UNITED STATES SENTENCING COMMISSION

WRITTEN TESTIMONY

PUBLIC HEARING
MARCH 14, 1995

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WRITTEN TESTIMONY

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Cardinal.

United States Sentencing Commission
Public Hearing on Proposed Guideline Amendments
March 14, 1995

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Testimony of Dr. Arthur Curry
for U.S. Sentencing Commission
hearing, March 14, 1995

Members of the U. S. Sentencing Commission:

Please allow me to thank you for this opportunity to testify before the commission.

I consider it extremely significant that you understand first why I am not here. It is not my intent to point fingers or criticize judges and prosecutors nor mock the Judiciary system of our country. My sole purpose today is to present my son's case to you as an example of why we must rethink the 1986 Anti-Drug Abuse Act in general and specifically the disparity that exists between "powdered" and "crack" cocaine sentencing.

In passing this Act, we have forced prosecutors to demonstrate their toughness on drugs and drug offenders by the number of convictions they get. This has meant, in many cases, referring cases normally heard in state courts to federal court, changing trials to a more favorable location for convictions, and using minor participants in an undercover capacity relative to other criminal investigations.

I must admit to you, however, that I am frustrated and sometimes angered by a democratic system that I defended and promoted as a soldier in Vietnam, as an educator, as a parent, and as a black male in America. I was raised to believe that this system worked for everyone, regardless of race, gender, age, or religion. Now for the first time in my life when I need to use that system, I have found it almost impossible to get an audience with any elected representative.

My son, Derrick A. Curry, was arrested on December 5, 1990, at the age of 19 and charged with one count of possession with intent to distribute crack cocaine, one count of distribution of crack cocaine, and one count of conspiracy to distribute crack cocaine. He is the youngest of three children and my only son. His oldest sister is an accountant in Chicago and the other a recent graduate of Carnegie-Mellen in Pittsburgh.

A complete background check was done by the F.B.I. and no evidence was found to support the contention that he was a major drug dealer. He owned no car; he drove an old Citation that belonged to his mother. He had no money and like most college students borrowed gas money routinely from his mother and me. He had no jewelry. He had no arrest record nor any involvement with the law prior to this incident. On the other hand, despite having an I.Q. of 80, he was a second year student at Prince George's Community College working toward, of all things, a degree in Criminal Justice.

The F.B.I. had conducted an investigation involving twenty-eight individuals for over five years. By the prosecutors own records, my son was determined to be a minor participant who was only involved the last six months of the investigation.

During the ensuing months, he was offered a plea agreement which called for him to plead guilty to the conspiracy count and agree to work in an undercover capacity in connection with other criminal investigations in addition to other terms and conditions. In exchange, it would be recommended to the court that he be sentenced to 15 years. My son turned down the plea agreement for two reasons. He did not feel that he was guilty and he did not want to work undercover.

Because of the large number of individuals involved and other legal implications, Derrick was tried separately. He also was the only one of the original 28 defendants found guilty of the conspiracy. One can't help but wonder with whom did he conspire.

My son was sentenced on October 1, 1993, to 19 years and 7 months. However, he would have received a 10 years sentence, at best, if it was powdered cocaine.

Federal prosecutor Jay Apperson in his commentary "What Prosecutors Know: Mandatory Minimums Work," Washington Post Newspaper, February 27, 1994, best describes the subjective practices that exist when comparing the Angela Lewis case with Derrick's case. Lewis was sentenced to 10 years for her involvement in drug trafficking when she failed to cooperate with prosecutors. After deciding to cooperate, she served only 18 months. Derrick was offered a chance to cooperate with the prosecutors in exchange for a 15 years sentence and undercover work. Does fairness, justice, and equality of the law depend solely on the prosecutor one receives?

I must admit to you that I too sat and watched former President Bush address the nation on the drug problem. Without the facts, I too believed that crack was the worst evil to confront our nation - that something had to be done. Now we have the facts and something still must be done. With the facts, how can the penalty for crack be 100 times greater than that of powdered cocaine? Without powdered cocaine there would be no crack.

In an effort to convince you to eliminate the disparity between, "powdered" and "crack" cocaine, I wish to offer the following:

* Is the penalty greater for killing someone with a handgun or shotgun?

* Is the penalty greater for killing someone with a gun or knife?

* Is the penalty for bombing a building dependent upon the type of bomb used?

* Is the penalty greater for vehicular manslaughter when one is intoxicated with beer or whiskey?

* How would you react to a law in the District of Columbia if vehicular manslaughter was punishable 100 times greater if you were intoxicated on martinis.

I am hopeful that this commission will eliminate the disparity between "powdered" and "crack" cocaine and that your solution will be retroactive.

Francis Kay Meade

Written Testimony for
the U.S. Sentencing Commission
Proposed Amendments 1995
March 14, 1995

I am concerned about Amendment #38, dealing with the disparity in sentencing between crack cocaine and powder cocaine. I feel the 100:1 ratio had an adverse effect on the sentencing of my grandson, Ronald G. (Jay) Kinzer, Jr. who was sentenced to 151 months crack cocaine distribution within 1000 feet of a school.

Ronald was charged with two counts of distribution which the government said totalled 50 grams. This figure was arrived at from Ronald's co-defendant's testimony. He said that he sold drugs for Ronald at approximately $200 per da for a period of 70 days. The government said they believed it was $800 worth for the same period. The co-defendant plead guilty and received a sentence of one year. Ronald repeatedly requested that he be allowed to take a plea for five years, but his lawyer said that she would not do so because it was a matter of principle. At this time, I knew next to nothing about the law, however, since then I have learned much about sentencing through working with FAMM.

Had the drug that Ronald was dealing been powder cocaine instead of crack, his sentence would have been between 21-27 months. There is not enough difference between the two drugs to merit a 10 year difference in sentence. For this reason alone, the disparity should be eliminated and crack and powder should be sentenced the same. Too many lives have been affected adversely by the 100:1 sentencing disparity. Please reconsider what has been allowed to happen here and make appropriate changes soon, and make them retroactive.

Ronald is a first-time, nonviolent offender, who was not a leader, organizer or manager. He did not get any points off for acceptance of responsibility and we don't really know why. But Ronald was only 19 years old when he was sentenced--much too young to have to serve such a long sentence.

Thank you for listening to my passionate plea on behalf of my beloved grandson Ronald. I also speak for the hundreds of other young victims--primarily young black men--of the harsh crack cocaine sentencing laws.

Testimony of Renee Patterson
U.S. Sentencing Commission Hearing
March 14, 1995

I am here today to tell you about my brother, Donald Strother, who was convicted, at age 19, of distribution and conspiracy to distribute crack cocaine. He was sentenced to life without parole, plus 40 years for being a low-level member of the "Newton Street Crew," as the Justice Department called it.

It's still hard for me to believe that at age 19, with no prior record, and no association with violence, my brother was sentenced to life in prison--a very harsh punishment. The largest quantity of crack cocaine that he allegedly sold was approximately 1/2 ounce. An execution of a search warrant of his house revealed the presence of approximately one ounce of crack. The upper level defendants in the Newton Street conspiracy were alleged to have been involved in a series of murders, but Donald Strothers was not connected to any of these.

I feel that the penalty for crack cocaine is unjust and uncivilized. Justice, must still be the goal of the Justice Department--without respect to an individual's race. Under the current crack cocaine laws of 100:1, Donnie received no justice. He was guilty of breaking the law and deserved to be punished, but life plus 40 years is cruel and unusual punishment. Too many young black men like Donnie are getting sentences like his and these sentences are the result of the sentencing guidelines--not the mandatory minimum sentences. If Donald were sentenced under the mandatory minimum laws, he would get 10 years and that should be more than enough punishment.

I know that Donnie got life because the guidelines are intended to be directed towards drug kingpins and violent drug dealers, not low-level, nonviolent, street dealers. In fact, your new report on crack cocaine shows that nearly 60 percent of the people who get sentenced for crack cocaine are street dealers. When are we going hear about the arrest and prosecution of the person at the top who controls the overall kingpin operation. These young black men do not have planes and boats to really transport the drugs into the country.

The only plea bargain Donnie was offered was on condition of his testimony against the other codefendants. Should Donnie receive life without parole merely because he refused to testify against other codefendants about something he had no knowledge of? Where is the justice? Was Donnie supposed to lie against the other codefendants under oath just so he could be set free? Is that the way the American justice system works?

Donnie Strothers may only be a federal ID number to the penal system, but he is a son, a brother, an uncle, and a father to his family. He is just one of hundreds--probably thousands--of Black males serving this sentence. I urge you to correct this injustice by making crack and powder cocaine sentences equal. We can send people to the moon, we can discover new technologies, but when it comes to sentencing our young Black men, we're still in the Stone Ages. When there's a wrong, you right it. The Commission has the power to correct this glaring wrong. Please do so this amendment cycle, and make your changes retroactive so my brother can have the chance to live again.

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ROCKY MOUNTAIN INSTRUMENTAL LABORATORIES, INC.

March 2, 1995

The Honorable Richard A. Conaboy, Chairman
Federal Judicial Sentencing Commission
1 Columbus Circle, N.E.
Washington, DC 20002-8002

re: mandatory minimum sentencing for possession and sale of cocaine

Dear Chairman Conaboy:

As a pharmaceutical scientist, I have been qualified as an expert in forensic toxicology and pharmaceutical analysis in Federal, military, and state courts. Therefore, I am quite concerned regarding the misinformation about drugs which often is promulgated in courts. Although your recent monograph, "Cocaine and Federal Sentencing Policy," has helped to clarify certain scientific issues, it is important to recognize that much false information continues to be presented in court. Such confusing claims even caused U.S. District Court Judge Forrester to indicate that he could "only guess" at what the Congress meant cocaine base to be (U.S. vs. Davis, N.D. Georgia, 93-CR-0234). Without clear definitions, logical discussion is not possible.

In the case of cocaine, several falsehoods are often presented as fact. In particular, these are:

1. Cocaine Hydrochloride ("cocaine powder" or cocaine HCl) and cocaine base ("crack") are different drugs.
2. Cocaine Hydrochloride may be converted to cocaine base only with great skill, known only to a few significant cocaine dealers.
3. Cocaine base is, of itself, more addictive than is cocaine hydrochloride.
4. Cocaine base causes its users to be more violent than does cocaine HCl.
5. Cocaine base is less expensive than is cocaine HCl; therefore, it is more dangerous to society.

All of the above assumptions are <u>false</u>.

1. Cocaine HCl and cocaine base contain exactly the same active molecule. Cocaine HCl is simply the salt of cocaine base and common hydrochloric acid. The only differences between so-called "crack" and so-called "powder" are due to the differences in contaminants. That is, "crack" is contaminated with baking soda (sodium bicarbonate) and washing soda (sodium carbonate), and "powder" is contaminated with stomach acid (hydrochloric acid).

Of particular concern to the Sentencing Commission may be the fact that, except for cocaine HCl obtained from a pharmacy, all "cocaine salt" contains cocaine base, and all "cocaine base" contains cocaine salt. That is, the distinction between "crack" and "powder" is arbitrary and without scientific basis. It is not possible for a scientist to state that evidentiary material is purely base or salt. This may well raise concerns about equal protection. As it is well recognized that the majority of "crack" users are Caucasian, while over 98% of "crack" defendants are Black or Hispanic, there is at least the suspicion of inequity.

2. Cocaine base and cocaine salt are interconverted many times during the manufacture of the final product. It is simply a matter of the neutralization of the HCl in cocaine HCl with baking soda, to make the cocaine base, or the addition of HCl to the cocaine base to make the cocaine salt. These conversions are easily accomplished, even by those who are illiterate or totally ignorant of chemistry. The conversion of cocaine salt to cocaine base requires only baking soda, a source of heat, and some sort of container. That is, the ostensibly less dangerous "powder" cocaine is converted to the allegedly extremely dangerous "crack" by the use of a spoon, a lighter, a few drops of water, and baking soda. The entire process requires less than one minute. The cocaine molecule is not changed.

3. The major factors in the addictive potential of a drug are the effect of the molecule on the brain and the rapidity of change of concentration of that molecule in the brain. This is why heroin is equally addictive when smoked or when injected. Note that the penalties for possession or sale of heroin base and heroin salt are the same. Similarly, cocaine HCl, when injected, is just as addictive as is cocaine base when it is smoked. The reason that cocaine base is smoked is that it is not soluble in water. Therefore, it cannot be injected. However, cocaine base does evaporate more easily than does the salt and, so, is more easily smoked. Cocaine HCl is soluble in water. Therefore, it is transferred more efficiently to the blood, and then to the brain, if it is injected or insufflated.

Once in the blood, there are no differences between cocaine molecules which had recently been in the base or salt form. The differences seen between the salt and the base are solely due to the route of administration, not to any differences in the molecules.

4. There is no credible scientific research which shows that there is a difference between the base and the salt forms of cocaine in the production of violence. Violence is associated with money, greed, and social disorganization. It is instructive that there is relatively little violence among wealthy drug abusers, even those who use cocaine base.

5. Because the salt and the base are so easily interconverted, it would not be logical for them to have different prices, absent other economic factors. In deed, the common claim that cocaine base is both more potent and less expensive flies in the face of market economics. Cocaine dealers may be evil, but it is not reasonable to expect that they are willing to pay more for less. At the wholesale level, the cost, per molecule of cocaine, is the same.

An additional proposal with regard to the relationship between drug crime and punishment is that sentences be proportional to the actual content of active drug substance sold or possessed. This would remove the often bizarre discrepancies in punishments for the possession or sale of the same effective amount of drug.

It is not difficult to analyze drug samples for the content of drug. Such testing is required by the FDA for every drug sold in legitimate commerce, and the BATF taxes alcoholic beverages according to alcohol content. Therefore, the government does recognize the validity of this concept.

The usual arguments made against this proposal are that the testing is difficult and expensive. Both arguments are just that: argument without substance. Any competent pharmaceutical analysis laboratory can perform such analyses with speed and accuracy at moderate cost. Modern, automated, analytical chemistry instrumentation obviates any such objections. Quantitative analysis also is the single most reasonable approach to relating drugs and punishment. The larger the amount of active drug that is sold, the greater should be the punishment. In the instance of marijuana, this method completely removes the arbitrary and capricious distinctions which occur due to the differences in plant size and gender.

Chemical principles also should be applied to cases of "conspiracy to manufacture." The court should be allowed to recognize that drug synthetic processes often occur with much less than 100% efficiency. That is, the amount of final product obtained in reality is generally much less than might be predicted by an ideal, but nonexistent, perfect conversion of raw material to final drug product. As a result, defendants often are charged with conspiracy or intent to manufacture more drug than they could possibly have made from the given amount of starting material in their possession.

