much as crack. At level 32, the mean amounts were 88.5 grams for crack defendants and 228 grams for methamphetamine defendants. Sourcebook, Table 42.

Raising powder cocaine penalties to make powder traffickers spend more time in prison does nothing to cure the excessiveness of crack cocaine sentencing; it would merely send cocaine traffickers -- half of whom are Hispanic and 80 percent of whom are minorities -- to prison for lengthier terms for no discernible reason. Drug Briefing, Figs. 26 and 27.

Therefore, we urge you to leave the powder cocaine penalty untouched.

D. The Commission can and should act absent a change to the mandatory minimum statute.

The Commission should promulgate guidelines independent of the mandatory minimum sentences. Congress has several times in the past permitted amendments to be adopted that delinked certain drug guidelines from their then-corresponding mandatory minimums. In 1993, the Commission changed the LSD-marijuana equivalency to standardize the penalty for LSD and to limit the impact of carrier weight on that penalty. Amendment 488 at Appendix C. In 1995, the Commission successfully proposed Amendment 516 to change the equivalency for marijuana plants from the statutory 1 plant, 1 kilogram equivalency to the 1 plant, 100 grams equivalency.

Congress was fully aware those amendments of and able to block them had it desired. It did not. Were there any legal bar to such decoupling amendments, it would have been raised at the time. Instead, just days before November 1, 1995, a Congressman from Oregon heard of the imminent marijuana guideline amendment and raised his concerns about it to Rep. Bill McCollum, the chair of the House Crime Subcommittee. Rep. McCollum stated that he was aware of the proposed amendment and would keep an eye on it, but he did nothing to stop it from becoming law.

From our recent conversations with Judiciary staff members on the House and Senate sides, they are eagerly awaiting an amendment from the Commission and have expressed no reservations about the Commission submitting an amendment instead of a recommendation. Why should they? The Commission was established in 1984 to promulgate sentencing policy that would reduce unwarranted disparity and increase certainty and uniformity of sentencing. The Commission is doing so in the current proposals to delink the crack possession guideline from the mandatory minimum contained in the statute.

E. The Commission should act to reassure the public that it has fulfilled its mandate.

FAMM's president, Julie Stewart, was recently asked by the chief counsel of a senior senator if the sentencing reform community and the civil rights community would respect a crack proposal put forth by the Sentencing Commission. FAMM did not respect the Ecstasy decision made by the Commission last year because the process was so flawed.

This year, in contrast, we are encouraged by the Commission's desire to hear from experts in all areas testify about crack cocaine and apparent interest in using that information to shape a sensible and rational policy. But, at the end of the day, the Commission must be able to explain in plain terms how it arrived at the quantity it did and how that quantity is consistent with other drug guideline sentences.

The Drug Briefing charts you have compiled are a excellent source of information regarding crack and powder cocaine sentencing. The testimony offered over two days in February overwhelmingly supported our conclusion that no rationale supports current crack cocaine penalties. We are concerned, however, that a great deal of attention has been paid to experimenting with various ratios between crack and powder cocaine and how they might be achieved by sliding triggering amounts up and down. We hope the Commission will not rely on a better sounding ratio alone to guide its proposed changes. Instead, a consistent organizing principle should be used to guide the development of new crack cocaine sentences and all drug sentencing changes.

However you choose to go forward, the guideline and the process you use must be of unassailable quality so that FAMM members and all Americans can trust that the penalty you chose was the product of informed judgement, not political expedience.

F. The amended guideline should be made retroactive.

In light of the evidence presented to the Commission that the current penalties for crack cocaine are excessive, we urge the Commission to designate corrective amendments to the crack cocaine guidelines – for both possession and distribution – as retroactively applicable under U.S.S.G. § 1B1.10. This is only just, in light of the Commission's efforts since the early 1990s to correct what it identified as the unjust sentencing structure for crack cocaine and the wealth of evidence presented then and now that the crack guidelines overstate culpability. Guideline amendments to reduce the possession and distribution penalties will reflect the Commission's considered judgment that old ranges were excessive, the new range is sufficient to achieve the purposes of sentencing and it will bring relief to at least some of those defendants serving excessive sentences under the discredited guideline.

G. Conclusion

We are enormously heartened by your attention to this serious problem. FAMM members, who gathered in Washington recently, share our hope and enthusiasm, even as they shared with us again their stories of young men and women imprisoned for horrific terms under the crack cocaine guidelines. You can demonstrate the courage of your obvious conviction that this penalty must change by proposing an amendment to Congress that brings sentencing for crack cocaine in line with that for other drug offenses.

II Amendment 8

A. Introduction

FAMM is similarly very encouraged by the Commission's intention to increase the consideration of role and decrease the consideration of drug quantity in drug trafficking offenses.

We have long argued that role is a superior indicator of culpability and should, if not supplant quantity, become a greater consideration when determining appropriate sentences for drug distribution convictions. Aggregation of amounts, the distorting effect of relevant conduct rules and conspiracy liability, and the operation of the substantial assistance departures frequently lead to long sentences for defendants whose true culpability would be better punished by a more holistic accounting of their actual role in the offense. *See* "Mandatory sentencing was once America's law-and-order panacea. Here's why it's not working." *FAMMGram*, Fall 2001 at 12 (provides case summaries of low-level, non-violent offenders with lengthy sentences based on quantity determination); *see also* "Profiles of Injustice," available at http://www.famm.org/si_poi_main.htm (profiling additional cases).

B. The Commission should propose the mitigating role cap.

We strongly urge the Commission to adopt a mitigating role cap of at least 24, if not lower, for defendants whose role in the offense is found to be minor or minimal. We also join the American Bar Association in its call to extend that relief further, so that the only those defendants who are determined to be organizers, managers or leaders of drug enterprises, receive the higher minimum sentences Congress laid out as appropriate to punish such highly placed offenders.. *See* Testimony of Ronald Weich at 8, Feb. 26, 2002. Concern about such minor players, "girlfriends," drug couriers, and low-level dealers informed the current proposal in Congress by Senators. Jeff Sessions (R-Ala) and Orrin Hatch (R-Ut). They propose a two-level reduction for defendants who do not profit from their participation, and who commit the offense for reasons driven by emotion. *See* S. 1874, 107th Cong. § 202.

We do not support limiting the cap to only defendants who receive the minimal role adjustment. A finding that a defendant was a minor player represents the court's considered judgment that that defendants was less culpable than other participants in the operation. Similarly, we do not support withholding the cap where serious bodily injury or a weapon is involved, unless it is established that the defendant was directly responsible for the bodily injury or used the weapon in connection with the drug offense. Vicarious liability should not operate to prevent genuine low-level offenders from the benefits of the cap.

We join the Practitioners' Advisory Group's position with respect to the Circuit conflicts identified at page 82. We note, for emphasis, that any attempt to define a hypothetical average participant is likely to result in disparate application of the mitigating role adjustment and further litigation about what is and what is not an average participant. "[T]]he determination of whether a defendant is entitled to a minor role adjustment is highly dependent on the facts of particular cases, *see* U.S.[S.G.] § 3B1.2, Background Commentary . . . ." *United States v. Isaza-Zapata*, 148 F.3d 236, 238 (3d Cir. 1998). This requires that courts address particular cases and particular defendants and militates against any Platonic ideal of an average participant.

Finally, we urge the Commission to extend whatever relief it proposes to defendants

previously sentenced by making the amended guideline retroactive to reflect its judgment that all defendants, not only those fortunate enough to be sentenced since adoption, should be entitled to consideration.

C. Enhancements

While we support the identification of role and conduct as a way to establish appropriate sentences, we do not support wholesale importation of enhancements to the existing guideline levels.

In our view, the current drug guidelines already result in excessive sentences for many offenders. Assessing additional enhancements, without adjusting the drug guidelines downward, will simply result in lengthier sentences that may be unwarranted. We strongly support the Practitioners' Advisory Group and the Federal Public and Community Defenders calls for a recalibration of the drug quantity table, whether or not the proposed enhancements are adopted. *See* letter from Jim Felman and Barry Boss to the Honorable Diana E. Murphy at 5-6 (March 19, 2002); *see also* Federal Public and Community Defenders, Proposed Priorities for the 2001-02 Amendment Cycle at 2-3. Such recalibration will provide room in which to apply enhancements for role, including enhancements for supervisors and leaders/organizers.

Such a recalibration will have the added benefit of giving the sentencing judge somewhere to go in applying the Safety Valve to defendants whose guideline sentence levels currently are higher than the mandatory minimums. Currently, the bottom of the ranges for levels 26 and 32 are greater than the mandatory minimums of five and ten years.