Sincerely,

Robert K. Lantz, Ph.D.
Director

RKL:bm

TESTIMONY FOR SENTENCING COMMISSION
MARCH 14, 1994 PUBLIC HEARING
SUBMITTED BY JUANITA HODGES
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I would like to first thank this Commission for realizing that the current 100-to-1 ratio in sentencing between crack and powder cocaine is unjust and unwarranted, and for strongly recommending against it.

However, I, along with the thousands of family members of those currently serving unjustly long sentences behind this country's prison walls; including the inmates themselves; am very, very disappointed to say the least, that this Commission failed to make any significant recommendations that could have expeditiously brought and end to this madness. If young white males, were being incarcerated at the same rate as young black males, I contend that the statutes would have been amended long ago.

Further, inspite of the November 9, 1993 hearing by this Commission which produced comprehensive data and testimony that there is no pharmacological difference between cocaine base (crack) and powder cocaine, this Commission asserts in its report that "[cocaine base] crack may be more harmful than powder cocaine" and "[cocaine base] crack cocaine poses somewhat [of a] greater harm to society". To this end this Commission in its report listed 11 enhancements which it intends to consider adding to the already overburden sentencing guidelines.

Most of the enhancements however, are already covered in the current guidelines and the remaining, if incorporated in the sentencing guidelines can, and should be, used as determining factors not only in the sentencing of cocaine base offenses but all drug related offenses, as all drugs pose the same threat to society, including the legal drugs, such as alcohol and tobacco products. I contend that further enhancements made only in reference to cocaine base offenses will only serve to cause similar disparities in sentencing which resulted from the 100-to-1 quantity ratio between powder cocaine and cocaine base. There should be no further enhancements adopted for cocaine base offenses, this Commission should recommended and adopted the only ratio based on facts and that is a 1-to-1 at the current levels set for powder cocaine.

Crack is cocaine. Scientists such as Dr. Charles R. Shuster, Director of the National Institute on Drug Abuse, have pointed out that "cocaine is cocaine is cocaine", whether you take it intranasally, intravenously or smoked it, the effects are the same. Dr. Shuster, provided testimony that supported the dangers of cocaine and gave statistical data on cocaine related deaths. He further testified that cocaine related deaths had increased. His report did not distinguish among smoking powder cocaine, smoking cocaine base (crack) or freebasing cocaine. He did state, however, that both the ingestion of cocaine in the form of crack or in liquid form intravenously equally provided rapid and euphoric responses for the user (it should be noted that crack is usually smoked and that powder cocaine can also be ingested by smoking).

In addition, Dr. Charles Schwartz, an expert in pharmacology and toxicology, testified that cocaine powder and base cocaine (crack) have the same effects on the body and temperament, and than no method of ingestion is more addictive than another: smoking (base cocaine) crack is not more additive than snorting powder cocaine. In fact he testified that three times as many deaths are reported from ingestion of cocaine nasally. [Transcript, Vol. II 55:6.] He also testified that the intravenous route was far more dangerous than any other methods of ingestion and that it is the leading cocaine-related threat to both the user and society. And from a public health perspective, injecting cocaine intravenously increases the threat of infections, including HIV and hepatitis. In addition, heart and lung problems are much more common among intranasal users.

In reference to the "crack babies", studies have shown that the "crack baby" scare has been overblown; and that many of these infants suffer as a result of other social factors. If there are going to be enhancements for selling cocaine base to pregnant women, which supposedly results in the birth of crack addicted infants, on the bases that all things being equal, this Commission should consider the needs to address issues of Fetal alcohol syndrome, in which the danger to unborn infants is just as great or even greater.

The Sentencing Guidelines were promulgated by this Commission to provide certainty and fairness in sentencing and to eliminate unwarranted sentencing disparities. The Commission was commanded to assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders. To apply enhancements to base cocaine offenders on the basis of it low cost discriminates on the basis of class, and this type of drug abuse policy which disproportionately impacts lower income people is neither logical nor effective. Base cocaine is no cheaper than powder cocaine because powder cocaine is the essential product of base cocaine. All forms of cocaine are available today in greater quantity and at lower prices than a few years ago.

Furthermore, there is no evidence that the use of base cocaine (crack) makes the user physiologically or psychologically more prone to violence or other antisocial behavior than does the use of powder cocaine. [Schwartz Testimony.] See Substance Abuse: A comprehensive Textbook, "Cocaine (and Crack): Neurology" (Gold, Miller, Jonas, M.D.s) P.225 [Def. Exh. 4V.] Moreover, researchers have concluded that the short-term and long-term effects of crack (base) and powder cocaine are identical. see, Peterson, David, Powder, Crack Effects called Same, Minneapolis Star Tribune, Oct. 18, 1991, at 1B (Remarks of Minnesota), cited in U.S. v. Wills, 967 F.2d. 1220, 1226 (8th Cir. 1992) (Heaney, J. dissenting).

Dr. Warren James Woodford, has a doctorate in chemistry and has undertaken post-doctoral studies in medical chemistry; Dr. Clinton Kilts is presently on the faculties of the Department of psychiatry and the Department of Pathology at Emory University School of Medicine; Mr. Joey Douglas Clark has a master's degree in chemistry and works as a forensic chemist; and Dr. John Marshall Holbrook holds a degree in pharmacy and a doctoral degree in pharmacology with an interest in controlled substances.

All four of these qualified experts testified at an evidentiary hearing that in the scientific community, the term "cocaine base" is synonymous with cocaine. And that in the scientific community cocaine base has no other meaning. They also unanimously agreed that the term "crack" as it relates to cocaine substance does not have a fixed meaning in the scientific community and that the term has it origins with illicit drug abusers. In other words, "crack" is the street name given to the solidified form of cocaine because of the crackling sound it makes when it is smoked. (see, U.S. v. Ricky Davis & Kerru Jones F. Supp. -- 63 USLW 2199 (Cited as: 1994WL 487849(N.D.Ga)),

In his state of the Union Address to this nation earlier this year President Clinton, stated that recommendations and decisions should be left to the experts, those who knows best, who have first hand experience in dealing with the problem or problems. In my opinion the experts in chemistry and pharmacology would be persons such as the individuals quoted above. And in criminal proceedings the experts would constitute judges, criminologist, criminal researchers, prison wardens and other corrections professionals, criminal justice practitioners, and the criminals themselves.

In a February 4, 1994 report conducted by the United States Department of Justice for the Office of the Attorney General, it was reported that the amount of time inmates served in prison does not increase or decrease the likelihood of recidivating either when time served is examined alone in relation to recidivism, or when controls are introduced for demographic variables including age, eduction, work experience, prior arrest, convictions, and incarcerations, drug and alcohol dependence, and post-release living arrangements. In fact it was reported because both marital stability and post-release income are strongly related to reduced likelihood of recidivating, anything, including a long prison term, that erodes marital stability or reduces employability will likely increase recidivism.

Senator Paul Simon in commenting on his survey of prison wardens and inmates, said that, "...We've just passed the dubious milestone of having one million people in prison. But for all the new prisons we've built and filled over the last two decades, we feel less safe today than we did before. Loading our prisons with nonviolent drug criminals means that, today, we are committing more nonviolent offenders to hard time than we are violent criminals, and there's little room left for violent offenders who should be put away to make our streets safer...".

In Senator Simon's survey 58 percent of the wardens who responded did not support mandatory minimum penalties for drug offenders; they overwhelmingly chose prevention programs, especially those addressing basic human needs when asked to identify the most effective way of fighting crime. 71 percent said improving the educational quality of public schools would make a difference in fighting crime; 66 percent favored increasing the number of job opportunities in the community; and 62 percent endorsed developing programs to help parents become better mothers and fathers.

In contrast, only 54 percent said longer sentences for violent criminals would have a major effect on crime, and only 8 percent supported longer sentences for drug users. 93 percent of the wardens surveyed recommended a

significant expansion of literacy and other educational programs in prisons. Even they can see that it was senseless for Congress to eliminate all funding for pell grants for prisoners.

The following are comments from experts in the field of corrections and criminology who responded to Senator Paul Simon's survey...

Chase Riverland, Secretary - State of Washington, Department of Corrections: "...The nation cannot withstand the enormous cost of incarceration, which is becoming the solution of choice for all social problems: drugs, mental illness, and hopelessness. The proposed stripping of the preventive measures from the crime bill is at best "Drive-by legislation", arguably continuing to promote that increased incarceration can "fix the problems of crime and violence. Sadly, few who work daily in criminal justice believe that...".

Commissioner Joseph Lehman, Pennsylvania Department of Corrections: "...The discussion we need to have is not over prisons but whether we are using them in a cost effective manner. The debate we should be having is whether we are making the sorting decision effectively. Are we locking the right offenders up? Is the criteria we are using appropriate?...

...The conclusions to the survey based on the prison administrators' responses would suggest that the answer to these questions is, all to often, a resounding NO."

David Kopel, Associate Policy Analyst at the Cato Institute in Colorado: "What the wardens are saying is exactly what many criminologists have been saying for years. Fighting the "drug war" through imposing draconian mandatory sentences on first time, non-violent offenders is unjust and ineffective. Mandatory minimums for drug offenses endanger society by reducing prison space for repeat violent offenders. And mandatory minimums undermine the moral basis for the criminal law, by destroying the principle that the punishment must be commensurate with the crime."

"Professor Philip B. Heymann, Director of the Center for Criminal Justice, Harvard Law School - Massachusetts: "...We do not have to help states emulate the federal government which, at Congress' command, has been filling thousands upon thousands of its cells with drug offenders who have no prior convictions, no record of violence and no important role in any significant drug organization; and who are serving congressionally specified sentences much longer than most violent criminals, far longer than the tough-minded federal Sentencing Commission would set, and longer than some of our most distinguished judges have been prepared to impose, despite the clarity of the mandatory minimum statutes. The common sense view that this is folly - is also the view of our nation's prison wardens."

"...The Congress should hold hearing on what works, and what does not work, before plunging ahead again with what "feels good" and "sells well..." "...The country is entitled to more safety, not more posturing."

E. Michael McCann, District Attorney, Milwaukee County, Milwaukee, WI, Chair, ABA Criminal Justice Section: "...Mandatory minimum sentences and other policies that substantially increase our reliance on incarceration are costly and

ultimately ineffective ways to combat many crimes, particularly nonviolent crimes. Alternative forms of punishment for nonviolent offenders that cost less but still hold criminals accountable for their crimes, such as community-based corrections plans, will free up prison and jail space so that violent predatory criminals can be kept off the streets."

Perry Johnson, Former Director of Michigan Department of Corrections, Former President of American Correctional Association: "...the results come as no surprise to me", he stated,. "Namely, that the wardens call for additional crime prevention programs, smarter use of prison resources, the repeal of mandatory minimum sentences, and an expansion of alternatives to incarceration and believe that elected officials are not offering effective solutions to the U.S. crime problem..."

"...As a former warden and director of corrections I recognized long ago that prisons have limited potential for control of crime -- prisons come into play far to late and leave the sources of the crime problem untouched...".

Marc Mauer, Assistant Director The Sentencing Project - Washington D.C.: "...Incarceration is expensive and should be used as a last result, if no other sanctions are appropriate. Viable alternatives that are more-cost effective than prison can be developed for many offenders currently incarcerated..."

"...The current "get tough" movement is hardly a new idea, but rather a continuation of policies that have been tried for two decades. The quadrupling of the prison population since 1973 has not left Americans feeling safer and has diverted resources from more productive crime control strategies. An effective crime control strategy should avoid "quick-fix" solutions and should address the appropriate mix of punishment and prevention that is needed to create safe communities."

Politicians are saying "We're getting tough on crime, with a "Zero" tolerance, we intend to lock away criminals and throw away the keys". On the other hand the experts are saying "you are locking up the wrong people, and the amount of time that is being imposed upon them is unjust", In other words the "punishment does not fit the crime."

Should we give one thought of consideration to the possibility that the experts in the field of chemistry and pharmacology, are speaking sensibly, when they assert that the only difference between powder cocaine and cocaine base is the means of ingestion? Or the experts in the field of criminology who assert that imposing draconian mandatory sentences on drug offenders is illogical, ineffective and unjust. Or are they all wet, and just radicals that survived our educational system without getting an education??? Should we not utilize their knowledge and expertise to make meaningful and rational decisions in matters which ultimately affects so many lives? Or should we, as in you, Mr. & Mrs. fair and just American, continuously rely on the media and politicians to make decisions for us?

I contend to this Commission that the time has come to put an end to injustice within the criminal justice system; to stop filling our prisons with nonviolent drug offenders and to use less costly community based alternatives.

These measures will enable families to stay together, help to keep our communities intact, as well as hold offenders accountable for their actions. Also, it would substantially lower the enormous cost to tax payers of approximately $23,000 a year per inmate.

Furthermore, it would seem to be economically sensible to devote scarce government resources to reducing the large ingress and wholesale distribution of powder cocaine by major traffickers which would consequently reduce the existent of base cocaine (crack) as a derivative product. For **without powder cocaine, there could be no base cocaine (crack)!**

However, both national and local statistical data do no show that prosecutions are targeting the upper echelons in the drug trade. Few kingpins are prosecuted. Powder cocaine is usually imported into this country by boats, trucks and planes, and in huge quantities. None of which, more often than not, are owned by street-level dealers who are filling this nations prisons and jails. Subsequently however, most street-level dealers are given managerial roles, thus sentence enhancements, under conspiracy laws which lands them into the prison system anywhere from 30 years to life and beyond; this also includes first time offenders, many with no prior convictions.

Sadly, the focus on the prosecution of numerous of low lever base cocaine dealers appears to be a national policy, perhaps designed to give the impression of great victories in the "War on Drugs". But such a misguided approach to the elimination of drug trafficking has resulted in the necessity of expensive prisons. It has also genocidally decimated a generation of African Americans, by destroyed the lives of thousands of young African American men during the most productive times in their lives, at the flowering of their manhood, many with no prior criminal record. And most importantly, the "war on drugs" has not reduced the quantity of drugs saturating our nation.

Thus, it would appear that the only ones profiting from the overwhelming high prison populations of this country are the demagogues such as politicians in furtherance of their political careers; and the businessmen such as those who stood up and cheered when Senator Edward Kennedy announced that Fort Devens would be converted to a federal prison.

The fact that African Americans are punished more severely for violating the same law as Whites Americans is not a new phenomenon. A dual system of criminal punishment based on racial discrimination can be traced back to the time of slavery. Prior to the civil rights era, Congress repeatedly imposed sever criminal sanctions on addictive substances once they became popular with minorities. Historically, as well as currently, a consortium of reactionary media and subsequently inflamed constituency have combined to influence Congress to impose more severe criminal sanctions for use of narcotics once they become popular with minorities.

And although moderate strides have been taken, we cannot continue to fool ourselves into believing that our decisions are free from the influences of this country's legacy of racial subordination and discrimination. If so, we will "remain imprisoned by the past.

So, why not punish the possession and distribution of powder cocaine with equal severity as cocaine base?...AFTER ALL COCAINE IS COCAINE!...Neither should be punished less than or more than the other: they are equal in their harm to society and destruction of individual lives and the punishment should be the same for both. To impose a more severe penalty on a derivative source of an illegal narcotic while the principal source of the drug is tolerated is illogical. In all actuality, if any enhancements would be justified, it would to be to penalize powder cocaine more severely, for without powder cocaine the derivative base cocaine (crack) would cease to exist!

You can not stop a run away freight train by grabbing hold of the caboose, it is the engine you must contend with; and in this war on drugs "cocaine base" is the caboose and "powder cocaine" is the engine; eradicate powder cocaine and you stop base cocaine, crack, dead in its tracks!

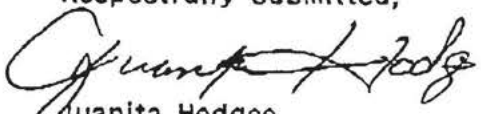
In conclusion, we contend, that this Commission has at hand, the golden opportunity to correct a grievous wrong. We realize that your job is one that will takes courage; a righteous conscience; and a God fearing heart. We beseech that this Commission would please bear in mind that there are thousands of family members of those serving unjustly long sentences impatiently waiting for this racially discriminatory policy to be rectified.

Further, we implore this Commission to do the only humane and just thing to do. Recommend that Congress adopt a 1-to-1 ratio thus equalizing the penalties between base cocaine and powder cocaine; and that this becomes retroactive so that those now in this country prisons sentenced under the cocaine base statues would be given a second chance to join society and live productive and meaningful lives.

To quote the late Dr. Martin Luther King, Jr. "Cowardice asks the question, is it safe? Expediency asks the question is it polite? Vanity asks the question is it popular? But conscience asks the question is it right?...And there comes a time when one must take a position that is neither safe, nor polite, nor popular...But one must take it because its right!

On behalf of the members of Seekers of Justice Equality & Truth, Inc., as it founding Director, I would like to thank this Commission for giving me the opportunity to testify before you concerning this important issue.

Respectfully submitted,



Juanita Hodges
Director

References quoted: US v. Clary, 89-167 CR (4); Dis. Missouri; US v. Davis & Jones, 1994WL 487849(ND Ga.); Crack and the Evolution of Anti-Drug Policy, Belenko, 1993; Senator Paul Simon's Survey, Dec. 21, 1994; Article Wall Street Journal, Thursday, May 12, 1994: Making Crime Pay; Comments to US Sentencing Commission by Nkechi Taifa, ACLU Legislative Counsel: Disparity In Penalty Between Crack and Powder Cocaine, March 18, 1994; Myths about "Crack Babies", Educational Leadership, Oct. 1994 v52 n2 P67(2).

MARCH 14, 1995

SOCIETY FOR EQUAL JUSTICE
1803 S. INDIAN CREEK DRIVE
MOBILE, ALABAMA 36607-2309
(334) 473-3268

DISTINGUISHED MEMBERS OF THE US SENTENCING COMMISSION: MY NAME IS FREDRICK D. RICHARDSON. I CAME HERE TODAY FROM MOBILE, ALABAMA WHERE I LIVE. THANK YOU FOR ALLOWING ME THIS OPPORTUNITY TO SPEAK ON BEHALF OF SOCIETY FOR EQUAL JUSTICE. MY REMARKS WILL SPECIFICALLY ADDRESS THE SUBJECT OF PROSECUTORY ABUSE OF THE FEDERAL CONSPIRACY LAW.

According to your latest Sentencing Commission's [1]report, 88% of inmates convicted of cocaine charges are BLACK; yet according to your study, 65% of cocaine users are WHITE. Well, in 1992 this [2]Commission found that out of 2,070 defendants sentenced for selling crack cocaine, 92% were Black. When will this obvious *prima facie* injustice change? If we always do what we always did, we'll always get what we always got. THE LAW MUST CHANGE or we can expect more of the same.

We are provided above with only a glimpse of the problem of inequity within the criminal justice system: Much of it is to the demise of the African American Community . When we see that 65% of cocaine users comprise less than 12% of convicted drug felons, we must also conclude the 88% incarcerated on drug charges were targeted for selected treatment. How did this happened? By arbitrarily assigning a criminal value to crack cocaine such that 1 gram of crack cocaine is was made to be equal to 100 grams of its powered base; without any pharmaceutical data to support that claim. And by covertly and cunningly misusing the US DRUG CONSPIRACY law in a manner which disproportionately and negatively impacted the African American community. I would like to address the latter today.

CONSPIRACY is an agreement between two or more persons to commit an unlawful criminal act, by taking steps to effect the plan. Under the SHERMAN ANTI-TRUST ACT, CONSPIRACY by business in restraint of trade has been punishable since 1890. During the Civil Rights struggle CONSPIRACY was applied to organizers of demonstrations as inciting participants to riot. But more recently, CONSPIRACY has been extended to include drug trafficking, making it a

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[1] Author. "US Sentencing Commission Report." USA Today 2-2-95: Pages.

[2] Bill Rankin. "CRACK COCAINE LAW DECLARED RACIST. ILLEGAL." Atlanta Constitution January 19. 1994: Pages.

federal crime to conspire to distribute illegal drugs. However, according to British Information Services in New York, the United Kingdom has no such conspiracy laws in regards to illegal drugs: Possession is the rule in the United Kingdom and also for many other industrialized nations of the world. We desire the same.

It has been established that the act of CONSPIRACY takes more than one person. Therefore it is important to review government INFORMERS, who make up the other party to the charge of CONSPIRACY. Over and over again the informer pro-to-type has been one caught with his own hands in the cookie jar; that is, with actual possession of illegal drugs; or, one already serving time in federal prison and seize the opportunity to provide fabricated testimony because that's his only way out.

The chief of the Criminal Division in the Reagan Administration, now a judge on the 9th U.S. Circuit Court of Appeals, offers this chilling warning in a lecture to federal prosecutors: [3]"Criminals are likely to say and do almost anything to get what they want, especially when they want to get out of trouble with the law". Judge Stephen S. Trott went on to say, "This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies and double-crossing anyone with whom they come into contact, including and especially - the prosecutor". A person convicted and sentenced to life in prison without hope of parole has absolutely nothing to lose and everything to gain, by cooperating in the collusion of false testimony against an innocent person.

In this regard, I have attached for your information, SWORN NOTARIZED AFFIDAVITS from co-conspirators used as government informants, all within the Southern Judicial District of Alabama, who all recanted their previous testimony. They all admitted to LYING on the witness stand. In a notarized statement dated June 29, 1994, Derrick Robinson 04352-003 admitted his testimony against David Coleman 04641-003 was false, in a drug CONSPIRACY case, when he stated:

> "My testimony against David Coleman was totally false and planned by an unlawful coherence with Ms Christi Lee, U.S. Asst. District Attorney"
> (See attached statement marked EXHIBIT -1 & 1-A)

Another federal inmate Jimmy Young 41878-004, who testified against Noble C. Beasley, a renown civil rights leader, in another drug CONSPIRACY case, also recanted his testimony in a notarized statement dated 10/31/91, by writing the following:

> "I am Jimmy Young, an federal inmate in Jesup, Ga prison camp.

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[3] Mark Curriden. "Secret Threar to Justice." The National Law Journal February 20, 1995: pp. 1. 28 & 30.

Has testified against your client Noble Beasley. I am sorry for the suffering I have caused your client and his family. All testimony that I gave during the course of the trial against your client was cohered by the U.S. Attorney Office. It was fabricated by the U.S. Attorney....I was told what to say on the witness stand" (EXHIBIT-2 & 2-A) Note: Beasley is still serving life without parole. Atlanta Federal Prison.

Cherol Burke, a crack cocaine co-conspirator also a government witness against Noble Beasley, recanted her testimony in a notarized statement dated June 30, 1992 when she stated:

"In order to coerce my untruthful testimony I was denied counsel and threatened with additional jail time if I did not cooperate. I yielded to this severe pressure and took the stand and LIED about my knowledge of Noble Beasley's involvement in said drug conspiracy. Everything I testified to concerning his involvement was untrue" (SEE EXHIBIT-3).

Bruce Montgomery, a crack cocaine co-conspirator, submitted a notarized statement dated March 16, 1993, detailing his role in providing FALSE testimony for federal agents to make a drug CONSPIRACY case against Daryon Sharp, when he wrote:

"Mr. Huntley cane to interview me with agent Gary Clem again, and this time he promised me a five (5) year sentence if I was to cooperate with the government and say the things he wanted me to say concerning my co-defendants and the alleged drug operation. I would like to add at this point that I have a convicted co-defendant by the name of Daryon (Buck) Sharp who I TESTIFIED AGAINST FALSELY....I feel real bad about LYING on Buck in court, but I had to say what they told me to in order to help myself" (SEE EXHIBIT-4 & 4-A).

Co-conspirator Ronnie Anthony Rankins 99590-012 who was a prime witness for the federal government's crack cocaine drug CONSPIRACY charge against Algernon Lonnie Lundy. He provided a notarized statement dated April 21, 1994, in which we wrote:

"I aided these government officials in breaking the law by conspiring with them in LYING to judge vollmer and the juriors about a man's involvement in a drug case. ...I am speaking of Donna Barrows, Assistant US Attorney; Cliff Chatam, FBI Agent; Dan Williams, FBI Agent; Craig Underwood, IRS Agent and Jeff Sessions, the US Attorney in Mobile, Alabama. They fabricated a story concerning one man's involvement in a drug case. I am sorry and must do the right thing by telling the truth...I was told over, and over to LIE " (SEE EXHIBIT 5 & 5-A).

Michael Levine, a DEA and Customs agent for 25 years who retired in 1990 and wrote his memoir called DEEP COVER stated [4]"no doubt, reliance on informants has replaced good solid police work like undercover operations and surveillance". Are we to believe our federal government is unaware of crime fighting tools such as infrared zoom binoculars that provide extremely powerful viewing even in the darkness of night. Crooks can't hide under the cover of night when infrared is used. Could the federal government not afford body microphones for informants and agents? What of those powerful sensitive listening devices, which when aimed in a specific direction can pick up sound from blocks away. There are many other tools of the trade a trained investigator and informers can use to catch drug traffickers.

Yet, over and over again, the federal government has relied on gossip, hearsay, he-say and she-say as evidence enough to gain drug convictions; and that is without any physical evidence presented, only testimony. A disproportionate number of those convicted, at least in the Southern District of Alabama are Black and more often than not the method was drug CONSPIRACY.

Although I was unable to gain national statistics regarding the number of persons convicted in federal court of actual possession of crack cocaine as compared to persons convicted in federal court of conspiring to distribute crack cocaine, I was able to go to the federal district court in Mobile, Alabama and obtain such records. From 1989 to 1990, I was hard pressed to locate the record of one person convicted of actually having in their possession, crack cocaine. I had no problems locating the records of 131 persons convicted in the Southern Judicial District of Alabama of CONSPIRING TO DISTRIBUTE CRACK COCAINE. Multiply that figure time the number of cities in this nation the size of Mobile and larger and you will almost have the 15,124 persons convicted on federal drug charges in the United States during 1990. For your information, I have published below persons convicted of drug CONSPIRACY from 1989 to 1990 in Mobile, Alabama:

DEFENDANT	DATE FILED	CHARGE
Adams, Jeffrey	5-9-90	Conspiracy to distribute crack cocaine
Ahmadi, Timithy	4-6-90	"
Aljeandra, Lnu	11-29-89	"
Allen, Catherine	7-21-89	"
Amelung, Todd	9-21-89	"
Andrew, Schell	5-2-90	"
Augustine, Michael	5-8-90	"
Barlow, Frances	5-8-90	"
Beasley, Noble	2-13-90	"
Blackwell, Raymond	3-7-90	"
Blevins, Lester	6-8-90	"

[4] Mark Curriden. "Informants. Investigators Depend on Each Other." The National Law Journal February 20. 1995. Monday ed.: A30.

Blevins, Lillie	6-8-90		"
Blevins, Lydell	6-8-90		"
Blevins, Williams	6-8-90		"
Boggio, Casar	11-28-89		"
Burroughs, Brenda	3-5-90		"
Boyce, Thella	5-9-90		"
Breland, Alfredo	5-8-90		"
Brown, Thelma	2-13-90		"
Brussell	2-2-90		"
Burroughs, Shirley	3-5-90		"
Bush	5-1-90		"
Clark, Woodrow	3-5-90		"
Cochran, Dora	3-7-90		"
Cochran, Glenn	3-7-90		"
Cortez, Fabio	3-5-90		"
Couacevich, Lisa	3-5-90		"
Daniel, John	3-5-90		"
Daniel, Lnu	3-5-90		"
Davis, Herbert	5-8-90		"
Delisser, Eamon	3-5-90		"
Dickens, Frank	3-7-90		"
Dickenson, Rodney	3-5-90		"
Dorsey, Tonya	5-8-90		"
Dunn, Boian	5-8-90		"
Durrance, Frances	6-12-90		"
Ellis, Billy	3-5-90		"
Ellis, James	3-5-90		"
Enrique, Leon	5-8-90		"
Faricloth, James	3-7-90		"
Feder, Larry	5-2-90		"
Flores, Delores	5-8-90		"
Garcia, Alfredo	11-29-89		"
Garcia, Pedro	5-11-90		"
Gaston, John	5-8-90		"
Gaston, Robert	5-8-90		"
Glass, Cindy	5-9-90		"
Gomez, Angelo	5-11-90		"
Geon, Rilliams	5-11-90		"
Gureain, Ralph	4-19-90		"
Gutierrez, Felix	5-8-90		"
Hall, Timothy	6-19-89		"
Hamlin, Frankie	4-2-90		"
Hernandez, Orlando	5-8-90		"
Herron, Terry	2-13-90		"
Hotchkiss, Leon	4-2-90		"
Huntley, Clayton	9-2-89		"
Iglasais, Roberto	5-8-90	"	
Ignots, Donald	3-5-90		"
Jackson, Darrell	3-5-90		"
Jackson, Dowling	3-5-90		"
Jackson, Earnest	3-5-90	"	
Jackson, John	3-5-90		"
Keackel, Corkey	5-9-90		"
Keys, Ramona	4-19-90		"
Lapointe, Kathy	6-12-90		"