Therefore, while we genuinely support the spirit of using role and not quantity to better reflect culpability, we are concerned that the current proposal, absent a recalibration of the guideline, will result in sentences that over-punish based on role and quantity.[2]

Any enhancements should be defendant-specific and not be applied through vicarious liability. In the area of enhancements, perhaps more than anywhere else, the application of sentence increases based on conduct should target *only* the offender's conduct and not that of

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[2] We also point out that the guidelines already adequately punish firearm use in drug crimes. For example, U.S.S.G. § 2K2.1 (b)(5) provides for a four-level increase for, *inter alia*, use or possession of a firearm in connection with a felony offense. The Commission amended § 2K2.1 in 1991 and added (b)(5) "to more accurately reflect the seriousness of such conduct . . . ." Amendment 374, U.S.S.G. App. C. The enhancement applies even when the defendant is acquitted of the underlying offense. *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992). U.S.S.G. § 2K2.1(c)(1)(A) permits the court to use a cross reference in certain circumstances to increase a penalty if it can achieve an offense level greater than that achieved by applying U.S.S.G. § 2K2.1(b)(5).

others involved in the conspiracy. To do otherwise will distort the objective of focusing on role-based culpability that is the concern driving these proposed changes. Similarly, we oppose any floor that limits the court's discretion. Courts have a number of tools available, including departure authority, should it find that the sentence arrived at, after applying enhancements, does not adequately punish the defendant's conduct.

Finally, FAMM urges that the Commission reject subsection (b)(8) of the proposed amendment that proposes a two- to four-level enhancement if the instant offense was committed following a prior felony conviction for a drug crime or crime of violence. Such prior conduct is already accounted for in the criminal history calculation and no sound rationale is offered to support what amounts to counting such prior convictions twice for the purposes of sentencing only drug defendants. Moreover, under U.S.S.G. § 4A1.3, courts are able to adjust sentences through upward departures for prior convictions when the criminal history scores do not adequately penalize repeat offenders. This departure authority is a more accurate way for judges to account for such conduct and does not tie judges' hands when confronting a criminal history that, coupled with the enhancement, may grossly overstate the impact of criminal history.

III. The Commission should adopt the reduction for no prior convictions.

FAMM generally supports this additional measure that is bound to provide additional consideration for first-time offenders and encourages the Commission to consider making the amendment retroactive so that it can benefit those previously sentenced defendants who, but for the ill-luck of timing, would otherwise have been eligible for the relief.

IV. Conclusion

FAMM appreciates this opportunity to provide our comments on the comprehensive proposals before the Commission. We understand that the review of the drug guidelines is a work in process and look forward to working with you over the next year to amend the guidelines in ways that increase the accuracy and flexibility of the Sentencing Guidelines.

Sincerely,

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Mary Price
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COMMENTS OF MALDEF

CONCERNING

CRIMINAL JUSTICE, DRUG SENTENCING AND THE LATINO COMMUNITY

SUBMITTED TO THE

UNITED STATES SENTENCING COMMISSION

MARCH 19, 2002

BY

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Celebrating Our 33rd Anniversary
Protecting and Promoting Latino Civil Rights
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I. INTRODUCTION

Congress has made significant progress toward ensuring equal treatment under the law for all citizens through the years by passing acts like: the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act in 1968. But while these acts improved treatment of minorities in our civil justice system, the criminal justice system has strayed from these ideals by the unequal treatment of minorities. Today approximately 2 million Americans – two-thirds of them African American or Latino – sit in a prison or jail cell.[1] Black and Latino Americans face disproportionate targeting by police and law enforcement officials as well as biased decisions made by prosecutors and the courts. The unequal treatment of minorities has lead to a surge in the prison population that is predominantly black and Latino. Both laws and systemic practices, such as mandatory sentencing and racial profiling, have lead to the disproportionate numbers of minorities in the criminal justice system. Specifically the disparate impact of drug laws on the Latino community has lead to growing incarceration rates.

The 2000 census shows that Latinos comprise 12.5 % of the population in the U.S., yet according to the Sentencing Commission's own data, Latinos accounted for 43% of the total drug offenders in 2000. Of those, 50.8% were convicted for possession or trafficking of powder cocaine and 9% for crack cocaine. The fact that Latinos and other racial and ethnic minorities are disproportionately affected by sentencing policies is not indicative of minorities committing more drug crimes or the community using drugs at a higher rate. According the Commission's own report in 1995, 75% of whites used cocaine once in the reporting year compared to 10% of Latinos who used cocaine during

[1] Leadership Conference on Civil Rights, "Justice on Trial: Racial Disparities in the American Criminal Justice System," 2000.

the reporting year. 52% of whites used crack once in the reporting year compared to 10% of Latinos who used crack once in the reporting year. What the numbers demonstrate is that the Latino community is more prone to being the victim of racial profiling, when we are targeted more for drug crimes and, therefore, our incarceration rates for drug crimes are higher.

These comments review MALDEF's background, summarize some of the racial disparities in the criminal justice system and provide recommendations on penalties for crack cocaine versus powder cocaine offenders.

II. BACKGROUND ON MALDEF'S WORK ON CRIMINAL JUSTICE ISSUES

Since 1968, MALDEF has challenged inequality for Latinos and other minorities. In recent years, both regionally and on the national level, it has focused more of its resources on monitoring and responding to a host of evolving criminal justice issues, including the practice of racial profiling. MALDEF has spoken out in courts, the public policy arena, and the community to combat civil rights abuses by the criminal justice system. In addition to reallocating staff resources to respond to racial profiling, MALDEF is also confronting issues related to detention, access to language rights and related areas that deal with the intersection of civil rights and immigration law. MALDEF's expanding efforts in the area of criminal justice also include addressing the disparity of access to quality legal counsel for indigent, mostly minority, clients and the adverse impact that ultimately affects minorities in sentencing outcomes and ultimately, cases of the death penalty.

MALDEF's national public policy office in Washington, D.C. has been extremely active over the past year providing testimony to policymakers and working in coalition with diverse civil rights and criminal justice advocates to promote equal access and protection for Latinos and other minorities.

Characteristics of ethnicity, immigration status, language and relative youthfulness are used against many Latinos by law enforcement and the legal system. The practice of racial profiling, for example, is often carried out against Latinos as a result of suspicions about their immigration status. As a result, unlawful partnerships between local law enforcement and federal agents are commonplace. We are also concerned about the treatment of Latinos at the U.S.-Mexico border where it is considered acceptable to target Latinos simply by their ethnicity and where civil rights violations are common. Even in the interior of the country, it is common to use Latino ethnicity as an indicator of unlawful status in the country in the case of workplace raids. For example, racial profiling is used to determine which industries to target. Across the nation, ninety percent of those subjected to INS enforcement actions are Latinos, even though Latinos constitute 60% of all undocumented persons in the U.S.[2]

MALDEF seeks to establish national models through its direct responses in each of its regional offices. In Los Angeles, for example, in response to an incident involving the wrongful arrest of an elderly Korean-speaking man, MALDEF was a leading participant in a task force to provide to the Los Angeles Police Department recommendations and guidelines for services to non-English speakers in the areas of

[2] Leadership Conference on Civil Rights, "Justice on Trial: Racial Disparities in the American Criminal Justice System," 2000.

training, hiring, promotions, personnel, development, management and community involvement.

MALDEF worked closely with the ACLU, NAACP, LULAC, and other groups to educate Texas state lawmakers on the importance of policies to prohibit racial profiling. As a result, a bill was drafted and signed into law in June 2001 requiring local law enforcement departments to establish policies prohibiting racial profiling and to collect data and report on traffic stops and other police actions as a way of monitoring and holding police departments accountable in this area. MALDEF is also a member of the Citizen's Advisory Group to the San Antonio Police Department (SAPD) working to develop the SAPD's bias prevention program. This includes developing the policy and monitoring mechanisms that will implement the new state law. This local model may be utilized statewide.

MALDEF also filed litigation in federal court in March 2001 on behalf of Latino plaintiffs in Rogers, Arkansas against the city and police department for alleged racial profiling (*Lopez v. City of Rogers, Arkansas*). At issue is whether the Rogers police department has been targeting Latinos for improper interrogation into their immigration status and documentation, in violation of the Fourth and Fourteenth Amendments, and whether this forms part of a policy, practice, or custom of trying to enforce federal immigration law outside of their local authority.

Unique to other civil rights organizations, MALDEF combines advocacy, educational outreach and litigation strategies to achieve macroeconomic social change. Its work in the area of criminal justice will continue to utilize this comprehensive strategy. For example, MALDEF recently helped to organize a border community on the

colonia of El Cenizo to establish its first human rights commission. This effort has enabled community members to bring cases of racial profiling by the INS and local law enforcement and other misconduct to the attention of MALDEF and other civil rights defenders who are now considering legal action.

MALDEF is active in Washington educating policymakers and providing training to other organizations on racial profiling and other criminal justices issues. Last year at a conference of the National Council of La Raza, MALDEF conducted a training workshop entitled, "Crime and Punishment: Nuestra Gente and the Criminal Justice System." MALDEF also participated in a workshop at the National Association of Hispanic Journalists entitled, "Racial Profiling- In the Southwest, It's Black and Brown: Battles on the Frontline." MALDEF staff has promoted the merits of national policy to officially prohibit racial profiling and have asked lawmakers to enact the End of Racial Profiling Act of 2001. MALDEF has also participated in discussions to ensure that civil rights in the criminal justice and immigration areas are not compromised due to misguided actions after the terrorist attacks of September 11.