Lewis, Milton		5-8-90	"
Linares, Tourad		9-21-89	"
Logan, Robert		1-11-89	"
Love, Samuel		6-12-90	"
Lowe, Nanacy		3-7-90	"
Marlowe, Clint		5-8-90	"
McCord, Eagan		5-9-90	"
McQuire, Matthew		3-7-90	"
McQuire, Leroy		5-8-90	"
McMillian, Alfred		5-8-90	"
McVeay, Tenya		3-5-90	"
Miller, Jimmy		3-5-90	"
Miller, Roxanne		3-5-90	"
Moneke, Willie		10-3-89	"
Montgomery, Betty		5-9-90	"
Monreo, Jose		5-8-90	"
Mosley, Christine		1-30-90	"
Nunn, Henry		5-8-90	"
Nodd, Torey		2-13-90	"
Peck, William		3-19-90	"
Pelace, Alberto		11-29-89	"
Phillip, Lnu		5-8-90	"
Portis, Robert		1-30-90	"
Pressley, Tameka		9-13-89	"
Preyer, Nancy		6-27-89	"
Ray, Ken		5-9-90	"
Reed, Joel		3-7-90	"
Reed, Rex		3-7-90	"
Rider, John		4-2-90	"
Rigsby, Barbara		3-5-90	"
Rigaby, Jim		3-5-90	"
Robinson, Paul		5-8-90	"
Rodriguez, Luis		5-8-90	"
Roper, Charlotte		6-12-90	"
Salazar, carlos		4-19-90	"
Salter, Enoch		4-19-90	"
Salter, Theresa		5-8-90	"
Scott, Gregg		5-8-90	"
Scott, Tory		5-8-90	"
Sellers, Sam		5-8-90	"
Sorensen, Jean		3-19-90	"
Springstein, Ray		5-9-90	"
St. Anaamt, Beqatrice		5-8-90	"
Stanberry, Richard		2-13-90	"
Stewart, Jimbo		5-9-90	"
Stoeffler, Gay		3-5-90	"
Stone, David		5-8-90	"
Thomas, Michael		5-8-90	"
Thompson, David		11-10-89	"
Torbert, Michael	11-6-90		"
Valdez, Evelyn		5-8-90	"
Vasquez, Jose		5-8-90	"
Vasquez, Rene		5-8-90	"
Walden, Lonnie		3-5-90	"
Wells, Donald		3-7-90	"

White, Andra	2-13-90	"
Williams, Patsy	3-5-90	"
Wilson, Frances	3-7-90	"
Young, David	6-27-89	"
Young, Jimmy	6-27-89	"
Young, Marshall	6-27-89	"
Young, Morris	6-27-89	"
Young, Rosalie	6-27-89	"
Young, William	4-18-90	"

The number of drug-related cases handled by U. S. prosecutors have almost tripled; from 11.8% in 1980 to 32.8% in 1992, according to a USA Today [5]Report dated June 23, 1994. The report went on to list the top 10 districts/cities with the highest percentage of cases involving drugs. Mobile was in the top 10 cities, ranking above Baltimore and Philadelphia who each have more than 1 million in population: Mobile has 200,000. The report went on to show that more than 75% of all cases processed in the Southern Judicial District of Alabama were drug related. This fact of leading the nation in drug convictions is not at all coincidental for Mobile. It merely mirrors what is shown on the above table of defendants. And the turbo engine propelling this rapid rate of Crack cocaine convictions in our community is drug CONSPIRACY. Removing, over and over again, family members and love ones from the streets of this nation has not resulted in the removal of illegal drugs that continue to plague this nation.

On that above list of defendants, convicted in the Southern Judicial District of Alabama of drug CONSPIRACY charges, are many whom I know personally. Paul Robinson, a young working family man. I know Paul. He never had any prior problems with the criminal justice system. His parents are role models in the African American community. Paul was a new car sales representative. If you notice, the date his case was filed in court was 5-8-90. You will also notice many others were charged on the same date. That is because the government's co-conspirator fingered Robinson among others who were all caught up in a drug CONSPIRACY drag net. And although no drugs were ever presented in court, Paul Robinson was sentenced to a minimum of 10 years to life in federal prison. We are helpless and hopeless in preventing such a travesty. This Commission must recommend action to correct this blatant miscarriage of justice. So many are depending of your help.

The Young family at the end of the list, I met them also in their search for justice. This White family operated a lucrative printing business on their prime hunting property in West Mobile County, near the Mississippi line. Many wealthy

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[5] Sam Vincent Meddis, "Trenches of Drug War Deeper in some cities," USA Today 23 June 1994: 4A.

hunters sought to purchase their property. They refused to sell. Drug agents came and arrested the parents and children; confiscated the property and sent the entire family to federal prison on drug CONSPIRACY charges. They too were helpless and hopeless against a system as powerful as the federal government.

I met the family of Algernon Lonnie Lundy. Lonnie is a White man, who is listed on page three (3) of this document. He was a young hard working family man who became the target of local law enforcement officials. They were able to carry out their personal vendetta by resorting to the federal drug CONSPIRACY law. Yes, I was in federal court when the government's witness, Ronnie A. Rankins, the co-conspirator, recanted his former testimony and told Judge Vollmar of LYING on the witness stand when he testified previously against Lundy. Still Lundy is serving life in federal prison. History has shown this system will not correct itself. Families across this nation is at your mercy. I am here today to speak for the many families across this nation, who are no different than those mentioned above; who also need your help in retrieving their sons and daughters from an unjustified penal system.

Noble Beasley, who is listed with the defendants on this document, was the prime character of my book entitled THE GENESIS AND EXODUS OF NOW. I know him well. Beasley was raised without a mother or father in his home, and without a sister or brother. He was determined to make it anyhow. He managed to finished high school. He joined the Army and served his country. He worked at the US Postal Service and he finally became a merchant marine. He got married and saved his money to start a business. When he came off the water he went into business. Things were going fine for he and his family. Things began to change in 1968. That's when the Civil Rights Movement hit Mobile and he joined. He became president of Neighborhood Organized Workers, which served as the driving force for change and inclusion. The system set out to stop Beasley and NOW. Assistant Attorney General , Department of Justice, [6]Drew Days, confirmed that Beasley was on the FBI's COINTELPRO list (Counter Intelligence Program) which targeted Black leaders for unwarranted investigation. In the mid 70's Beasley was convicted on a number of federal CONSPIRACY charges and sent to prison for 33 years. His case was remanded back to Mobile and he was eventually set free. But they came back in 1990 and charged him again with drug CONSPIRACY and sent him to federal prison for life, with parole, without federal agents ever producing one grain of crack, let alone a gram.. They did it merely on the strength of someone else testimony. And even that government witness, Jimmy Young, recanted his former testimony, as listed on page 2 of this document. The government is not about to undo what it did to Beasley or any other inmate. Well who than can help Beasley

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[6] Jonathan Shaapiro. "Letter Fron Attorney Jonathan Shapiro to Hon. Drew Days." Washington. DC. 18 June 1979.

and others like him? You the Commission can, by recommending a repeal of the federal drug CONSPIRACY law.

Our organization contacted U.S. Attorney Janet Reno of the US Justice Department and asked her to conduct an investigation in the Southern Judicial District of Alabama regarding the many government witnesses who contacted us concerning FALSE TESTIMONY they provided with the help and coaching of federal prosecutors and drug agents. To our dismay, our request was forwarded to the same office we wanted investigated. We are at wits end. We request your help.

This madness has got to stop. None of the people listed on the table above were caught with drugs. They all were sentenced on the strength of another person's testimony. All too often what we find is a federal drug task force, comprising of DEA agents, FBI, law enforcement agents from state and local municipalities. Based on sheer gossip, local officers are able to evoke personal prejudices by making a raid on whoever they please. Most often, persons caught up in the raid are African Americans or poor whites.

Armed with Carte Blanche authority to arrest at will, at any level, using a disguise and cover of drug CONSPIRACY, small wonder our nation's prisons are running over. [7]United States has highest rate of incarceration than other industrialized country in the world except Russia, according to The Sentencing Project. The United States has the worse drug problem. And Blacks, according to the same report, are incarcerated at six (6) times the rate of Whites. Drug CONSPIRACY is the main culprit responsible for the high rate of incarceration for Blacks and poor Whites. This should stop; this must stop.

In closing, consider the fact that much of the evidence in drug CONSPIRACY cases is imaginary. Yet over and over again it is imagined by federal prosecutors that Blacks and poor Whites had crack cocaine and not powder, some fictional date of the past. And although there are no drugs, crack is almost always charged because it carries a stiffer sentence than powered cocaine. And since no actual drugs are available for examination at the trials, the amount a suspect is charged with is always imagined by drug officials to be enough to incarcerate the defendant from 10 years to life, without hope of parole. It is high time to end confiscating imaginary drugs while real drugs can be purchased almost on any street corner. We want agents to confiscate real drugs from our communities.

For the sake of justice and common sense, I recommend a revocation of the drug CONSPIRACY LAW. We beg you to recommend the same. After all,

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[7] AP- Washington. "Inmate Population Reaches a High." Mobile Press September 13. 1994. Morning ed.: 3-A.

crowding federal inmates in prisons across the nation , on a charge of drug CONSPIRACY has not resulted in a reduction in crack cocaine by one iota. Quite the contrary, since 1986 we have more than doubled our incarceration rate, as a direct result of emphasis on crack cocaine. Yet we have more crack and powered cocaine available today, on our streets, than ever before. The notion that drug convictions are evidence that authorities are somehow diminished the supply of illegal drugs is merely pretextual. Even the casual observer knows that unless those supplying and distributing illegal drugs are targeted, whatever else is done is merely an exercise in futility. Simply put, the means don't justify the end as Blacks have already paid a much too higher price in a drug war where the real enemies to society have never been identified or exposed and their cocaine supply have largely gone untouched.

One behalf of Families For Equal Justice, I thank you for providing me an opportunity to speak and I just hope you give full consideration to our recommendations.

FREDRICK D. RICHARDSON

EXHIBIT-L

SWORN AFFIDAVIT

NOW COMES I, Derrick Robinson 04352-003, aka "Lolly Pop", hereby admit that my testimony against David Coleman 04641-003, aka "Day-Day", was totally false and planned by an unlawful coherence with Ms. Christi Lee, U.S. Asst. District Attorney.

The statements and testimony against a person known as "Day-Day" from Mobile, Alabama were ~~true, however, David Coleman~~ is not the "Day-Day" I know and were dealing cocaine with in Mobile. I have never seen Mr. Coleman before I walked in the court room to testify. I asked Ms. Lee if I would receive a time reduction and she said there would not be any reduction; I told Ms. Lee that I did'nt want to testify against David Coleman, if there was not a time reduction. Ms. Lee told me if I did'nt cooperate with this prosecution that I would have my previous time reduction taken away, therefore, receiving the court imposed sentence of 17½ years imprisonment, if not more. Mr. Henry Brent, Mobile FBI Agent, were present at the time I gave Ms. Lee the facts surrounding this mix-up.

I must inform the court of all truths concerning my involvement in this unlawful prosecution. I was put in a City Jail with the same inmates who were to testify falsely against Mr. Coleman to receive a time reduction and to put a innocent man in prison for our personal gain of a time reduction.

~~This statement~~ is made voluntarily and true to the best of my knowledge.

EXHIBIT 1-A

Derrick L Robinson

Signature Derrick L Robinson
Derrick Robinson 04352-003

Derrick L. Robinson

Print Name Derrick L Robinson
Derrick Robinson 04352-003

David Coleman

Inmate of Conviction: David Coleman
David Coleman 04641-003

Witness (1): ANNETTE OLDS, CASE MANAGER, AUTHORIZED BY THE ACT OF JULY 7, 1955, AS AMENDED, TO ADMINISTER OATHS (18 USC 4004).

Witness (2): Annette Olds 6/30/94

ANNETTE OLDS, CASE MANAGER,
AUTHORIZED BY THE ACT OF
JULY 7, 1955, AS AMENDED, TO
ADMINISTER OATHS (18 USC 4004).

Of this June 29, , 1994.

EXHIBIT A

October 31, 1991

Mr. Jimmy Young
41898-004
FCI, SCP, PMB 315
2650 Highway 301 South
Jesup, GA 31545

RECEIVED 11/4/91

DEAR SIR,

I Mr Jimmy Young, an Federal inmate in Jesup GA Prison Camp. Has testified against your client Noble Beasley. I, Am sorry for the suffering I have caused your client and his family. All testimony that I gave during the course of the trial against your client was cohered by the U.S. Attorney office. It was fabricated by the U.S. Attorney. I was threaten if I did not do what I was told and what to say on the witness stand in the court room I would be put in prison unlimited of time; Also my properties will be taken away from me. Threats was brought against my family. So I cooperated with the Government to get a reduction of sentence, and also keep my valuables. But this did not work that way. Your client is innocent of the charges brought against him.

P.S. I would like to speak with you at your earliest convience, I'm prepared to go to the press with story.

EXHIBIT A11

THANK YOU
TIMMY YOUNG
Jimmy Young

EXHIBIT-5

STATE OF GEORGIA
BIBB COUNTY

I Cherol Burke, AKA MARY BURKE MARTIN, SHELL BURKE, "CHIPS" after being duly sworn and after being made aware of all my rights and possible consequences due hereby, under oath, make the following statement.

I was indicted, tried, and convicted as a co-conspirator in a case involving John Christopher, et al, in the United States District Court for the Southern District of Alabama, Southern Division. While serving my sentence as prescribed, I was taken back to Mobile, Alabama with no knowledge of the reason. Upon arrival I met on several occasions with John Christopher, Investigators, et al, and was instructed and coaxed by Christopher principally and others as to what to testify about against Noble Beasley at his trial, Case No. 90-16-AH. I was a party at several meetings at the jail where Christopher directed discussions as to the best way to implicate Noble Beasley. Further, in order to coerce my untruthful testimony I was denied counsel and threatened with additional jail time if I did not cooperate. I yielded to this severe pressure and took the stand and lied about my knowledge of Noble Beasley's involvment in said drug conspiracy. My testimony implicated him in the drug conspiracy, but everything I testified to concerning his involvement was untrue and I do now hereby recant that testimony.

Cherol Burke

Sworn to and subscribed before
me this 30th day of June, 1992

Lisa C. Rich
Notary Public

MY COMMISSION EXPIRES DECEMBER 18, 1995

EXHIBIT-4

AFFIDAVIT

I Bruce Montgomery, after being duly sworn and advised of all my rights and the possible consequences, due hereby, under oath make the following statement:

On friday December 16th,1988 I was arrested in the southern district of alabama by federal agents for the crime of consiring to distribute cocaine. At the time of my arrest, myself and other co-defendants were takened to the federal building in Mobile and questioned one at a time. During my questioning I was asked by the Assistant U.S. attorney Mr. Willie Huntly if I wanted to make to make a deal with him to inform about the allege drug operation, and testify for the government. He (Mr Huntly) promised me that if I co-operated with him that he would assure me only a ten (10) year prison term. I refused the oft, because a ten (10) year term of imprisonment is a life term for me due to my poor state of health and age status. Since Mr. Huntly and I could make no deal, I and other co-defendants were cartered off to the city jail.