Because of MALDEF's increasing interest in criminal justice issues, we appreciate the opportunity to provide comments to the U.S. Sentencing Commission.

III. BACKGROUND ON THE ISSUE OF RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

Racial disparity exists when the proportion of a racial/ethnic group is greater than the proportion of such groups in the general population. For example, Latinos constitute 18% of the prison population and 16% of the jail population, compared to their 12%

share of the overall population. Latinos face a criminal justice system plagued with discrimination and prejudice from the moment they are arrested. In many cases it is racial profiling which triggered an arrest, but racial profiling is just a small piece of a large puzzle in the criminal justice system. Racial profiling gets the ball rolling, but it is the decision to prosecute that lands many Latinos in jail cells and in prison. The prosecutorial decision to bring charges in federal, rather than state, court is demonstrated by statistics on crack cocaine prosecutions.

The decision of whether to prosecute a drug case in federal court has important consequences for the defendant because federal sentences are notoriously harsher than state sentences. Federal parole was abolished in 1987, and federal drug convictions frequently result in lengthy, mandatory sentences. According to the United States Sentencing Commission, federal courts in 1990 sentenced drug traffickers to an average of 84 months in prison, without possibility of parole. By contrast, state courts in 1988 sentenced drug traffickers to an average maximum sentence of 66 months, resulting in an average time served of only 20 months.[3]

Mandatory sentencing laws establish a minimum penalty that the judge must impose if the defendant is convicted of particular provisions of the criminal code. Mandatory sentencing laws are generally premised on the view that the punishment and incapacitation, not rehabilitation, is the primary goal of the criminal justice system.[4]

In 1986 Congress enacted especially harsh mandatory minimum penalties for crack cocaine offenses. From 1988-1994, hundreds of blacks and Latinos – but no whites

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[3] United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995), p. 138 and nn. 186-188.

[4] Leadership Conference on Civil Rights, "Justice on Trial: Racial Disparities in the American Criminal Justice System," 2000.

– were prosecuted by the United States Attorney's office with jurisdiction over Los Angeles County and six surrounding counties.[5] The absence of white crack defendants in federal court could not be ascribed to a lack of whites engaged in such conduct; during the 1986-1994 period, several hundred whites were prosecuted in California state court for crack offenses.[6]

The changing face of the U.S. prison population is due in large part to the war on drugs: In 1985, the number of whites imprisoned in the state system actually exceeded the number of blacks. Between 1985 and 1995, while the number of white drug offenders in state prisons increased by 300%, the number of similarly situated black drug offenders increased by 700%, such that there are more than 50% more black drug offenders in the state system than white drug offenders.[7] As of 1991, 33% of all Latino state prison inmates, and 25% of all black state prison inmates, were serving time for drug crimes, as compared to only 12% of all white inmates. Minorities are disproportionately disadvantaged by the current drug policies.

Currently a conviction for possession of five grams of crack cocaine triggers a five-year mandatory minimum sentence, while it takes 500 grams of powder cocaine possession to get the same sentence. While possession of 50 grams of crack cocaine triggers a 10-year mandatory minimum sentence, the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence. Despite the fact that Latinos are no more likely than other groups to use illegal drugs, Latinos are more likely to be arrested. Once convicted, Latinos do not receive lighter sentences, even though the majority of

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[5] Dan Weikel, "War on Crack Targets Minorities Over Whites," *Los Angeles Times*, May 21, 1995, p. A1.
[6] *Id.*
[7] Leadership Conference on Civil Rights. "Justice on Trial: Racial Disparities in the American Criminal Justice System," 2000.

Latino offenders have no criminal history. Such sentencing disparities affect minority populations, including Latinos, the most.

- Latino and Black federal defendants were more likely than white defendants to be charged with drug offenses. *In 1996, 46.3% of Latino defendants and 47.9% of Black defendants were charged with drug offenses in U.S. district courts, compared to 29.4% of white defendants (FPR&D)*[8]
- Latino defendants are about one-third as likely as non-Latino defendants to be released before trial. *In 1999, 22.7% of Latino defendants were released before trial, compared to 63.1% of non-Latino defendants (CFJS)*
- Latino defendants had less extensive criminal histories than white defendants. *In 1996, 56.6% of Latino defendants, compared to 60.5% of white defendants, had been arrested on at least one prior occasion.*

According to the Commission's most recent statistics, in fiscal year 2000, 93.7% of those convicted for federal crack distribution offenses were Black or Latino and only 5.6% were white. Although those figures have not changed that much in the past decade, the racial makeup of powder cocaine defendants has. In 1992, almost one third of those convicted of federal powder cocaine distribution were white, while 27% were Black and 39% Latino. By 2000 the percentage of white powder cocaine defendants had dropped to 17.8% while the percentage of Black powder cocaine defendants had increased to 30.5%

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[8] All the data in this section is attributed to the following sources: *Compendium of Federal Justice Statistics*, 1999, Washington, D.C.: U.S. Department of Justice, May 2000 (CFJS,) *Correctional Populations in the United States*, 1997, Washington, D.C.: U.S. Department of Justice, November 2000 (CP,) and *Federal Pretrial Release and Detention*, 1996, Washington, D.C.: U.S. Department of Justice, February 1999 (FPR&D.)

and the percentage of Latino powder cocaine defendants had increased to 50.8%. In sum, by 2000, 81% of the federal powder cocaine defendants were minorities.[9]

During the mid-1990's Congress and many states adopted "3 strikes, you're out" laws. Under these statues, defendants with two prior criminal convictions can be sentenced to life in prison, even if their third "strike" is for relatively minor conduct. Once the "3 strike" statute is invoked, there is often nothing a judge can do to amend the harsh punishment that the legislature has authorized the prosecutor to demand.

The result of mandatory sentencing combined with the "3 strikes, you're out" statute has resulted in the increase of the prison population system. The chances of receiving a prison sentence after being arrested for a drug offense increased by 447% between 1980 and 1992. The number of state prison drug sentences between 1985-1995 increased 331%, and represented more than half of the overall increase in state sentences meted out during that period.[10] The choice of legislatures to lengthen drug sentences, combined with drug enforcement tactics, has had a disproportionate impact on America's minorities.

The disproportionate effect of the war on drugs on minorities' results from three factors: first, more arrests of minorities for drug crimes; second, overall increases in the severity of drug sentences over the past 20 years; and third, harsher treatment of those minority arrestees as compared to white drug crime arrestees.

The next section deals specifically with concerns and recommendations on the crack versus powder cocaine disparities in sentencing.

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[9] Testimony of Wade Henderson before the U.S. Sentencing Commission, Leadership Conference on Civil Rights, February 25, 2002.
[10] *Id.*

IV. RECOMMENDATIONS

Currently, a conviction for possessing five grams of crack cocaine triggers a five-year mandatory minimum sentence, while it takes 500 grams of powder cocaine possession to trigger the same sentence. Possession of 50 grams of powder cocaine triggers a 10-year mandatory minimum sentence; the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence. MALDEF believes that the disparity between crack cocaine and powder cocaine has a discriminatory effect on minorities, including Latinos.

We share the three areas of concern outlined in the Proposed Amendments to the Sentencing Guidelines. The extremely harsh penalties for possession of small amounts of crack cocaine does not serve to differentiate those offenders who are guilty of mere possession versus those offenders who engage in aggravating conduct. To the extent that the Drug Quantity Table takes into account aggravating conduct, an appropriate response to this concern would be to reduce the penalties based solely on quantity of crack cocaine possessed. If offenders engage in aggravating conduct, sentencing enhancements could be added. Part of the original reason for such heavy penalties in the 1990's was that it was assumed that crack cocaine was always accompanied by possession of arms and/or violent conduct, but this is not always the case.

Second, we agree that, in general, the statutory penalty structure of the Sentencing Guidelines for most drug offenses is designed to give a 5-year sentence to a serious drug-trafficker, and a 10-year sentence to a major drug-trafficker. This is not the structure underlying the penalties for possessing 5 grams of crack cocaine and 50 grams of crack

cocaine. In order to meet the general framework for statutory penalties for drug offenses, the amounts that trigger 5-year and 10-year penalties should be substantially increased.

Third, MALDEF also strongly agrees that the current disparity between the penalties for crack cocaine and powder cocaine results in an unacceptable racial disparity in which blacks and Latinos are sentenced to much longer sentences than white offenders for the drug of cocaine. In order to reduce the racial disparity, the trigger amount ratio of 100:1 must be substantially reduced if not equalized.

The Sentencing Commission asks for comments in three areas: 1) whether the current penalty structure for crack offenses is appropriate; 2) whether the 100:1 drug quantity ratio is appropriate, or whether some other alternative is appropriate; and 3) whether penalties for crack cocaine should be more severe, less severe, or equal to penalties for heroin or methamphetamine. At this time, based on our resources, we will address the first two questions. We do not have the expertise to address the third question currently.