Once-at the city jail I was housed in a cell block with several other men, four such men were John Christerpher and his two sons, and anothe man who became known to me as James Brown. I related mostly with John Christerpher, because I knew him slightly and also because he seemed to have the run of the jail, and could get things done. He (Christerp even kept a steady supply of cocaine at the jail which he kept hidden in a bible.Later I learned through the jail-house grapevine that the officer that was bringing John's concaine got busted and was discharg from his job. I use to sit and watch James Brown cook the cocaine for John with a light bulb. At least on two occasions myself and co-defe ants were takened back to court for bail hearings, but each time bai was denied and detention was ordered.

Sometime later Mr. Huntly came to interview me with agent Gary Clem again, and this time he promised me a five (5) year sentence if I wi to cooperate with the government, and say the things he wanted me t say concerning my co-defendants and the alleged drug operation. I w like to add at this point that I have a convicted co-defendant by t name of Daryon (Buck) Sharp who I testified against falesly, becaus Mr. Huntly and agent Clem told me to do so if I wanted the deal of five (5) years. Nevertheless at this time I realized that I needed assistence of a good attorney,because my court appointed attorney Jeff Dean was representing another of my co-defendants, and in my eye this was conflicting. Thus I soght the advisement of John Chri pher about a good attorney, because of concerns that Mr. Huntly ar Clem would cross me and not keep their word. John said he knew of great attorney, and thereby contacted a Mr. Joseph O. Kulakowski promptly came to the jail to visit with me. After I gave a brief down of the siuation he (Mr. Kulakowski) advised me to cooperate the government and that he would contact Mr.Huntly about the deal that time I advised Mr. Kulakowski that I did not have the money his fee, but if he could get me out on bail I could get it, even had to sell my boat, trailor, truck, and other assets, plus give cash erned from the store I operated.

EXHIBIT 4-A

Sometime thereafter Mr. Kulakowski went to my home where my girlfriend and I lived together and took without my knowledge my trailor, andboat, as well as he went to my girls' mother's home where I had my truck and took the truck as well from her yard. Later Mr. Kulakowski came to the jail to see me and brought with him a blank reciept for me to sign, which I did without even knowing the reasons why or what for, because I only knew that I was in big trouble and I needed help in a bad way.

One day Mr. Kulakowski and agent Clem came to the jail and took me out for a ride telling me that they wanted to see where Buck Sharp"s family lived and that Buck might be hiding there, and also because they wanted to see the trucks and cars Buck owned. We didn"t see Buck and we only saw one (1) car which belonged to Buck, so we left. On the way back I mentioned to them both that since I was supplying them with all this cooperation and assistence what all were they going to do for me, and Mr. Kulakowski asked me just what it was I wanted, and I replied that I wanted some fried chicken, and agent Clem responded is that all, and I said back that a little pussy would help, and then agent Clem said that could be arranged. Thus the next stop was in front of my home were my girlfriend and I lived. I was lefted there on my own for several hours, and sometime later Clem and Kulakowsi returned to pick me up and returned meto the city jail.
On another occasion agent Clem and Mr. Kulakowski came to the jail to visit with me, and agent Clem asked me if I wanted to stretch my legs, and I said yes. This time I was takened to a very nice restaurant on the Crosway where agent Clem went inside alone and returned and said that the U.S. Attorney Mr. Session was in there and said not to bring him (meaning me) in there because there was some very important people there. So we eat in the car and returned to the jail.

One day Mr. Kulakowski came to the jail and called out both me and John Christerpher, and went into a room with John Christerpher and some ladies from off the females'section of the jail. He came out of the room and left John there alone withe ladies and he and I went into another room to discuss my case before the court and the deal.Thereafter I was takened before the Honorable Alex T. Howard (Chief) United States Judge inconcerns to the deal I had made with the government and the cooperation I had givened, and the testimony I had to give. The judge explained to me at least five different time that he could not give me probation in the instent case, but he could give me the least time law would permit, which was the five (5) year term.He also odered the statement seal.
In ending I would like to add that I feel real bad about lying on Buck in court, but I had to say what they told me to in order to help myself.

Bruce Montgomery

Signed: Bruce Montgomery

Sworn to an subsribed beforc
me this 16th day of March, 1993

Christopher K. Colvin

Signed: Notary Public

EXHIBIT 5

April 20, 1993

Alex T. Howard, Chief Judge
U.S. Courthouse
113 St. Joseph Street
Mobile, Alabama 36602

Dear Judge Howard:

My name is Ronnie Anthony Rankins, my federal identification number is 99590-012 and I am incarcerated in the Federal Correctional Institute in Talladega, Alabama. I have a very definite purpose why I'm writing to you and want to make sure that you receive this letter since you are the Chief Judge and hopefully can help me.

I, along with several employees of the federal government have done a serious injustice to the very core that the United States was built upon, we abused the justice system and I aided these government officials in breaking the law by conspiring with them in lying to Judge Vollmer and the jurors about a man's involvement in a drug case to cover up the real truth just so they could incarcerate an innocent person.

Even my attorney was involved in this conspiracy, his name is Gregory Hughes and this is one of the reasons I am writing to you because I need counsel to represent me, someone I can trust that is not going to sell me out to a corrupt group of government employees. Mr. Hughes tricked me into pleading guilty by making big promises to me that never came true. He told me that if I would plead guilty and "TELL THE TRUTH" that the government would give me one to two years in prison or a maximum of five years but no more. Once he coerced me into pleading guilty and I met with the government employees and told them the truth, they told me that since I had plead guilty I would have to tell the story they had prepared and even though I told them the truth I was warned not to tell the truth on the witness stand and they coached me for several days just to make sure I got their story straight.

The government employees I am speaking of are: Donna Barrows, Assistant US Attorney; Cliff Chatam, FBI Agent; Dan Williams, FBI Agent; Craig Underwood, IRS Agent, and Jeff Sessions, the US Attorney in Mobile, Alabama. They fabricated a story concerning one mans involvement in a drug crime just to have this man put in prison and I was told very boldly by Cliff Chatam not to mention his friends real involvement in any crimes because he had known him and his family for such a long time. I was told over and over to lie as they went over their story with me to make sure I could get it correct on the witness stand and was told that if I did not do what they told me to do that I would be sentenced to life in prison and they would make sure that I never got out.

I was wrong for conspiring with these government employees to obstruct justice and I am sorry and I must do the right thing

EXHIBIT 5-A

a motion to vacate and need some type of legal assistance in this matter. These people, regardless if they are government employees or not were wrong in what they did and so was I. Maybe the fact that these people represented the government and kept telling me that is was all right to break the law because I was helping them, or mabe it was just the fact that they were employed by the government and I was scared that if I didn't go along with them that they would actually go along with their threat and put me in prison for the rest of my life, but regardless of what the reason was, it was wrong.

The government set out to obstruct justice by convicting an innocent man and his name is Algernon Lonnie Lundy and they knew that if they did convict him of drug charges it would be illegal in doing so. None of us should be so above the law that we can break it at our own discretion with no risks involved and no threat of prosecution and that's exactly what Mr. Sessions and the others did.

I am willing to accept the responsibilities of what I have done because it was wrong and if that means more time then I can accept that. I have got to tell the truth and not be a conspirator in covering the truth up any longer. My life may be a mess but I'm not going to live the rest of my life with this on my conscience.

I have written a letter to Mr. Hughes to let him know I no longer want him to represent me because he does not care about my best interest, he is only concerned with sleeping with the government, maybe because they give him more cases I don't know but I'm sure there is some reason. I need your help in finding me a new court appointed attorney so I can file the necessary paperwork with the court.

Please write to me and tell me what to do so I can make this right.

Ronnie A. Rankins

Sincerely yours,
Ronnie Anthony Rankins
99590-012
Box PMB 1000 Gamma Unit
Talladega, Alabama 35160-8799

PS: I am enclosing a copy of my motion to vacate as well as a copy of the Statement of truth. If you can pass it on to the proper court I would appreciate it.

Rickey W. Daniel

Rickey W. Daniel, Notary
My Commission Expires 06-10-94

4/21/93

WRITTEN TESTIMONY ON TOPIC # THIRTY-EIGHT

BY NICOLE ISOM

March 7, 1995

The heightened penalty provision for cocaine base should be ignored according to Robert Byck, MD, professor of Psychiatry and Pharmacology at Yale University School of Medicine. Lab analysis revealed that both forms of cocaine are scientifically synonymous. Tests conducted by government chemist, Joey Douglas Clark of the Drug Enforcement Administration, yielded the same results. Therefore, the one hundred to one ratio should be abolished and revised to a ratio of one to one. This revision will accurately reflect the meaningless distinction of the heightened penalty provision for cocaine base.

UNITED STATES
SENTENCING COMMISSION

Subject: Amendments to the
United States Sentencing Guidelines

Hearing. Live Testimony to be given March 14, 1995.

Filing: The following is the written testimony of Patrick L. Brown which shall be used as a guideline for his live testimony to be offered on March 14, 1995.

I would like to begin my remarks by thanking the United States Sentencing Commission for the time and opportunity to provide my testimony to you regarding the currently pending amendments. I am Patrick L. Brown, an attorney from Union, Kentucky. I am licensed in the State of Ohio, and numerous federal jurisdictions. My practice is dominated by sentencings, appeals, and post-conviction motions in United States District Court, and Courts of Appeals, literally across the country. My work has necessarily required me to become intimately familiar with the United States Sentencing Guidelines, as I work them each and every day of my professional life. I provide my testimony from the perspective of an attorney who works with the Sentencing Guidelines on a daily basis and who struggles with some of the results under the system.

In 1987 the justice system in the United States underwent a massive change in the way criminal sentences are determined in federal court. This commission was created to being conformity and rationality to sentences of criminal defendants with cases pending in United States District Court.

The major thing to evolve from that change was the advent of the United States Sentencing Guidelines (hereinafter USSG). Save a few exceptions, these were to serve as the tool by which sentences would ultimately be determined in all federal criminal cases for crimes committed on or after November 1, 1987. The USSG have not been a static collection of rules and guidelines, but instead have by virtue of court decisions, congressional action, and most notably by the actions of this commission have been an amorphous changing and growing system. It is that continued growth and change which brings us together at this time to determine the next step in the evolution of the USSG and how it shall proceed.

Since the implementation of the USSG numerous amendments have been considered. Theses amendments have predominantly been of two types or categories. The first dealing with clarifications of existing guidelines and their accompanying notes and commentaries. The second category of amendments have addressed guideline applications which have been perceived as unfair or

otherwise unworkable. This second class of amendments has, in many instances, proven to be the most significant in terms of their effect on sentences.

Several of the amendments which are currently under consideration are under the second category and are the ones which I will focus my comments. It is the hope of this witness that the commission will see to act on these amendments, and that this will also result in a more workable and rational system. It is further the understanding of this witness that this written testimony is only a guidepost and supplement to the live, oral testimony to be given on March 14, 1995. The testimony on March 14, is not expected to be a mere recitation of this written testimony, as such comments made in this document may not be referred to in the oral testimony, such failure to refer to comments herein should not be interpreted as an abandonment of such position stated in this document. Furthermore, any oral testimony not be reflected in this document, such should not be devalued or thought to be less significant to this witness, because it was not in writing.

Amendment 57 It is the understanding of this witness that this amendment will serve to eliminate the sentencing shelf that currently exists

with respect to marijuana plants, by removing the ten fold increase in per weight calculations for each plant over 49.

It is not clear to me what the basis is for such a jump to 1 kilogram per plant from the 100 gram per plant simply from the number of plants recovered. I have struggled to determine a rational basis for such a calculation, but do not understand one. The USSG already take into account additional weight amounts in calculating a sentence, but the current system over penalizes a defendant with more than 49 plants. The increase in per plant calculation does not seem sensible and in a real sense results in double counting for a defendant. Furthermore, with an understanding of the emerging doctrine of Sentencing Entrapment, further described below, an officer by demanding one additional plant can result in a significant increase in overall weight for sentence calculation.

The amendment proposing to eliminate this jump to 1 kilogram per plant would serve to provide a more rational and workable system for all persons involved in the system.

Amendment 38. Cocaine Ratio-Crack to Powder. Regardless of its form cocaine is cocaine, either in powder or crack. Currently the sentencing scheme is such that a person charged in a case involving crack cocaine is subject

to a five year mandatory minimum sentence upon the sale of only 5 grams of the substance, while it take half of a kilogram or in excess of 1 pound of cocaine powder to get to the level of a five year mandatory minimum sentence. The current treatment under the USSG provides for this 100 to 1 ratio.

The ultimate result, as bore out the research of this Commission itself, is a sentencing scheme with a racially disparate impact, with blacks receiving 88.3 of all crack sentences imposed. (See "Special Report to Congress: Cocaine and Federal Sentencing Policy," issued by the United States Sentencing Commission on February 28, 1995). It goes without saying that this is at best problematic.

The current ratio was developed in a time of great fear and apprehension about this new form of cocaine. In 1986 when the current ratio was developed, there was a fear about the new form of cocaine and what it would mean to society. As with most things unknown, an over reaction occurred and, without sufficient information or knowledge about the cocaine in rock form, the current 100 to 1 ratio was established. The result is that low level street sellers of crack cocaine are routinely subjected to 5 year mandatory minimum sentences by virtue of small and largely insignificant sales, which if made in powder, would most likely result in little or no prison time at all.

One reason given in support of this disparity is alleged violence related to crack distribution. It is noteworthy that the enhancement for such possible violence is thus included in all crack sentences, even where no violence is alleged in connection with crimes a particular defendant is charged with. Crimes of violence are prosecuted on their own and furthermore, the USSG contains provision for factoring in acts of violence in calculating a sentence. Thus another example of double counting will exist in those cases in which violence actually occurs, and this simply should not exist in a fair and rational system of justice.

In federal criminal cases it can be argued that we no longer sentence defendants, but instead sentence crimes. The drugs are weighed the chart is consulted and the sentence is determined. In this system of determinative sentences a real and significant problem has developed with respect to what has been referred to as sentencing entrapment. In fact this commission in a prior amendment has recognized this problem and addressed it by an amendment to the Application Note to § 2D1.1, Par. 486.

Courts have also recognized this problem and the interplay between the USSG and the former notions of entrapment:

> Now that our sentencing scheme has moved from a discretionary process to a determinate system based on the weight of the drugs involved in a

> transaction, the entrapment doctrine designed for the previous system no longer adequately protects against government abuse nor ensures that defendants will be sentenced on the basis of the extent of their culpability.