In light of the foregoing concerns, MALDEF recommends that the ratio of 100:1 in the disparity in sentencing for powder cocaine versus crack cocaine be equalized as much as possible. While we realize that Congress has specifically requested that the U.S. Sentencing Commission not return with their 1995 recommendation to equalize the ratio, all the data suggest that the ratio should be reduced as close to 1:1 as possible. MALDEF specifically recommends the following to the U.S. Sentencing Commission:

A. **Raise the crack threshold and maintain the powder threshold.** Possession of crack cocaine should not result in a five-year mandatory sentence, especially when

simple possession of powder cocaine by first time offenders is considered a misdemeanor punishable by no more than one year in prison. The average sentence for crack cocaine is 10 yrs., 52% longer than the average powder cocaine sentence. According to the DEA, 500 grams of powder cocaine has a street value of approximately $20,000. An individual who deals in $30,000 or more is considered a serious drug dealer. The DEA says that 5 grams of crack is worth a few hundred dollars at most, and its sale is characteristic of a low-level street dealer, and yet the low level dealer is getting just as harsh a sentence as the serious drug dealer. There is no reason for crack sentences to be so much higher.

B. Resist proposals that would lower the powder thresholds. MALDEF believes that lowering the powder thresholds would have a negative impact on the Latino community, especially because already 50.8% of federal powder cocaine defendants are Latino. Because so many of the defendants charged with powder cocaine offenses are minorities, lowering the threshold would simply exacerbate racial disparity even further.

C. Find alternatives to incarceration for first time, non-violent offenders. Penalties for crack cocaine should not be more severe, especially when the Journal of American Medical Association 1996 concluded that the physiological and psychoactive effects of cocaine are similar regardless of its form. So if the medical world recognizes that crack cocaine is no more harmful than powder cocaine, the courts should also recognize this and not make penalties more severe for crack cocaine. Imprisoning low-level crack dealers for long periods of time does nothing except to drain the resources of the Bureau of Prisons. Many of those convicted of crack cocaine possession are for the most part non-violent offenders who in many cases are drug addicts.

V. CONCLUSION

MALDEF has provided comments for the first time to the U.S. Sentencing Commission. Our involvement in this area is a recognition that the status of Latinos in the criminal justice system has reached an emergency situation. As a national civil rights organization, we can no longer ignore the civil rights implications of our federal criminal laws on the Latino community. In these comments, we reviewed how much of the work of MALDEF has focused on the front-end issue that first brings Latinos into the criminal justice and immigration legal system – racial profiling. We also realize, however, that in order to address the racial disparities in our justice system, we must also address the racial implications of all the stages of the decisions that lead to incarceration, including sentencing guidelines and practices. In these comments, we specifically focused on the racial implication of the wide disparity in sentencing between those who violate crack cocaine laws versus powder cocaine. In both cases, Latinos are disproportionately targeted and prosecuted. In order to address the disparities that result from mandatory minimums in this area, we specifically recommended that the amount of crack cocaine that triggers 5- and 10-year sentences must be substantially increased; however, it would be a mistake to lower the amounts that trigger the 5- and 10-year sentences for powder cocaine since already Latinos are disproportionately represented among offenders in that category as well. We look forward to establishing a working relationship with the U.S. Sentencing Commission on the sentencing issues in these comments but also on other sentencing issues that affect the ever-growing Latino population that is entering the federal criminal justice system.

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March 18, 2002

Judge Diane Murphy
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Dear Judge Murphy:

As President of the International Association of Chiefs of Police, I am writing to express my gratitude for your invitation to appear before the U.S. Sentencing Commission to discuss proposed amendments to the current sentencing guidelines. Unfortunately, I will be attending the IACP's 19th European Executive Policing Conference in Budapest, Hungary and therefore unable to appear in person.

However, I would like to take this opportunity to share my views on the current sentencing guidelines for crack and powdered cocaine. For over thirty years, I have served as a law enforcement officer, executive and police chief in the Metropolitan Miami area. During that time, I have repeatedly witnessed the devastation and horror suffered by families and communities as a result of the sale and use of crack and powdered cocaine.

Both of these illegal substances are closely associated with crime, violence, death and destruction, and therefore, individuals who participate in the sale or use of these drugs should be punished to fullest extent of the law. However, federal law mandates a minimum sentence of five years for first-time possession of more than 5 grams of crack, but allows probation for possession of the same quantity of powder cocaine. It takes possession of 500 grams of powdered cocaine to trigger the same 5-year mandatory minimum sentence. As a result of the 100 to 1 ratio between crack and powdered cocaine, concerns have been raised over a seeming disparity in the penalties for crack and powdered cocaine.

While I understand these concerns, I do not believe that the Sentencing Commission should take any steps that would weaken the existing penalties for possession and sale of crack cocaine. Rather, it is my belief that the current threshold limits for powdered cocaine should be reduced so that they more closely track those for crack cocaine. In this fashion, the commission would achieve the goal of reducing or eliminating any disparity between crack and powdered cocaine, while at the same time ensuring that those who participate in the sale and use of these illegal narcotics are penalized in a manner appropriate to the crime they commit.

Once again, I appreciate the opportunity to provide the Commission with my views on this important issue. Please contact me if you have any questions.

Thank you for your attention to this matter.

Sincerely,

Wm B. Berger

William B. Berger
President

Comments on

2002 Amendments to the U.S. Sentencing Guidelines

Submitted by:

Elaine R. Jones
President and Director-Counsel

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To the:

United States Sentencing Commission

March 18, 2002

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I. INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") respectfully submits these Comments in response to the Commission's request for public comment regarding amendments to the U.S. Sentencing Guidelines that apply in cocaine base cases. LDF believes the current Guidelines concerning crack cocaine sentencing require fundamentally unfair sentences and are in need of significant reform.

LDF was founded in 1940 and is the nation's oldest civil rights law firm. Since its founding, LDF has identified and challenged racial bias in numerous facets of the criminal justice system. Our efforts in the 1950s and 1960s resulted in the end of the exclusion of African Americans and other minorities from jury rolls were largely successful; similar efforts in the 1970s and 1980s to integrate southern police and corrections staffs were also successful. Today, despite significant progress, racial bias continues to infect many discretionary acts within the criminal justice system.

We believe the explosion in the incarceration rates for non-violent drug offenders and the disproportionate effect the drug laws have on African Americans and other minorities require immediate attention and reform. Many African Americans view the crack-powder cocaine sentencing disparity as a prime example of the law's continued discriminatory treatment of minority citizens. The Commission acknowledged these views in 1995, when it proposed changes in the Guidelines' treatment of crack cocaine offenses. But Congress rejected the proposals by passing Pub. L. 104-38, which reiterated, in part, that offenses involving equal weights of crack and powder cocaine are not to be considered deserving of equal punishment. LDF submits that the congressional climate has changed since 1995. Increasing numbers of legislators of diverse ideological beliefs have become wary of this costly and draconian sentencing regime.[1] Consequently, we hope that Congress will, in 2002, adopt a recommendation of rational reform to rectify this egregious racial disparity.

II. SENTENCING IN COCAINE BASE CASES

LDF is deeply troubled by the current federal sentencing regime, particularly as it applies to crack cocaine offenses, for a number of related reasons.

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[1] *See, e.g.*, S. 1874, the Drug Sentencing Reform Act of 2001, sponsored by Senators Jeff Sessions (R-AL) and Orrin Hatch (R-UT), aimed at reducing the crack-powder cocaine sentencing disparity.

A. The Existing System Is Irrational

The federal criminal law and sentencing guidelines currently work as blunt instruments that prevent fair and proportional sentences. They impose stiff mandatory minimums and high offense levels for relatively small amounts of crack. The current penalty structure does not adequately differentiate between crack offenders who engage in aggravating conduct and those who do not; instead, it treats every crack offender equally and disproportionately harshly. Under the current regime, a person convicted of possession with intent to distribute fifty grams or more of crack cocaine must be sentenced to no less than ten years in prison. By contrast, a person must be convicted of possession with intent to distribute at least 5,000 grams of powder cocaine to be subject to the same sentence - a 100:1 ratio in terms of intensity of punishment.[2] Moreover, a person caught merely possessing one to five grams of crack cocaine is subject to a mandatory minimum sentence of five years in prison.[3] Crack cocaine is the only drug for which there exists a mandatory minimum penalty for a first offense of simple possession.[4] This penalty structure irrationally overstates the drug trafficking function of crack offenders, by subjecting low level traffickers to penalties designed for individuals higher on the distribution chain.

Congress' original rationale for treating crack cocaine differently from powder cocaine was, in large part, that the former was perceived to be often directly linked to criminal violence. If this is true, then the Commission may wish to assess whether the punishments provided for violent conduct are adequate. However, it should not continue to treat every crack cocaine offender as violent and meriting an often exceedingly long prison sentence. The Guidelines should be reformed so that they depend less on the name or quantity of the drug allegedly sold and more adequately reflect the aggravating and mitigating conduct.