United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994). The Court in Staufer, went on to point out that while under the former system the sentencing discretion was with the judge, it has now been delegated all the way to the individual drug agent:

> Drug agents can decide, apparently without any supervision by anybody to negotiate with somebody fro an ounce, a pound, a kilo, 100 kilos, a million kilos of a substance and, of course, if the defendant bites at the bait, then that amount chosen by the drug agent will determine his sentence.

This points out a very significant problem. It is relevant to the pending crack amendment because this action of Sentencing Entrapment will be difficult, if not impossible, to show under the system of 100 to 1 ratio. If an officer requests to purchase 5 grams instead of 4 grams, the defendant is then subject to 5 years mandatory minimum. Furthermore, each additional gram of crack will result in a two point incise in the base offense level and thus a corresponding increase in the length of the sentence. In powder cocaine cases this manipulation will be detectable because of the large increase I quantity required for an increase in the base offense level and mandatory minimum applications and the sentencing courts will be able to address this problem.

However, under the existing crack to cocaine ratio it will not be easily detectable for crack, and therefore, will not be able to be addressed by the courts. The effect will ultimately be that the sentence disparity for crack and powder will only continue to grow and increase.

This Commission has heard plenty of individual horror stories and knows of the difficulty this ration has caused. It is now time to take the lead in this area and establish under the USSG that crack and powder are to be treated equally, with a 1 to 1 ration. Hopefully this will serve to encourage Congress to revisit the mandatory minimum provisions relative to this problem, and ultimately will result in a fair and more rationally based sentencing scheme for all defendants.

STATEMENT OF POSITION

NATIONAL ASSOCIATION OF WOMEN JUDGES

U. S. SENTENCING COMMISSION

March 7, 1995

We appreciate this opportunity to appear before you representing the National Association of Women Judges and its educational foundation, the Women Judges' Fund for Justice. Created in 1979, the association is composed of over twelve hundred judges - female and male - of all races and ethnicity who are dedicated to improving the administration of justice with particular emphasis on eliminating gender bias in all areas of the law, providing judicial education, increasing the number of women on the bench, and addressing legal issues of particular concern to women and children. Members are trial and appellate judges who sit on state and federal and administrative courts throughout the United States. The association is also a member of the International Association of Women Judges.

We are here because of our concerns as we struggle on the front lines to perform the difficult duty of sentencing. We are aware that the Guidelines have increased the rate of incarceration for women and the length of their sentences. It is not our position that women should be treated less severely than men because they are women, and we are not here advocating preferential treatment for women. It is our position that policies that are truly gender neutral require more than the application of non-gender specific pronouns to a structure that

reflects the experience of only males. We are of the view that sentencing policies should be reexamined because while facially gender-neutral they in fact disadvantage members of one gender. We focus on five particular areas:

1. Preserving Family Ties

As you know, the Commission adopted Policy Statement 5H1.6 which provides that "[f]amily ties and responsibilities ... are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." We advocate that sentencing policies should consider the primary or custodial parent status of any individual who can demonstrate a history of active parenting, and that once established such a relationship should, in appropriate cases, be a basis for a downward departure from the otherwise applicable Guideline range.

Estimates are that seventy/eighty percent of women inmates are mothers, most of them are single mothers, almost half have minor children, and most were the primary custodial parent before they were incarcerated. [1] It is generally agreed that

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[1] A 1990 publication by the American Correctional Association reported that 80 percent of female inmates were mothers, and 62 percent were single mothers. The Female Offender, What Does the Future Hold?, American Correctional Association 6, 50 (1990). A 1991 survey of the federal prison population revealed that more than 86 percent of mothers, as opposed to 68 percent of fathers with minor children, lived with those children prior to being incarcerated. Some 91 percent of men and only 33 percent of women reported that their children now live with the child's other parent. Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepperdine Law Review 913, 951-52 (1993).

maintenance of the parental relationship is vitally important to children, particularly when parent and child were closely bonded prior to sentencing. Maintaining such a parent-child relationship is difficult for anyone who is incarcerated. None of the federal institutions allows children to stay with their custodial parent so that preserving parental ties depends on site visits and communications. It is even more difficult for women to maintain their family ties than it is for men to do so. The primary reason is that the Bureau of Prisons has facilities for women at only eighteen locations nationwide. [2]

The probability that a woman will serve her sentence in an institution located in close proximity to where her children are placed, most often with grandparents or relatives, so as to allow periodic visits is minuscule. For example, women seeking treatment at the Bureau's single high intensity drug treatment facility for women at Bryan, TX, face almost certain isolation from family contacts. Bureau of Prison data show that female inmates are located on average 567 miles from their residence. The Ninth Circuit Gender Bias Task Force Report (1993) found that nearly two thirds of the women inmates interviewed were located more than five hundred miles from their homes. [3]

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[2] This number includes facilities where women are held pending trial.

[3] The comparable figure for men is 391 miles. Experienced correctional personnel relate that women will often relocate themselves and their children to follow a male who is incarcerated so as to maintain the relationship, but this does not occur when the woman is incarcerated. Quite to the contrary. What correctional personnel observe is the dismaying lack of

A 1992 study of children whose mothers were incarcerated in jails and prisons reported that over 54 percent of the mothers never saw their children while they were incarcerated. [4] Those children suffer along with their parents.

While the Commission is not directly responsible for inmate placement, the Commission's policies should be based on the realities sentencing judges face in discharging their sentencing responsibilities. Because it appears that a policy that is facially gender-neutral is actually causing unintended damaging consequences to women and their children to a far greater degree than to males, we urge the Commission to reconsider its policies so as to allow and even urge the sentencing judge, when he or she thinks it is appropriate, to consider family responsibilities and the effect upon the children of the custodial parent's incarceration in exercising his or her discretion.

2. Pregnant Offenders

Typically, pregnant inmates stay in a federal institution until they are ready to deliver, they are then moved to a contract facility where they deliver, after which, within 24 to 48 hours if there are no medical problems, they are returned to

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visitation by family members to incarcerated women.

[4] There are a number of studies documenting the negative impacts on children related to the separation caused by a parent's incarceration. Barbara Bloom, Why Punish the Children? A Reappraisal of the Children of Incarcerated Mothers in America, National Council on Crime and Delinquency (1992). Also, Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepperdine Law Review 953-55 (1993).

the institution, and the child is placed elsewhere. [5] We maintain that the Guidelines should allow judges discretion to explore sentencing options for pregnant persons, where appropriate, which would provide for more humane treatment.

3. Incarcerating First Offenders for Non-violent Offenses

Women commit mainly non-violent crimes, if one does not automatically include all drug related offenses in the violent category. "[F]emale offenders overwhelmingly commit crimes that, while unacceptable, pose little threat to the physical safety of the community at large." [6] For example, in 1989 federal prison admissions classified only 3.5 percent of federal crimes committed by women as violent, [7] and in 1993 the Bureau of Prisons classified 83 percent of women inmates at either the minimum or low security level, 50 and 33 percent, respectively.

While the nonviolent nature of crimes by women is well known, what is startling is that recent statistics show that most federally incarcerated women are first offenders. In 1993, 82.5

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[5] In 1991, thc Bureau of Prisons instituted a policy which permits a qualified pregnant inmate to enter a community correctional facility about two months before her scheduled delivery, and remain in the facility with her child for two months before returning to the institution to complete her sentence. Implementation of the policy is limited. Consuelo B. Marshall, 20 Pepperdine Law Review 1202 (1993).

[6] Russ Immarigeon & Meda Chesney-Lind, National Council on Crime and Delinquency, Women's Prisons, Overcrowded and Overused, 9 (1992).

[7] Compared to 8.2 percent of male federal offenses. Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepperdine Law Review 910 n.11 (1993).

percent of women sentenced had either no prior criminal history or some minor occurrence as indicated by their inclusion in Criminal History Category One. [8]

We suggest that the Commission examine whether sentences other than imprisonment might be appropriate for persons - male and female - who are first offenders, who are convicted for non-violent offenses, and who are the custodial parent with a demonstrated parenting history.

4. Substantial Assistance Departures

We are troubled by how little information exists regarding the effects of substantial assistance departures - the only departure permitting a judge to impose a sentence below the mandatory minimum - on women, who often play secondary roles or occupy low positions in organized criminal activities, especially in the area of drugs. [9] We are aware that the Commission is examining this subject and we applaud that effort.

The general view is that substantial assistance departures are being used as a significant plea bargaining tool since the number has gone from approximately 1,200 departures in 1989 to 5,442 in 1992. Some have suggested that while it is reasonable to expect to see women with a greater proportion of departures based on their limited roles, the reverse has occurred and their roles

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[8] The percentage of males in Criminal History Category One was 57.22 percent.

[9] Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepperdine Law Review 980 (1993).

have put them at a disadvantage in obtaining a substantial assistance departure or in plea bargaining. Tracy Hulling, formerly with the Correctional Association of New York, Inc., notes in connection with her study of "drug mules", women acting as couriers in smuggling drugs across international borders, that most prosecutors and drug enforcement agents noted that women rarely can offer material assistance of any value because they are involved so marginally, if at all, in the larger drug operation. [10]

5. Domestic Violence

One survey of prisoner-mothers in prisons and jails reported that 53 percent of female inmates had been physically abused at some time and that 42 percent had been sexually abused. [11] This tracks survey results by the American Correctional Association which found that over half of all adult female offenders were victims of physical abuse and 36 percent had been sexually abused. [12] The difference between the abused status of men and women inmates is stark: federal data show that 21.9 percent of women as compared with 4.8 percent of men had been either

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[10] Tracy Hulling, Women Drug Couriers, Criminal Justice, Winter (1995).

[11] Barbara Bloom, Why Punish the Children? A Reappraisal of the Children of Incarcerated Mothers in America, National Council on Crime and Delinquency 5 (1992).

[12] The Female Offender, What Does the Future Hold?, American Correctional Association 6, 56 (1990).

physically or sexually abused. [13]

Section 5K2.12 provides that coercion may justify a downward departure but, ordinarily, only where there was a threat of physical injury involved in the instant crime. We are not aware that the Commission has ever examined the broader issue of women who commit crimes while they are the subjects of battering by spouses or boyfriends in situations where they and their children are economically dependent on their abuser. In view of the case law and scholarship that is emerging in this field, we urge that you do initiate such an examination. [14]

In conclusion, from what we can tell, the profile of the women offender in federal prisons is a complex one that may not be easily compartmentalized, factor by factor. She is most likely a nonviolent first offender with minor children. She has most likely been the victim of abuse herself. We know that many of our federal judges are especially concerned with the consequences of sentencing these women to long periods in prison with the attendant breakup of their families. These judicial concerns are not easily dismissible as a residue of paternalistic or stereotypical attitudes of the past. Rather, these judges sense

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[13] Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepperdine Law Review 914 (1993).

[14] Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepperdine Law Review 905 (1993). See cases and articles cited at 972 - 977.

that the system is not doing what it should in these cases. We believe that a systematic study of women sentenced under the Guidelines might well reveal patterns of behavior and judicial reaction that would in turn lead to solutions that are not immediately apparent.

We thank you for your attention, we wish you well on your important work, and we stand ready as an association and as individuals to assist you.

Passport and Visa Offenses

Statement of

Anthony C.E. Quainton

Assistant Secretary

Bureau of Diplomatic Security

Department of State

before

United States Sentencing Commission

March 14, 1995

Mr. Chairman and Members of the Commission:

I am pleased to have this opportunity to appear before you today. As Assistant Secretary of State for Diplomatic Security, I am here to discuss the need to amend the sentencing guidelines concerning passport and visa statutes so as to provide meaningful deterrence to those who would violate these laws.

Let me first thank the Commission for its serious consideration of this important issue and for your earlier action in submitting to the Federal Register for comment the proposal submitted by the Department of Justice (DoJ) to amend the relevant sections 2L2.1 and 2L2.2 of the guidelines.

Passports, recognized as proof of citizenship, and visas are highly sought after documents that allow unrestricted travel to and from the United States. And, it is becoming more and more apparent to the diplomatic and law enforcement communities that passport and visa violations are predicate offenses to a host of other criminal activities.

Under law, the Secretary of State is responsible for the issuance and integrity of U.S. passports and the duty of issuing visas is accorded to Department of State consular officers. The Secretary also has the related responsibility (22 U.S.C. §4802) for investigations of illegal passport and visa issuance or use. Special agents of the Bureau of Diplomatic Security (DS) conduct these investigations and exercise arrest and other necessary law enforcement powers in connection with passport and visa violations (22 U.S.C. §2709).

The Department has given high priority to addressing the increasing problems associated with these important responsibilities, and it has been working closely in this effort with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the Customs Service, and other federal, state, and local agencies, as well as foreign governments. For example, the Bureau of Consular Affairs last year centralized immigrant visa processing at a new National Visa Center that is linked to the FBI's National Crime Information Center for name checks; automated consular systems are being expanded and improved, including the important lookout system for identifying criminal and other factors that make an applicant ineligible for a visa; and both the Machine Readable Visa and the new passport include a multitude of sophisticated security features to deter counterfeiting or alteration.

Bureau of Diplomatic Security agents are assigned to most U.S. embassies abroad and to 18 offices in key locations domestically, from which they fulfill investigative and other responsibilities. The past two years has seen a significant increase in the number of passport and visa investigations conducted by DS agents, as well as in the number of arrests. In 1992, 1801 cases were closed and 256 arrests were made; 1993 saw 2859 closed cases and 375 arrests (a 46% increase); and last year 3507 cases were closed, with 514 arrests (up another 37%).

We estimate that approximately 2/3 of all passport fraud is committed by aliens, many of whom have criminal records or are involved in other criminal activities. A significant portion of passport fraud involving Americans is perpetrated by narco-traffickers, organized criminals, escaped convicts, or other criminals. Visa fraud frequently involves alien smuggling, organized crime, and drug trafficking.

Nine of the 41 counts in the indictment for the bombing of the World Trade Center in February 1993 and subsequent plots against the United Nations and other facilities in the New York metropolitan area were passport or visa related offenses. Agents of the Bureau of Diplomatic Security played a key role recently in the apprehension in Pakistan of Ramzi Ahmed Yousef, an alleged participant in the Trade Center bombing. The Federal

indictment against him includes a charge of fraudulently procuring a passport which facilitated his entry into the United States.

In order to maximize the likelihood of prosecution we carefully prioritize cases. Those involving illegal issuance of documents by Federal employees, vendors of high quantity and high quality documents, and suspects with substantial criminal histories or who are engaged in ongoing criminal activities are assigned the highest priority. As a result of this prioritizing process, the majority of Diplomatic Security investigations that lead to arrest result in successful prosecution. However, most passport/visa cases do not go to prosecution. The relatively mild penalties, not only discourage prosecution, but even when applied do not provide a significant deterrent. Let me cite three recent case examples.

Within the last year in the Eastern District of Texas a defendant pled guilty to eight counts of making false statements in an application for a U.S. passport, one count of false claim to U.S. citizenship, and one count of the unlawful procurement of U.S. citizenship. This defendant was previously convicted of making a false statement in a passport application in the Southern District of Louisiana. He subsequently fled the United States after an unsuccessful murder attempt on his

former wife, which left her permanently paralyzed from the waist down. He was never indicted for the attempted murder but a jury awarded the victim $28.6 million from the defendant in a civil suit for planning and carrying out the attempted murder through intermediaries. After fleeing to avoid paying the judgment he renounced his U.S. citizenship, and acquired at least five passports in three different identities from three different countries (including the United States). This same defendant also tried unsuccessfully to obtain U.S. passports in at least two other false identities. At the time he was taken into custody he was using the fraudulent passports to conceal his movements and hide numerous overseas bank accounts. He was sentenced to four months imprisonment on each of ten felony counts to run concurrently, fined $100,000 and released for time served.

Another case involves a defendant wanted for murder in the District of Columbia. He obtained a United States passport in the identity of his cousin from the passport agency in New Orleans, used it to flee the United States, and was subsequently arrested in Canada after having robbed a bank in that country. He was deported to the United States and the murder charge was dismissed. He pled guilty to the passport offense (a violation of 18 U.S.C. §1542) and was sentenced to two months in jail, two years probation, and a $500 fine.

In 1992, DS initiated an investigation of an Egyptian national who used a state-of-the-art color copying process to counterfeit numerous U.S. nonimmigrant visas which he sold to other document vendors for $1,200 each. State Department agents arrested the defendant in New Jersey in 1993 for the visa offenses. He jumped bail, but was eventually arrested by the Canadians, deported to the United States, and sentenced to five months for visa fraud (a violation of 18 U.S.C. §1546).

Because of the very limited results seen in these three examples, the Department of State strongly supported action by Congress to increase the statutory penalties, and we were very pleased that such provisions were enacted in the 1994 Crime Bill (the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322).

Department of State Special Agents conduct passport fraud and visa fraud investigations to enforce 18 U.S.C. §§1541 - 1546. Prior to the passage of the Crime Bill the maximum statutory penalties for passport offenses ranged from a fine of not more than $500 to one of not more than $2000 and/or imprisonment of from not more than one year to not more than five years. The primary statute that the Department of State enforces concerning visa fraud is 18 U.S.C. §1546a. Prior to the enactment of this legislation, Section 1546a carried a fine of not more than $250,000 and/or five years imprisonment.

Section 130009 of the 1994 Crime Bill increased the maximum fines and periods of imprisonment as follows: 18 U.S.C. §1541 (illegally granting, issuing or verifying a passport), 18 U.S.C. §1542 (false statements in connection with the application or use of a passport), 18 U.S.C. §1543 (offenses involving falsely made, forged, counterfeited, mutilated, or altered passports), 18 U.S.C. §1544 (misuse of passports), 18 U.S.C. §1545 (violating "safe conduct"), and 18 U.S.C. §1546a (fraud and misuse of visas and other documents or statements) to not more than $250,000 and/or ten years; and 18 U.S.C. §1546b (misuse of documents or statements in satisfying requirements for employment) to not more than $250,000 and/or five years. The maximum term of imprisonment was also increased for these offenses (other than §1545) to not more than fifteen years if committed to facilitate a drug trafficking offense and twenty years if committed to facilitate an act of international terrorism.

Now, to ensure that the actual sentences imposed by judges for these offenses are also increased, the Federal Sentencing Guidelines must be amended. We are very pleased that the Department of Justice has submitted a proposal to accomplish that end and that the Commission has published it for comment.

The current Sentencing Guidelines as they apply to both visa and passport offenses are not effective deterrents given the fact that most convicted defendants are looking at less than six months in jail. The majority of the passport and visa cases brought to prosecution following DS investigations result in sentences imposing no imprisonment beyond any time that may have been served during post-arrest custody. The Guidelines consistently assign higher base offense levels to other offenses with statutory maximum incarceration periods of 10 years.

In general, the amendment proposed by the Department of Justice would increase the base offense levels for passport and visa offenses from 9 to 13 and from 6 to 10 if the offense were committed other than for profit. If committed to facilitate drug trafficking or international terrorism, the base offense levels would rise to 20 and 26, respectively. The proposal also provides for additional enhancements to help better tailor the sentence to the severity of the crime, including those addressing racketeering and unlawful flight from justice.

Increased penalties of this magnitude are essential to provide the enhanced deterrence needed to protect these important documents and are in the spirit of what Congress had

in mind in enacting Section 130009 of the Crime Bill. The amendment advanced by the Justice Department contains the key elements necessary for meaningful deterrence -- higher base offense levels and enhanced penalties for those who provide or use documents to further other serious criminal activity.

We are grateful to the Department of Justice for its work in developing the proposed amendment and to the Commission for its serious consideration of it. If we can provide any further information that would be helpful as you consider this amendment or any modifications to it, please do not hesitate to contact me. Meanwhile, we stand ready to work with both the Commission and the Justice Department to help finalize fair and effective sentencing guidelines concerning these statutes for which we have enforcement responsibilities.

Thank you, again, for the opportunity to appear before you and for your consideration of our comments.

Statement of

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on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission
Washington, D.C.

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My name is Abraham L. Clott, and I am an attorney with the Legal Aid Society in New York City and represent indigent criminal defendants before the United States District Court for the Eastern District of New York. As some on the Commission and its staff may recall, I was detailed to the Commission for several months and worked on the staff of the General Counsel. I am here today to present the views of the Federal Public and Community Defenders on the pending amendments to the guidelines.

Federal Public and Community Defender Organizations operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. Defender Organizations currently operate in nearly 60 federal judicial districts. We appear before magistrate-judges, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of criminal defendants in federal court. We represent persons charged with frequently-prosecuted federal crimes, like drug trafficking, and with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with street crime, like murder, and persons charged with suite crime, like embezzlement.

Congress has directed in 28 U.S.C. § 994(o) that certain entities, including the Federal Defenders, "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication

would be useful." In addition, we are directed to submit, at least annually, written comments on the guidelines and suggestions for changes in the guidelines.

The Federal Defenders are pleased to comment upon the proposed amendments, but before turning to specific proposals, we have several general observations. First, we are concerned that a number of the amendments are labelled "issue for comment" and ask generalized questions. We find it difficult to respond to that kind of invitation because it is not always clear what range of options the Commission has under consideration. We recognize that the present situation is unique. A majority of the members of the Commission are new, and Congress has dumped in your lap a lengthy new crime act that, among other things, calls for several reports to be completed in rather short order. We hope, however, that in the future the Commission will be more specific in the amendments that it publishes.

Second, the Commission must comply with Congressional mandates, but not every mandate in the new crime act deprives the Commission of discretion. Section 280003 of the crime act, probably the provision of the crime act that most restricts the Commission's discretion, mandates the Commission to amend the guidelines to provide a three-level enhancement if the jury finds, beyond a reasonable doubt, that the defendant's offense was a hate crime. The Commission cannot decline to act and must add a guideline provision that complies with section 280003. Even section 280003 does not divest the Commission of all discretion,

however. The Commission can decide the manner in which the enhancement will appear in the guidelines manual and the Commission can -- as it has in the proposed amendment -- decide to expand the mandate so that the hate-crime enhancement applies when the defendant elects to be tried by the court.

Most of the mandates in the crime act are not like section 280003. Most call upon the Commission to make appropriate amendments to the guidelines. With regard to such language, the Commission has full discretion. We believe that in exercising that discretion, the Commission must give due deference to what Congress is seeking, but the Commission must also keep in mind that it is not a scrivener whose job is merely to write down in guideline form what Congress has said. The Commission -- an independent agency within the judicial branch of government -- was established to draft and perfect sentencing guidelines that would achieve the purposes of sentencing spelled out by Congress in the Sentencing Reform Act of 1984. Congress intended the Commission to be a body of sentencing experts who would develop a rational and principled sentencing policy for the federal government.

Therefore, the Commission, when evaluating provisions of the crime act that give the Commission discretion, must exercise independent judgment as to whether or to what extent that provision requires amending the guidelines. Congress recognizes that the Commission has an independent role.

> In carrying out directions from the Congress, the U. S. Sentencing Commission shall assure reasonable consistency with other guidelines, avoid duplicative punishment for substantially the same offense, and take into account any

> mitigating circumstances which might justify exceptions. The Commission shall also carry out such directions in light of the factors set forth in subsection 3553(a) of title 18, United States Code.[1]

It is important that the Commission keep this independent role in mind. For one thing, it is not always clear what Congress is seeking. Take section 40112 of the crime act, for example. Section 40112(a)(3) requires the Commission to "review and promulgate amendments to the guidelines to enhance penalties, if appropriate, to render Federal penalties on Federal territory commensurate with penalties for similar offenses in the States." Does this mean that Congress intends federal penalties to be commensurate with the penalties in all states? That seems unlikely because state law maximums and state sentencing system vary greatly. A penalty commensurate with the penalty imposed in Arizona, for example, may not be commensurate with the punishment imposed in Minnesota.

Does Congress instead intend that federal penalties should be commensurate with the penalties of the state in which the federal offense occurred? Section 40112(b)(2) suggests that the answer is yes.[2] The Sentencing Reform Act, however, calls for uniformity in federal sentencing. Did Congress intend to abandon that principle?

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[1]H.R. Rep. No. 711, 103d Cong., 2d Sess. 391 (1994). Identical statements also appear at pages 388-89 and 392 of that report.

[2]Section 40112(b)(2) requires the Commission to send Congress a report "containing an analysis of Federal rape sentencing, accompanied by comment from independent experts in the field, describing . . . comparative Federal sentences for cases on Federal territory and sentences in surrounding States."

If so, why only in sexual abuse cases? There is no legislative history that helps us answer these questions.

Section 40112(a) illustrates another reason why the Commission must exercise a considerable degree of discretion. Section 40112(a)(2) directs the Commission to "review and promulgate amendments to the guidelines, if appropriate, to reduce unwarranted disparities between the sentences for sex offenders who are known to the victim and sentences for sex offenders who are not known to the victim." This provision is premised upon the assumption that there is unwarranted disparity in the treatment of defendants who are known to the victim and defendants who are not known to the victim. Is this assumption factually accurate? There is nothing in the legislative history to suggest the basis for this assumption. The Commission should find out whether the assumption is correct before attempting to revise the guidelines applicable to sexual abuse offenses.

Our third general observation is that an increase in the maximum penalty for an offense is not necessarily a mandate to the Commission to increase the punishment for all forms of the offense. That is, an increase in the statutory maximum for an offense does not automatically require a general increase in the offense levels of the offense guideline applicable to that offense. A statutory maximum is the punishment reserved for the most aggravated form of the offense. An increase in the maximum means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily mean that Congress

believes that the heartland form of the offense should be treated more severely.

Finally, we are pleased to see that among this year's proposed amendments there are a number of concrete proposals designed to alleviate a persistent problem with the drug guideline: the disproportionate punishment that often results from the rigid application of the current drug quantity table -- particularly in cases involving low-level defendants. Two approaches are offered this year. The first (Amendments 33 - 42) would revise the method for determining quantity in drug trafficking cases and would modify the drug quantity table somewhat to minimize the impact of quantity on the determination of the offense level. Three options are presented to revise the drug table -- any one would be a significant improvement over the current table. The second proposal (Amendment 43) presents a radical approach that eliminates the significance of quantity altogether, so that the offense level would be based instead on other factors traditionally considered in other chapters in the guidelines. We prefer the first approach because it builds on the existing structure of the guidelines and should ensure that a defendant who plays a small role in a drug trafficking offense receives punishment more proportionate to the gravity of the offense.

Amendment 1
(General Application Principles)

Amendment 1 invites comment on whether the guidelines should be amended to address "offenses in which an HIV-infected individual engages in sexual activity with knowledge of his or her HIV infection status with the intent through such activity to expose another to HIV." Congress, in the Violent Crime Control and Law Enforcement Act of 1994, directed the Commission to submit a report with recommendations for revising the sentencing guidelines for such offenses by March 13, 1995.

Offenses motivated by an intent to spread the HIV virus occur infrequently. They can best be addressed through departures, until there is a sufficient number of cases to permit a well-informed determination of what changes to the guidelines may be needed.

Amendment 2
(Assault Against a Person under Age 16)

Amendment 2 invites comment in response to section 170201 of the Violent Crime Control and Law Enforcement Act of 1994, which created a new offense (18 U.S.C. § 113(a)(7)) for an assault of a person under age 16 that results in "substantial bodily injury." The term "substantial bodily injury" is defined, for purposes of the new offense, to mean "(A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." We believe that § 2A2.3 is the most appropriate offense guideline to apply to the new offense.

There are seven types of assaults defined in 18 U.S.C. § 113,

including assault resulting in serious bodily injury. That offense, a violation of 18 U.S.C. § 113(a)(6), carries a maximum prison term of ten years, twice that of the maximum for the new offense. The term "serious bodily injury" in 18 U.S.C. § 113(a)(6) is defined to mean "bodily injury which involves (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

The new offense covers conduct that is less harmful than the conduct covered by 18 U.S.C. § 113(a)(6). The maximum term of imprisonment is half that of 18 U.S.C. § 113(a)(6) because an injury that is "substantial bodily injury" is less than an injury that is "serious bodily injury."[3] A violation of 18 U.S.C. § 113(a)(6) is covered by § 2A2.2. Because the new offense is less serious than a violation of 18 U.S.C. § 113(a)(6), the appropriate offense guideline for the new offense is § 2A2.3.

Amendment 3
(Involuntary Manslaughter)

Amendment 3 invites comment on whether to increase the base offense levels of § 2A1.4 (involuntary manslaughter) in response to Section 320102 of the Violent Crime Control and Law Enforcement Act of 1994, which increased the maximum penalty for involuntary manslaughter from three years to six years. We oppose this amendment. Section 320102 contains no directive to the Commission

[3]An injury that is temporary but involves substantial disfigurement is substantial bodily injury under 18 U.S.C. § 113. Only if that injury becomes protracted does it become serious bodily injury under 18 U.S.C. § 113.

to revise the guidelines to reflect the increase in the maximum penalty for a conviction for involuntary manslaughter. As discussed in our introductory remarks, an increased maximum statutory penalty does not necessarily warrant an increased sentence for the heartland form of the offense. We recommend that Commission collect data to determine whether any adjustment to the base offense levels may be warranted.