B. The Current Sentencing System Has a Disproportionate Racial Impact

One certain result of our current sentencing scheme and law enforcement's disparate targeting of communities of color has been that our prisons are filled with African Americans who are serving excessively long sentences at far higher numbers than whites. At no prior time in American history – including the darkest days of Jim Crow – have such a large number of minority offenders, many of whom have committed no violent crime, been incarcerated pursuant to such long sentences. Of drug offenders admitted to federal prison, 59 percent of all inmates are confined for drug offenses.[5] Though African Americans comprise only 12% of the national

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[2] *See* USSG 2D1.1 (Drug Quantity Table).

[3] *See* the USSC Drug Quantity Table, USSG 2D1.1, and the USSC Sentencing Table at <www.ussc.gov/2001guid/Sentntab.pdf>.

[4] *Id.*

[5] *Correctional Populations in the United States, 1997*, Washington, D.C.: U.S. Dep't of Justice, Nov. 2000.

population, as of 1996, they made up 39% of the federal prison population.[6] And though the majority of crack cocaine users are white,[7] nearly 90 percent of offenders convicted in federal court for crack cocaine distribution are African American.[8] In 1996, 47.9% of African American defendants and 46.3% of Hispanic defendants were charged with drug offenses in U.S. district courts, compared to 29.4% of white defendants.[9] All of this adds up to one final, deeply disturbing statistic: African American males have a 29% chance of serving time in prison at some point in their lives; Hispanic males have a 16% chance; white males have a 4% chance.[10]

The irony in these statistics is that the federal sentencing guidelines were adopted in 1987 ostensibly to bolster public confidence by creating a more uniform sentencing structure to eliminate disparity and lend the criminal justice system an air of neutrality. Instead, the current scheme has ensured racial inequity the likes of which our prison system has never before witnessed and seriously undermined the criminal justice system's legitimacy in the eyes of many. The War on Drugs has become known as the War on People of Color, not only among disadvantaged, marginalized communities of color, but also among mainstream journalists and politicians.[11] This disproportionate representation leads many African Americans to view such sentencing laws[12] and their enforcement as a prime example of the ways in which the criminal justice system treats blacks more harshly. The cocaine base sentencing scheme furthers the perception that the government, through the criminal justice system, unfairly targets the most disadvantaged communities, seeking to lock up nonviolent women and men of color for periods of time that are unthinkable in other developed nations and in most white communities in this country. The injustice of the current scheme promotes a mistrust of government.

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[6] *Characteristics of Federal Prisoners*, Sourcebook of Criminal Justice Statistics, 524, Washington D.C.: Bureau of Justice Statistics, U.S. Dept. of Justice, 2001.

[7] In the mid-1990s, the United States Sentencing Commission estimated that 65% of crack users were white. *See United States v. Armstrong*, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting) (citing *Special Report to Congress: Cocaine and Federal Sentencing Policy*, 39, 161: United States Sentencing Comm'n, 1995).

[8] *Cocaine and Federal Sentencing Policy*, 8, Washington, D.C.: United States Sentencing Comm'n, 1997.

[9] *Federal Pretrial Release and Detention, 1996*, Washington, D.C.: U.S. Dep't of Justice, Feb. 1999.

[10] *See* <www.sentencingproject.org/brief/pub1035.pdf> (citing the Bureau of Justice Statistics, U.S. Dept. of Justice).

[11] *See* "Waters sees racism in war on drugs," Santa Fe New Mexican, June 2, 2001 at A3 (U.S. Rep. Maxine Waters, D-CA, states that the national war on drugs has created an 'apartheid' in the United States); Jack VanNoord, "Long past time to wage war on War on Drugs," Chicago Daily Herald, March 21, 2001, at 12; Ryan Friel, "War on drugs undermines justice and common sense," University Wire, Oct. 31, 2000; William R. Macklin, "Justice system riddled with racial, ethnic bias, studies say," Philadelphia Inquirer, May 7, 2000 in Domestic News.

[12] *See supra* note 2.

The impact of the cocaine base sentencing scheme ripples beyond the published figures of the federal prison population. People of color who are nonviolent, often minor, offenders are spending their most productive years locked away, in prisons that offer little preparation for a life on the outside.

Further, the racial impact of cocaine base sentencing has a devastating effect on families.[13] From 1996 through 2000, LDF represented Kemba Smith, a young mother who received a 24 ½ year federal sentence for her minor role in a cocaine conspiracy.[14] Kemba's experience exemplifies not only the many harms current sentencing laws impose upon prisoners who are overwhelmingly people of color, but also upon their families and communities. Even though Ms. Smith committed a series of minor criminal acts at the behest of a severely abusive boyfriend, she was separated from her son, Armani, for six years. Many studies confirm that children of prisoners run a high risk of becoming prisoners themselves.[15] Ms. Smith was fortunate to have parents who had some means to support her son and work toward her release. Nevertheless, the Smiths were forced to spend all their savings, cash in retirement funds, twice file for bankruptcy, and assume the day to day parenting of Armani. Though Ms. Smith received her excessive sentence as a result of conspiracy laws, countless numbers of crack cocaine offenders are sitting in prison with life sentences, triggering the same collateral consequences on their families and communities.[16] Out of the 1.5 million minor children who had a parent incarcerated in 1999, African American children were nearly nine times more likely to have a parent incarcerated than white children. Latino children were three times more likely to have a parent incarcerated than white children.[17] Thus, the cocaine base sentencing scheme, far disproportionate to most underlying nonviolent offenses, exacts enormous costs not only from the prisoners but also from their children and loved ones. By incarcerating individuals, who often are parents of young children, for excessive periods of time, the current cocaine base sentencing regime corrodes the human and social capital of communities that are already disadvantaged.

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[13] As of 1996, 37% of women offenders had been convicted of a drug offense, compared to 22% of men, and two-thirds have children under 18. *See Prisoners in 1997*,11, Washington, D.C.: Bureau of Justice Statistics, U.S. Dept. of Justice, 1998.

[14] One factor that contributed to Ms. Smith's lengthy sentence was that she was held accountable for crack, as opposed to powder, cocaine.

[15] *See* D. Johnston and Gabel, *Incarcerated Parents*, 1995; D. Johnston, *Intergenerational Incarceration*, Pasedena, CA: Pacific Oaks Center for Children of Incarcerated Parents, 1993; D. Johnston, *Children of Offenders*, Pasadena, CA: Pacific Oaks Center for Children of Incarcerated Parents, 1992; D. Johnston, *Jailed Mothers*, Pasedena, CA: Pacific Oaks Center for Children of Incarcerated Parents, 1991.

[16] Today, Ms. Smith is out of prison and living with her family. She was fortunate enough to have been granted clemency by President Clinton in December, 2000. Obviously, thousands of women and men in her situation remain in prison today.

[17] C.J. Mumola, *Incarcerated Parents and Their Children*, Washington, D.C.: Bureau of Justice Statistics, U.S. Dept. of Justice, Aug. 2000.

Rather than deter crime, the sentencing guidelines may, if anything, contribute to higher crime rates.[18]

C. Lowering the Powder Threshold Is Not the Answer

Some federal legislators have proposed lowering the powder cocaine threshold to "neutralize" complaints of racism in the excessive sentences meted out almost exclusively to African American defendants for crack cocaine offenses. This is not the answer. First, such a proposal would actually increase the number of non-violent African Americans and Hispanics sentenced to prison. This would certainly occur because the crack cocaine quantity threshold would remain the same and there is no reason to believe that the disproportionately high number of African Americans sentenced under this provision would change. Moreover, while two-thirds of federal cocaine powder defendants are white, the vast majority of this group are ethnically Hispanic. Overall, Hispanics account for 48% of powder cocaine defendants, African Americans for 30%, and non-Hispanic whites for 21%.[19] As is true for African Americans, law enforcement priorities explain almost exclusively the disparities for Hispanics. Although it is not the role of the Sentencing Commission to make policing fairer, the impact of law enforcement priorities on who gets arrested for drug offenses cannot be overstated.[20] Lowering the powder cocaine threshold would simply add to the racial disparity in sentencing.

Second, powder sentences are four and a half times more severe than they were in 1970, and a Sentencing Commission survey found that neither law enforcement nor the public finds them too "soft."[21] Indeed, the Commission's Chairman testified in 1995 that existing powder sentences are "quite harsh," and that raising them as an alternative to lowering crack sentences "could distort this sensible structure [that targets upper-level dealers] and result in application of the mandatory minimums to defendants at lower culpability levels."[22] There is thus no justification for raising powder sentences.

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[18] *See supra* note 8.

[19] *Drug Briefing*, January 2002, United States Sentencing Commission.

[20] Michael Tonry provides an excellent explanation of why urban police departments often focus on disadvantaged minority neighborhoods in combating the trade in illegal narcotics in *Malign Neglect: Race, Crime, and Punishment in America*, 105-06 (1995).