Amendment 4
(Parental Kidnapping)

Amendment 4 sets forth two options for amending the guidelines to address violations of 18 U.S.C. § 1204 (international parental kidnapping). Both options would provide for a base offense level of 12. Option 1 would amend § 2A4.1 (kidnapping) to include a separate offense level of 12 for a conviction under 18 U.S.C. § 1204. Option 2 would amend the statutory index to list § 2J1.2 (obstruction of justice) as the applicable guideline for a violation of 18 U.S.C. § 1204. We support Option 2, but believe that a base offense level of ten would be more appropriate for this type of offense.

We do not believe that § 2A4.1 is the appropriate guideline for this new offense. Unlike most kidnapping offenses, which involve extortion and risk of physical harm to the abducted person, the conduct covered by 18 U.S.C. § 1204 stems primarily from domestic custody battles and involves neither a ransom demand nor risk of physical injury to the child. This type of conduct is more accurately characterized as a violation of a court order, so the guideline for obstruction of justice is the appropriate guideline.

In addition, § 2A4.1 covers offenses that have a statutory maximum of life imprisonment, while the statutory maximum of 18 U.S.C. § 1204 is only three years.

Although we believe that § 2J1.2 is the more appropriate guideline for 18 U.S.C. § 1204, we believe that the unique nature of this type of obstruction calls for a base offense level of ten rather than 12. A base offense level of ten will give the court the option to impose a sentence that does not include a term in a federal penitentiary. The conduct involved in a violation of 18 U.S.C. § 1204 will usually reflect a person's reaction to domestic discord rather than a propensity to commit crimes. If the conduct is more serious, § 2J1.2(b) requires enhancements for threats to cause physical injury or property damage, and particularly egregious cases may be handled through a departure.

Amendment 5
(Sex Offenses)

Amendment 5 invites comment in response to section 40112 of the Violent Crime Control and Law Enforcement Act of 1994, which contains two directives to the Commission. First, section 40112(a) directs the Commission to review, and amend where necessary, the guidelines applicable to sexual abuse offenses.

> (1) The Commission shall review and promulgate amendments to the guidelines, if appropriate, to enhance penalties if more than 1 offender is involved in the offense.
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> (2) The Commission shall review and promulgate amendments to the guidelines, if appropriate, to reduce unwarranted disparities between the sentences for sex offenders who are known to the victim and sentences for sex offenders who are not known to the victim.
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> (3) The Commission shall review and promulgate amendments to the guidelines to enhance penalties, if appropriate, to render Federal penalties on Federal territory commensurate

with penalties for similar offenses in the States.

(4) The Commission shall review and promulgate amendments to the guidelines, if appropriate, to account for the general problem of recidivism in cases of sex offenses, the severity of the offense, and its devastating effects on survivors.

The second directive, in section 40112(b), requires the Commission to report to Congress (by March 13) on federal sentencing of sex offenders. Section 40112(b) specifically requires the Commission to submit to Congress

> a report containing an analysis of Federal rape sentencing, accompanied by comment from independent experts in the field, describing --
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> (1) comparative Federal sentences for cases in which the rape victim is known to the defendant and cases in which the rape victim is not known to the defendant;
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> (2) comparative Federal sentence for cases on Federal territory and sentences in surrounding States; and
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> (3) an analysis of the effect of rape sentences on populations residing primarily on Federal territory relative to the impact of other Federal offenses in which the existence of Federal jurisdiction depends upon the offense's being committed on Federal territory.

The issues raised in section 40112 are complex and will require comprehensive analysis. For instance, section 40112(a)(2) assumes that (1) there is unwarranted disparity between sentences for sex offenders who are known to the victim and sentences for those who are not known to the victim and (2) there is no justification for the disparity. The legislative history points to no evidence that there is unwarranted disparity.

Another troubling area is whether Congress wants the Commission to deviate from the general policy underlying the sentencing guideline system -- that federal penalties should be uniform and nationwide. Section 40112(b)(2) requires the

Commission to report on "comparative Federal sentences for cases on Federal territory and sentences in surrounding states," while section 40112(a) directs the Commission to consider the appropriateness of amending the guidelines "to render Federal penalties on Federal territory commensurate with penalties for similar offenses in the States." Does Congress mean that sentences for sex offenses on federal territory in North Carolina, for example, should replicate those penalties in the State of North Carolina? Or, does Congress intend federal sentences to be commensurate with the penalties in all fifty states -- an inconceivable task? Does "penalty" mean the sentence imposed, or the actual time served?

The lack of clarity in the directive in section 40112 precludes the Commission from producing a meaningful and responsive report. The report is not due until after the public hearing, preventing us and any other interested parties from reacting in a timely manner. We believe that any action to amend the guidelines in Chapter Two, part A, subpart 3, would be premature and not factually well-based.

Amendment 6
(Offenses Resulting in Death)

Amendment 6 sets forth two options to amend the guidelines in response to sections 60010, 60011, 60017, and 60024 of the Violent Crime Control and Law Enforcement Act of 1994, which increase penalties for certain offenses when death results. Option 1 would amend the statutory index and § 1B1.2 (applicable guidelines) to require application of the guidelines for homicide (§§ 2A1.1,

2A1.2, 2A1.3, 2A1.4) and aggravated assault (§§ 2A2.1, 2A2.2) for violations of 8 U.S.C. § 1324(a) (unlawful employment of aliens) when the trier of fact determines beyond a reasonable doubt that the offense resulted in death. In addition, Option 1 would amend the statutory index and § 1B1.2 (applicable guidelines) to require application of §§ 2A1.1, 2A1.2, 2A1.3, or 2A1.4 for violations of 18 U.S.C. § 2243(a) and (b) (sexual abuse of a minor or ward), 18 U.S.C. § 2244 (abusive sexual contact), 18 U.S.C. § 2251 (a), (b), and (c)(1)(B) (sexual exploitation of children) if the trier of fact determines beyond a reasonable doubt that death resulted from the offense.

Option 2 would add cross-references to Chapter Two, part A, under the guidelines applicable to these particular offenses when the sentencing court determines by a preponderance of the evidence that death resulted.

We oppose both options as unnecessary. In our experience, the specified offenses seldom result in death. When death does result, the offense can be prosecuted, except in the rarest of circumstances, under a federal homicide provision; otherwise the court can depart under § 5K2.1, p.s. (death). Absent evidence of a problem, we believe that action by the Commission is unnecessary.[4]

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[4]If the Commission decides to adopt either option, we prefer Option 1 for those offenses where it is clear that the trier of fact must determine beyond a reasonable doubt that death resulted. For the provisions that appear to be sentencing enhancements, we believe that a cross-reference to the homicide guidelines is appropriate only if the trier of fact determines beyond a reasonable doubt, that the offense resulted in death. This

Amendment 7
(Sexual Abuse; Criminal History)

In response to section 40111 of the Violent Crime Control and Law Enforcement Act of 1994, Amendment 7 would authorize increased punishment for repeat sex offenders. Section 40111 doubled the maximum penalties for some sexual abuse offenses, if the defendant has been previously convicted of a sexual abuse offense, and directed the Commission to amend the guidelines accordingly, if appropriate. Amendment 7 would revise the commentary to § 2A3.1 (criminal sexual abuse), § 2A3.2 (criminal sexual abuse of a minor), § 2A3.3 (criminal sexual abuse of a ward), and § 2A3.4 (abusive sexual contact) to specify that an upward departure may be warranted under § 4A1.3 "if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense." The amendment would also revise § 4A1.3 (adequacy of criminal history) to specify that under certain circumstances an upward departure may be warranted "to reflect a defendant's demonstrated pattern of particularly egregious criminal conduct." Finally, Amendment 7 invites comment as to whether the offense levels in Chapter Two, part A, subpart 3 should be raised to take into account a defendant's prior convictions for similar sexual abuse offenses.

We support the proposed amendment to § 4A1.3 to amend the commentary to indicate that recidivism is a basis for an upward

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approach would be consistent with the felony murder rule, which requires the trier of fact to determine, beyond a reasonable doubt, that the offense resulted in death.

departure in particularly serious cases when no other enhancement applies. There are already guidelines and statutory enhancements to address serious recidivism, including the career offender guideline, the armed career criminal act, and the "three-strikes" mandatory life provision.

We oppose revising the offense levels applicable to sex offenses to account for recidivism. Chapter Four already covers criminal history characteristics. The proposed revision to increase offense levels based on a defendant's criminal history would result in double-counting.

Amendment 8
(Counterfeiting and Fraud)

Amendment 8 presents two options to amend §§ 2B5.1 (counterfeiting) and § 2F1.1 (fraud) in response to section 110512 of the Violent Crime Control and Law Enforcement Act of 1994. Option 1 would add a specific offense characteristic to §§ 2B5.1 and 2F1.1 to provide for a two-level increase "if a dangerous weapon was possessed in connection with the offense". Option 2 would amend the commentary to the two guidelines to authorize an upward departure if a dangerous weapon was possessed in connection with the offense. At the request of the Department of Justice, Amendment 8 also invites comment as to whether the weapon enhancement should instead be modeled after that found in § 2B3.1 (robbery).

We support Option 2. We believe that the use of a dangerous weapon in connection with a counterfeiting or fraud offense occurs so infrequently that such a situation is best addressed by a

departure. In addition, illegal firearm offenses are already covered under § 2K2.1 -- a guideline that ensures a severe sentence by providing for a high base offense level, numerous enhancements, and when applicable, a cross-reference to the guideline for the underlying offense.

Amendment 9
(Drive-by Shooting)

Amendment 9 offers two options in response to section 60008 of the Violent Crime Control and Law Enforcement Act of 1994. Section 60008 creates a new offense of "drive-by shooting" (18 U.S.C. § 36). Option 1 amends the statutory index to list § 2D1.1 as the applicable guideline for a conviction under 18 U.S.C. § 36. Option 2 amends the statutory index to list §§ 2A1.1, 2A1.2, 2A2.1, 2A2.2, and 2D1.1 as possible guidelines for a conviction under 18 U.S.C. § 36. In addition, at the request of the Department of Justice, Amendment 9 seeks comment as to whether to add a specific offense characteristic to § 2D1.1 to increase an offense level "for reckless endangerment by firing a weapon into a group of two or more persons in a circumstance set forth in section 60008 when no injury occurs."

We support Option 2, but believe that § 2D1.1 should not be included in the statutory index as an applicable guideline for a violation of 18 U.S.C. § 36. The gravamen of a drive-by shooting is the assaultive behavior. The guidelines that cover such conduct (§§ 2A1.1, 2A1.2, 2A2.1, 2A2.2) would therefore be most appropriate for an offense under 18 U.S.C. § 36. We believe that § 2D1.1 (drug trafficking) does not address the assaultive conduct prohibited by

18 U.S.C. § 36. If a defendant also commits a drug offense, the defendant should be charged for that offense. Because we do not believe that § 2D1.1 is an appropriate guideline to cover an offense under 18 U.S.C. § 36, we do not support adding to § 2D1.1 an enhancement for "reckless endangerment."

Amendment 10
(Drug Offenses in Prison)

Amendment 10 presents two issues for comment in response to sections 90101 and 90103 of the Violent Crime and Law Enforcement Act of 1994. Section 90101 amends 18 U.S.C. § 1791 (providing or possessing contraband in prison) to require that for a violation of 18 U.S.C. § 1791 any sentence imposed must run consecutively to any other sentence imposed for a controlled substance offense. Section 90103 directs the Sentencing Commission "to appropriately enhance" the penalties for violations of 21 U.S.C. §§ 841 or 844 that occur in a federal prison or detention facility.

Amendment 10(A) seeks comment on how the guidelines should address violations of 18 U.S.C. § 1791 that involve drug possession or trafficking in correctional facilities. Amendment 10(B) seeks comment on how the guidelines should be amended to provide an adequate enhancement for controlled substance offenses (21 U.S.C. §§ 841 and 844) that occur in a federal prison or detention facility.

We believe a defendant should receive the same penalty whether prosecuted under 18 U.S.C. §§ 1791, 841 or 844. Further, we believe that a prison is similar to other protected locations and should be treated similarly. Under § 2D1.2, a drug trafficking

offense in a protected location is two levels higher than that offense committed elsewhere. We believe that § 2P1.2 provides an appropriate penalty for drug trafficking violations of 18 U.S.C. § 1791. A defendant convicted of providing a controlled substance in prison receives the applicable offense level under § 2D1.1 plus an additional two levels under § 2P1.2.

Violations of 21 U.S.C. § 841 that occur in prison should also be subject to a two-level enhancement similar to that provided in § 2P1.2 and § 2D2.1 (protected location). A defendant convicted of possessing a controlled substance under 18 U.S.C. § 1791 receives an offense level of thirteen or six, depending on the type of controlled substance. A defendant convicted of simple possession of a controlled substance under 21 U.S.C. § 844 receives an offense level of four, six or eight (unless the offense involved five or more grams of crack cocaine). We suggest that § 2D1.2 be amended to provide a two-level enhancement if the offense occurs in prison. For consistency, we recommend a cross-reference to § 2D2.1, plus a two-level enhancement, for an offense prosecuted under 18 U.S.C. § 1791 that involves simple possession of a controlled substance.[5]

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[5] A defendant who commits an offense under either 18 U.S.C. § 1791 or 21 U.S.C. §§ 841 or 844 while serving a sentence will receive an additional penalty because that defendant's criminal history score will be increased by two levels under § 4A1.1(e). A prison guard or other law enforcement officer who violates 18 U.S.C. § 1791 will be subject to an additional enhancement under § 3B1.3 (abuse of trust).

Amendment 11
(Drug Trafficking in Protected Locations)

Amendment 11 seeks comment as to how to comply with section 90102 of the Violent Crime Control and Law Enforcement Act of 1994, which directs the Commission to provide "an appropriate enhancement" for violations of 21 U.S.C. § 860 (drug trafficking in a protected location). We believe that § 2D1.2 (drug offenses occurring near protected locations) already provides an appropriate enhancement for those violations. There is no evidence to indicate that § 2D1.2 does not currently provide appropriately severe penalties for drug offenses that occur near a protected location. We believe, therefore, that the Commission has already complied with the mandate, so no further action is required.

Amendment 11, at our request, also invites comment as to whether § 2D1.2 should be amended to provide for a base offense level of 13, if law enforcement personnel or their agents selected the protected location. Amendment 42 also deals with this matter by revising the commentary to § 2D1.2 to authorize a downward departure if the protected location was chosen by law enforcement agents.

A defendant convicted of an offense that occurs in a protected location that law enforcement personnel or their agents selected is not as culpable as a defendant who chooses a protected location. The guidelines should reflect this difference in culpability. We think both proposed amendments would address this matter, but prefer our approach because it would promote more uniform sentencing.