[21] *Special Report to Congress: Cocaine and Federal Sentencing Policy*, 39, 161: United States Sentencing Comm'n, 1995.

[22] *Id.*

D. History Repeats Itself, but This Time the Human and Economic Costs Are Too Great

The War on Drugs that began in the mid-1980s is not the first drug war that has been fought largely at the expense, and based on stereotypes, of racial minorities. Prior to the civil rights era, Congress repeatedly imposed severe criminal sanctions on addictive substances as soon as they became popular with minorities.[23] For examples, one need only trace the history of the 1909 Smoking Opium Exclusion Act,[24] the Harrison Act of 1914,[25] and the Marijuana Tax Act of 1937.[26] But when cocaine became a celebrated drug of the rich and famous in the 1970s and early 1980s, no new drug laws were enacted to further criminalize or penalize cocaine possession. As numerous historians have documented, and as Judge Clyde S. Cahill found in *United States v. Clary*, 846 F.Supp 768, 776 (E.D. Mo. 1994), "Almost every major drug has been, at various times in America's history, treated as a threat to the survival of America by some minority segment of society."

The cocaine base sentencing guidelines are yet another phase of this long history, though this most recent phase has incurred far greater costs. Crack cocaine sentencing bears significant responsibility for the quadrupling of the national prison population since 1980 and a soaring incarceration rate, the highest among western democracies. The disparate impact of the crack cocaine sentencing guidelines are, combined with racially-targeted policing, responsible for such jarring statistics as the fact that blacks are incarcerated at 8.2 times the rate of whites.[27] Nonviolent drug offenders of color are robbed of years during the prime of their lives in prison over long periods of time. Moreover, guarding, housing, feeding, and caring for all these prisoners costs a great deal, and drains away funding from other more productive and certainly

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[23] *United States v. Clary*, 846 F.Supp 768, 774 (E.D. Mo. 1994) (citing expert witness testimony by Dr. David Courtwright. Def. Ex. 3(b)-3(g)), *rev'd.*, 34 F.3d 709 (8th Cir. 1994).

[24] "Ambivalence and outright hostility" toward Chinese coupled with the concern that opium smoking was spreading to the upper classes contributed to the passage of these laws. David Musto, *The American Disease: Origins of Narcotic Control*, 65 (1987).

[25] This was the first federal law to prohibit distribution of cocaine and heroin and was passed after media accounts depicted heroin-addicted black prostitutes and criminals in the cities. See David Musto, *America's First Cocaine Epidemic*, The Wilson Quarterly, Summer 1989. The author of the Act, Representative Francis Harrison, moved to include coca leaves in the bill "since [the leaves] make Coca-Cola and Pepsi-Cola and all those things are sold to Negroes all over the South." *Supra* note 11, 46.

[26] Using the media as his forum, Harry J. Anslinger, then the Commissioner of the Treasury Department's Bureau of Narcotics, graphically depicted the alleged violence which he alleged resulted from marijuana use. quoted in The War, citing Larry Solomon, *Reefer Madness: A History of Marijuana in America*, Indianapolis: Bobbs-Merrill, 1979, 34.

[27] *See* Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Vol. 12, No. 2, May 2000.

more successful programs. Typical estimates of the average annual cost of holding one prisoner range from $ 20,000 to $ 30,000. Typical estimates of the cost of building new prisons, depending on climate and security level, range from $ 50,000 to $ 200,000 per prisoner.[28]

By failing to change the five gram threshold that triggers the mandatory sentence for crack cocaine, federal drug policy will continue to exact an enormous fiscal and social cost with little sustained impact on crime levels. Research in this field by criminologist Alfred Blumstein and others has concluded that drug-offending is far less responsive to incarceration than other offenses since it is demand-driven. In a review of the impact of incarceration on drug selling, Blumstein concluded that "As long as the market demand persists and there is a continued supply of sellers, there should be little effect on drug transactions."[29] This can be seen by looking at the increase in cocaine consumption from 190 metric tons in 1980 to 284 metric tons in 1990, despite a 649% rise in the number of drug offenders incarcerated during this period.[30]

Judging by the persistently high rate of arrests and convictions fifteen years after the scheme was implemented, the excessively long cocaine base sentences do little to make communities of color safer or to reduce the availability of illegal drugs. On the other hand a growing number of scientific studies demonstrates that drug treatment - both within and outside the criminal justice system - is more cost-effective than locking away crack cocaine offenders in prison for years and years at a time.[31] A RAND analysis of these issues in the more general context of mandatory minimum sentencing concluded that whereas spending $1 million to expand the use of mandatory sentencing for drug offenders would reduce drug consumption nationally by 13 kilograms, spending the same sum on treatment would reduce consumption almost eight times as much, or 100 kilograms. Similarly, expanding the use of treatment was estimated to reduce drug-related crime up to 15 times as much as mandatory sentencing.[32]

E. The Climate in Congress and in the Nation Has Changed since 1995

The Commission must not resist reform despite the recent experience in Congress. Since 1995, states have led the way in reforming state mandatory minimum schemes so that they are

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[28] See Criminal Justice Institute, *The Corrections Yearbook 1997*, 74-75, Washington, D.C.: Camille Graham Camp & George M. Camp eds., 1997.

[29] *See* <www.sentencingproject.org/brief/pub1057.htm>.

[30] *See* <www.sentencingproject.org/brief/pub1057.htm>.

[31] Marc Mauer and Jenni Gainsborough, *Diminishing Returns: Crime and Incarceration in the 1990s*, Washington, D.C.: The Sentencing Project, 2001; Jonathan P. Caulkins, *An Ounce of Prevention, A Pound of Uncertainty: The Cost-Effectiveness of School-Based Drug Prevention Programs*, RAND, 1999; Peter Rydell et al., *Estimating the Cost-Effectiveness of Cocaine Control Programs*, RAND, 1998; Jonathan P. Caulkins, et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or Taxpayers' Money?*, RAND, 1997.

[32] Jonathan P. Caulkins, et al., *Mandatory Minimum Drug Sentences*, xvii-xviii.

more humane and more cost-effective.[33] Since 1995, increasing numbers of state and federal legislators are speaking out against the current drug sentencing scheme. Numerous legislators who advocated for stiffer crack cocaine penalties in the late 1980s have subsequently retracted their support, and are advocating for reform. Federal crack cocaine sentencing laws have failed, and at enormous cost. The Commission recognized the serious flaws in 1995, and LDF hopes that it will do so again in 2002. Although proposals exist in Congress to raise the cocaine base threshold, perhaps in an effort to narrow the crack-powder ratio, evidence is overwhelming that any perceived rationale that existed for singling out crack cocaine in 1987 is no longer viable. The costs have been too great.

III. RECOMMENDATIONS

The Commission has requested comments concerning the sentencing of defendants convicted of crack cocaine and powder cocaine under the Sentencing Guidelines. LDF makes the following recommendations:

- **Close the ratio between crack cocaine and powder cocaine sentencing without lowering powder thresholds.** LDF understands that Congress passed Pub. L. 104-38 in direct response to the Commission's 1995 recommendation to Congress calling for a 1:1 ratio between crack cocaine and powder cocaine sentencing, and that therefore, current law may constrain the Commission from calling for a 1:1 ratio again. Nonetheless, LDF urges that the Commission resubmit this recommendation, supporting it with evidence of the costs incurred by the current regime. Crack cocaine sentencing must become fairer, more just, and cost-effective. LDF urges the Commission to resist proposals to lower the powder cocaine threshold ostensibly to equalize the racial impact for all of the reasons we have stated above. Should Congress once again reject the Commission's recommendation, the Commission should urge Congress to issue a report providing a non-political, scientific, economic, and medical analysis that justifies retaining a disparity between crack and powder cocaine.

- **Present to Congress a complete analysis of the economic and human costs of the current cocaine base regime.** Congress needs to have this information when it considers the Commission's recommendations.[34]

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[33] In 2000, California voters passed Proposition 36, which requires drug treatment in place of harsh prison sentences for first- and second-time non-violent drug offenders; in 2001, Louisiana lawmakers passed a bill reducing sentences for certain drug and non-violent crimes and eliminating mandatory minimum sentences for non-violent crimes; in 1998, Michigan rolled back its "650 lifer" law that mandated life in prison without parole for drug offenders convicted of delivery or conspiracy to deliver 650 grams or more of heroin or cocaine. *See also* Fox Butterfield, *"States easing stringent laws on prison time,"* New York Times, 9/2/01 at A1.

[34] For examples of such studies, see *supra* note 24.

- **Offer more alternative sentencing for first-time, non-violent, low level cocaine base and other offenders modeled on established programs that have been evaluated and that work.** The current penalty structure is excessively severe and cannot adequately address the true culpability of the defendant. Where current federal guidelines have tied the hands of judges and do not give them the opportunity to give first-time, nonviolent, low-level offenders alternative sentences that are proving to be far more cost-effective and humane, the Commission should recommend that Congress enact appropriate reforms.

- **Repeal mandatory minimum sentences. In the alternative, reduce drug sentences across the board while reforming sentencing so that it more adequately reflects the aggravating and mitigating conduct that may be unrelated to drug quantity or drug name.**

IV. CONCLUSION

The current sentencing scheme runs counter to the American ideal of "equal justice for all." There are more humane, cost-effective, productive ways of addressing drug trafficking and use. The current racial disparities in the criminal justice system and the mass incarceration that our country is infamous for internationally offend rational thinking.

LDF urges the Commission to provide necessary leadership to bring about much-needed reform of sentencing laws for first-time, nonviolent, low-level cocaine base offenders, and thus restore credibility to the nation's criminal justice system.

COMMITTEE ON CRIMINAL LAW
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Honorable William W. Wilkins, Jr., Chair

March 13, 2002

To the Chair and Members of the U.S. Sentencing Commission:

The Committee on Criminal Law respectfully submits comments to the proposed January 17, 2002, guideline amendments.

Proposed Amendment 8 (Drugs)

Mitigating Role Adjustment (pages 65 and 66 of Proposed Amendments). The Committee believes that the maximum base offense level for minimal participants who do not receive enhancement for aggravating conduct such as weapons involvement or bodily injury should be 26 and that the maximum base offense level for minor participants who do not receive enhancement for aggravated conduct such as weapons involvement or bodily injury should be 32.

The Commission invites comments whether it should address three circuit conflicts concerning mitigating role adjustments. (The circuit conflicts are described at pages 82 and 83.) The Committee does not believe that the Commission should attempt to resolve these conflicts. The Committee believes that the Commission should adopt a comment noting the conflicts and stating that no hard and fast rule should be applied and that the

district court must make its assessment based on all the facts before it. Determining a defendant's role in the offense is a fact-intensive determination, and the Committee believes the Commission would be better served by not trying to add additional criteria for district judges to apply, but instead leaving this determination to the sound judgment of the district judges.

Prior Criminal Conduct (pages 68 and 72). The Commission proposes amending § 2D1.1(b) by adding a subsection (8) that would provide a two- or four-level increase in the offense level if a defendant had a prior conviction of a crime of violence or a drug offense. Because most prior convictions are already counted in the defendant's criminal history category, this proposed change is unnecessary. Although this change could be justified in cases where prior convictions are not counted because of their age, the Committee does not believe that these cases, which are probably few in number, warrant adding Chapter Four criteria into Chapter Two.

Reduction for No Prior Convictions. The Committee is opposed to amending the guidelines to provide a two-level reduction in the offense level for a defendant who has no prior criminal convictions. A defendant who qualifies for the "safety valve" already receives a two-level reduction. Sentencing judges can and do consider a defendant's lack of any prior conviction in determining where in the guideline range to sentence him. Because that discretionary ability already affords sentencing judges a basis for distinguishing among defendants who fall within Criminal History Category I, this proposed change is not needed.

Simple Possession of Crack Cocaine (page 70). The Committee supports the deletion of the cross-reference in § 2D2.1(b) for simple possession of crack cocaine.

Crack Cocaine Sentences (pages 79 and 80). The Committee strongly endorses dramatically lowering the current 100-to-1 crack-to-powder cocaine ratio without increasing the guideline for powder cocaine, and the Committee will carefully consider any proposed alternative crack cocaine guideline that the Commission proposes.

The Committee is concerned, however, that without legislation reducing the minimum sentences for crack cocaine any proposed guideline amendment could drastically reduce proportionality and significantly increase disparity because the current statutory mandatory minimums, which apply the 100-to-1 statutory ratio, would create enormous "cliffs" between those to whom a mandatory minimums apply and those to whom they do not. The Committee is also mindful that the Commission was directed to report to Congress on the different penalty levels that apply to different forms of cocaine and to include any recommendations the Commission may have for retention or modification of those differences in penalty levels. That Special Report to Congress: Cocaine and Federal Sentencing Policy, was submitted in February of 1995, and while it may be dated in some respects, it may be useful to revisit the research and empirical data as the Commission considers this important issue.

Revised Proposed Amendment Nine - Alternatives to Imprisonment

The Committee favors Option One, which would amend the sentencing table by expanding Zone B to include current Zone C. This option eliminates the complexity of having four zones and affords the sentencing judge adequate discretion to sentence defendants who would now come within expanded Zone B.

Alternatively, the Committee would support proposed Option Two.

Proposed Amendment Ten - Discharged Terms of Imprisonment (page 102)

As the Committee explained in its December 20, 2001, letter to the Commission, the Committee supports amending § 5G1.3 to provide, to the extent practicable, that a defendant should be given credit for time served, even if his prior sentence has been discharged. Instead of the proposed structured downward departure suggested in this amendment, the Committee would prefer merely amending the commentary to § 5G1.3 to state that in the case of a discharged term of imprisonment that arose from conduct involved in the instant offense, a sentencing judge may consider a downward departure limited to the increment in the guideline sentence that resulted from including in the offense level conduct for which the defendant has already served time. The limited number of cases in which such a departure would be necessary militates against requiring a more complex structure for departure that would have to be mastered by probation officers and district judges.

The members of the Committee appreciate the opportunity to comment on these proposed guideline amendments. As Chair of the Sentencing Guideline Subcommittee, I look forward to meeting with the Commission by videoconference on March 19, 2002, at 4:30 p.m. (Eastern Time) and will be prepared to answer any questions about these comments and to discuss any other matters of interest with the Commission.

Yours very truly,

Sim Lake
Chair
Sentencing Guideline Subcommittee

cc: Members of the Committee on Criminal Law
John Hughes, Assistant Director
Kim Whatley, Special Assistant to Assistant Director

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

CHIEF
CRIMINAL INVESTIGATION

March 19, 2002

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
South Lobby, Suite 2-500
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Washington, D.C. 20002-8002

Dear Madam Chairman:

We are writing to you to express our opposition to Proposed Amendment Nine of the January 17, 2002 Proposed Amendments to the Sentencing Guidelines. Proposed Amendment Nine contradicts the United States Sentencing Commission's ("Commission") long-standing philosophy that sentences for criminal tax cases should be commensurate with the gravity of the offense and should act as a deterrent to would-be violators.[1] It also contradicts the Commission's philosophy that tax offenses are serious offenses.[2] Furthermore, the amendment, if adopted, will undermine the Internal Revenue Service's ("IRS") efforts to promote and achieve voluntary compliance with tax laws. As such, we very strongly oppose Proposed Amendment Nine.

This amendment proposes a substantial change to the Sentencing Table structure. The amendment, entitled Alternatives to Imprisonment, strikes the line separating Zones B and C and creates one single zone, Zone B. Zone D will then be renamed Zone C. The Proposed Amendment offers three options to increase sentencing alternatives for offense levels 11 and 12 incorporated from the current Zone C.

Generally, Option One permits the alternatives for imprisonment in the current Zone B to be applied to the incorporated Zone C levels. This provides offenders at offense levels 11 and 12 with the sentencing options currently available in Zone B, which are not currently available to those offenders. Specifically, the options include (A) a probation sentence with a condition of confinement sufficient to satisfy the minimum of the applicable guideline range; and (B) one month imprisonment followed by a term of supervised release with a condition of confinement sufficient to satisfy the remainder of the minimum of the applicable guideline range (a "split-sentence"). This latter option reduces the amount of imprisonment required for the "split-sentence" from four or five months (at offense levels 11 and 12, respectively) to one month.

Option Two is similar to Option One, but limits the use of home detention for offenders

[1] U.S.S.G., Chapter 2, Part T, introductory comment.

[2] U.S.S.G. § 2T1.1, commentary, background.

in which the minimum guideline range is at least 8 months. In such cases, the defendant must satisfy the minimum of the applicable guideline range by some form of confinement, but must serve at least half of that minimum in a form of confinement other than home detention. Option Three is also similar to Option One, but limits the expansion of the sentencing options available in Zone B to Criminal History Category I offenders; therefore, offenders with an offense level 11 or 12 in Categories II through VI will not benefit from additional sentencing alternatives.

As you consider our comments below, please recall that because of our general deterrence mission, we cannot focus our efforts only on the uppermost income tax evaders; in fairness to all taxpayers, we must investigate and prosecute cases across all income ranges. To do otherwise would establish a "safe" level of tax evasion for all taxpayers. We are faced with attempting to send a tax enforcement message to over 200 million taxpayers with a relatively small number of prosecutions. We must both deter those few who are tempted to cheat and simultaneously assure the vast majority of compliant taxpayers that the IRS is investigating and prosecuting those who are evading their obligations to this country. Amendment Nine threatens to eviscerate a sentencing structure that already poses challenges for our tax compliance efforts. Nearly
90 percent of taxpayers who filed tax returns in tax year 1999 had an adjusted gross income of $95,000 or less (or a tax loss of $26,600 or less).[1] If a taxpayer at the top of this income range evaded 100 percent of his or her taxes, it would translate into an offense level of 12. Furthermore, over 80 percent of criminal tax defendants are sentenced as Criminal History Category I offenders.[2] Consequently, even under the current sentencing structure, because acceptance of responsibility is usually granted, only the very highest earning taxpayers fall into Zone C and receive some mandatory sentence of imprisonment. Under Proposed Amendment Nine, an even larger percentage of these very high-income offenders would qualify for probation and not be subject to any mandatory imprisonment.

The following example further illustrates the impact Proposed Amendment Nine would have on a typical tax offender. The current Sentencing Table mandates at least some imprisonment for Criminal History Category I offenders that fall in Zone C.[3] Presently, therefore, Criminal History Category I offenders with a tax loss of more than $12,500 but less than $30,000 would be subject to imprisonment for at least half of the minimum term of the guideline range.

Under Proposed Amendment Nine, that same offender would not be subject to any mandatory imprisonment. Under Option One, the sentencing options available for that

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[1] Internal Revenue Service, Statistics of Income (Fall 2001).

[2] United States Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics.

[3] See U.S.S.G. § 5C1.1(d).

offender would include a probationary sentence with an alternative confinement option, or one month imprisonment followed by a split sentence (combination of a condition of confinement and supervised release). Under Option Two, the sentencing options available for that offender would include similar options as Option One, but would limit the use of home detention for defendants in which the minimum of the guideline range is at least eight months of confinement (but not necessarily imprisonment) other than home detention. Under Option Three, the sentencing options available to that offender would be the same as under Option One and Two, since that offender is a Criminal History Category I offender. Therefore, under the proposed sentencing table, a tax offender with a tax loss of greater than $12,500 but less than $30,000 would go from having at least part of the sentence a term of mandatory imprisonment to having all of the sentence qualify for probation (including an alternative confinement option).

Statistics from the Sentencing Commission's 2000 Sourcebook establish that under the current guidelines, tax offenders are sentenced more leniently than other offenders. Notably, 75 percent of tax offenders were sentenced to the guideline minimum, over 10 percent greater than the number of all criminal defendants sentenced at the minimum. Only 3.3 percent of tax offenders were sentenced in the upper half of the guideline range. An overwhelming 88.8 percent of tax offenders received an acceptance of responsibility reduction. In downward departure cases (other than substantial assistance departures), the median sentence imposed was 0 months and the median percent decrease from the guideline minimum was 100 percent. This data demonstrates that judges tend to view tax offenders as less serious than criminal offenders as a whole. Thus we fear that the current proposal of providing even more lenient options in tax cases would have the effect of further undercutting criminal tax enforcement and the policy purposes underlying sentencing guidelines.

The Commission should not provide more options to decrease sentences for tax offenders, nor should it provide alternatives to sentencing that would limit mandatory incarceration to a maximum of 10 percent of all tax offenders. (We moved this sentence to the second full paragraph on page 2 because the thought flows more smoothly with that paragraph than with this one) It is apparent from these statistics that courts already feel quite comfortable granting departures where warranted, often to the point of imposing no prison term. When sentencing within the guideline range, courts already sentence over three quarters of tax defendants at the guideline minimum. This amendment effectively increases the options for courts to impose lighter sentences, for which there is neither need nor justification.

Internal Revenue Service Commissioner Charles O. Rossotti and then Acting Deputy Attorney General Robert Mueller testified on March 19, 2001 in opposition to a similar proposed amendment. Commissioner Rossotti observed in his statement to the Commission:

> Seventy-eight percent of tax offenders are sentenced at the low end of the sentencing range. And in instances where downward departures are granted in tax cases, the judges depart in the majority of cases to a

sentence that does not include incarceration. There seems to be a sign in those cases that the judges not only believe that the guidelines' prison sentence is too long, but that incarceration at all is inappropriate. Any change, even a modest change, given the distribution of incomes in this country, will seriously aggravate the circumstances. And we believe that it would overshadow, or impair to some degree, all of the IRS' efforts to improve the effectiveness of our criminal compliance program, and also of previous Commission efforts to ensure some increases in tax deterrence.[4]

Proposed Amendment Nine also defeats the Commission's stated intent in its 2001 adopted Economic Crime package. In its Synopsis of the Economic Crime Package dated July 20, 2001, the Commission indicated the revised tax loss table "is designed to reflect more appropriately the seriousness of tax offenses" and "ensures significantly higher penalty levels for offenses involving moderate and high tax loss, but does not reduce generally any sentences for offenders involved with lower loss amounts."[5] Proposed Amendment Nine contradicts this intent as it effectuates the reduction of sentences for offenders with lower tax loss amounts, especially Criminal History Category I offenders. As Commissioner Rossotti stated regarding proposed changes in the zones in last year's amendment cycle, "proposed amendments changing the zones on the sentencing table would have a much more substantial effect on sentences going in the opposite direction; significantly expanding the number of tax offenders who are eligible, or where the guidelines make them eligible, for probation or home detention."[6]

It is crucial to the integrity of our nation's tax system that the Commission's proposed amendments do not send a message that tax crimes should be taken less seriously. Last year, in a letter to the Chair of the Commission regarding the 2001 Proposed Amendments, Commissioner Rossotti stated the following:

> [A]doption of amendments that lessen the likelihood that convicted tax offenders will be incarcerated will undermine our efforts to promote and achieve voluntary compliance with the tax laws. The criminal tax laws play a crucial role in deterring unlawful tax evaders and assuring the honest taxpayers that those who willfully and deliberately evade paying their fair share face very serious criminal sanctions. Unless the punishment meted out to those found guilty of violating those laws adequately reflects the gravity of criminal tax offenses, this vital message

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[4] IRS Commissioner Rossotti's statement to the United States Sentencing Commission, March 19, 2001, during hearings conducted concerning the 2001 Proposed Amendments to the Sentencing Guidelines.

[5] Federal Sentencing Guidelines Manual, Highlights of the 2001 Amendments, 2T4.1, p. XXXVII (West, 2001), citing U.S.S.G. App. C, amend. 617 (reason for amendment).

[6] IRS Commissioner Charles O. Rossotti's statement to the United States Sentencing Commission, March 19, 2001.

will be lost.[7]

This observation is still true today. Commissioner Rossotti further noted "there could not be a more dangerous time for the United States Sentencing Commission to devalue tax law enforcement. The most recent estimate of the tax gap is $195 billion dollars."[8]

Indeed, the public's trend toward tax noncompliance is growing rather than receding, according to the latest IRS Results of Oversight Board Polling ("Roper") statistics.[9] When asked whether it is more likely that people will **not** report and pay their fair amount of taxes now than in the past, 42 percent of those polled agreed that it is more likely. Furthermore, the number of people who thought no amount of cheating was acceptable fell from 87 percent in 1999 to 76 percent in 2001. This indicates a growing trend of Americans who believe at least some amount of cheating on their taxes is acceptable.

In order to combat this dangerous trend, the IRS must continue to aggressively pursue criminal tax convictions and publicize those efforts in order to deter the general public from such conduct. As Commissioner Rossotti stated, "[the] Sentencing Commission has, from its inception, recognized the special deterrence issues associated with tax crimes: the need to encourage over 200 million taxpayers to comply voluntarily with their affirmative tax obligations by seeking meaningful punishment for willful evasion."[10]

The significance of prison sentences to the IRS' deterrence mission was evident on the front page of the Wall Street Journal as recently as February 13, 2002. The first line of the Tax Report read in bold, "More people using untrustworthy trusts go to prison."[11] The article further reported there were 45 criminal convictions by year end, as of Sept. 30, 2001, up from 31 in 2000 and 24 in 1999.[12] As of February 4, 2002, there are currently 158 open criminal investigations.[13] The most salient point was conveyed to

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[7] Letter from IRS Commissioner Rossotti to the Honorable Diana E. Murphy, Chair, United States Sentencing Commission, dated March 12, 2001.

[8] Id.

[9] The Roper poll was conducted by Roper ASW and consisted of 1,990 in-person, in-home interviews conducted from July 28, 2001 through August 11, 2001. The poll was initiated to obtain initial data on taxpayers' attitudes regarding their obligations to report and pay their fair share of taxes.

[10] Letter from IRS Commissioner Rossotti to the Honorable Diana E. Murphy, Chair, United States Sentencing Commission, dated March 12, 2001.

[11] Tax Report, WALL ST. J., Feb. 13, 2002, at A1.

[12] Id.

[13] Id.

the public in the headline, however, which communicated that these tax offenders were receiving sentences of imprisonment, not probation or home detention.

Proposed Amendment Nine will have a devastating impact on the sentences imposed on criminal tax offenders. We sincerely hope you will consider the risk to the integrity of the nation's tax system and on our tax compliance effort in deciding whether to adopt this amendment. Commissioner Rossotti and/or I would be more than willing to testify or provide additional information if it would assist the Sentencing Commission in evaluating this amendment. Thank you for your consideration of these comments.

Sincerely,

Mark E. Matthews
Chief, Criminal Investigation

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