Amendment 12
(Precursor Chemicals)

Amendment 12 would add pills containing ephedrine to the prohibited chemical list in § 2D1.11. Section two of the Domestic Chemical Diversion Act of 1993 made such pills illegal. The amendment would also change the designation of listed chemicals from "listed precursor chemicals" to "list I chemicals" and from "listed essential chemicals" to "list II chemicals" to bring the guidelines into conformity with the Domestic Chemical Diversion Act of 1993. Because section eight of the Act removed d-lysergic acid from the listed chemicals regulated under the Controlled Substances Act, Amendment 12 would remove the reference to d-lysergic acid from § 2D1.11. Finally, Amendment 12 would amend § 2D1.11 to add benzaldehyde and nitroethane because the Act made them listed chemicals.

We support this amendment, which is consistent with the Domestic Chemical Diversion Act of 1993. We believe that the revision of application note 4 will make application of the guideline easier.

Amendment 13
(Drug Manufacturing Equipment)

Amendment 13 would revise § 2D1.12 (unlawful possession, manufacture, distribution, or importation of prohibited flask or equipment; attempt or conspiracy) to provide two base offense levels. The base offense level would be 12 if the defendant intended to manufacture a controlled substance or intended or believed that the prohibited equipment would be used to manufacture

a controlled substance. The base offense level would be nine if the defendant had reasonable cause to believe that the prohibited equipment would be so used. We support this amendment.

Amendment 14
(Hate Crimes)

Amendment 14 has three parts. The first part deals with incorporating into the guidelines the hate crimes directive of section 280003 of the Violent Crime Control and Law Enforcement Act of 1994. That directive calls for a three-level enhancement if the finder of fact at trial determines beyond a reasonable doubt that the defendant intentionally selected a victim because of the "actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

The Commission's proposal is to incorporate this provision into the vulnerable victim guideline. The Commission would also modify the statutory language to apply to guilty plea situations by requiring the court, at sentencing, to find beyond a reasonable doubt that the offense was a hate crime. The Justice Department proposal would put the enhancement in a separate guideline.

We support the Commission's proposal. We see no need for a new guideline. We believe that the three-level increase called for by Congress, which was not particularly lenient in the Violent Crime Control and Law Enforcement Act of 1994, is appropriate and should not be any higher.

The second part of Amendment 14 deals with consolidating several of the offense guidelines applicable to civil rights

crimes. The Justice Department has proposed an alternative that would increase the base offense levels of § 2H1.3 and add an enhancement to § 2H1.1. We support the Commission's proposal.

The Commission's proposal will avoid double counting when calculating the offense levels under the civil rights offense guidelines as well as simplify application of the guidelines, and we support it. The proposed revision of § 2H1.1 has bracketed proposed base offense levels. The difference between the first set of base offense levels and the second set is how an offense involving more than one participant should be treated. The first set would call for an offense level of ten, the same offense level applicable to an offense involving force or threats against a person or property damage (or a threat of property damage). The second set would call for an offense level of 12 if there is more than one participant.

We do not believe that there should be an increased penalty for offenses involving more than one participant, so we oppose the second set of base offense levels. The second set is inconsistent with the general approach of the guidelines to such offenses. The guidelines do not punish a conspiracy to commit an offense more seriously than the substantive offense that was the objective of the conspiracy. In fact, § 2X1.1 treats a conspiracy as three levels less serious under certain circumstances. For the same reason, we recommend deletion of proposed subsection (a)(2)(C) in the first set.

The proposed revision of § 2H1.1 has bracketed the number of

levels by which the base offense level would be enhanced "if the defendant was a public official at the time of the offense" or "if the offense was committed under color of law." Under the current version of §§ 2H1.1, 2H1.3 and 2H1.5, there is a four-level enhancement for the defendant's status as a public official.

While a four-level increase would be consistent with Commission's current approach, we believe that four levels is too substantial an increase. A public official who engages in the conduct covered by this guideline has abused the public's trust. That abuse of trust is comparable to the abuse of a position of trust that triggers a two-level enhancement under § 3B1.3. We therefore recommend that the Commission adopt a two-level enhancement to reflect a defendant's status as a public official.

The Justice Department has not provided a rationale for its proposed changes to § 2H1.1 and § 2H1.3. If the purpose is to increase offense levels, the Justice Department should provide data justifying the increase. We prefer the Commission's approach.

Amendment 15
(Semiautomatic Assault Weapons)

Amendment 15 would amend the statutory index to list § 2K2.1 as the applicable guideline for a violation of 18 U.S.C. § 922(v) (unlawful manufacture, transfer, or possession of semiautomatic assault weapons) -- a new offense created by section 110102 of the Violent Crime Control and Law Enforcement Act of 1994. Amendment 15 also invites comment at the request of the Department of Justice as to "whether there should be an enhanced offense level under §

2K2.1 for a conviction under 18 U.S.C. § 922(v)."

We believe that § 2K2.1 is the most appropriate guideline for a violation of 18 U.S.C. § 922(v), but we do not believe that an increased offense level is justified for possession or transfer of a weapon listed under 18 U.S.C. § 922(v). The severity of the penalties for a firearm offense should be based on the circumstances under which that offense occurred. U.S.S.G. § 2K2.1 already provides numerous enhancements and cross-references to account for offenses that involve more than simple possession or transfer of a firearm. Indeed, the enhancements in § 2K2.1 more than adequately cover virtually every conceivable circumstance that might warrant additional punishment. For instance, the offense level is increased based on the number of firearms, whether the firearm is stolen or has an obliterated serial number, and whether the defendant intended or believed that the firearm would be used in another felony offense, and the defendant's criminal record. In addition, the cross-reference in § 2K2.1(c) ensures a sentence commensurate with the offense for which the defendant used or intended to use the firearm. Finally, to address serious cases, the court can sentence at the top of the guideline range.

Amendment 16
(Transfer of Handgun or Ammunition to a Juvenile)

Amendment 16, in response to sections 110201 and 110401 of the Violent Crime Control and Law Enforcement Act of 1994, would add 18 U.S.C. § 922(x) to the statutory index and would revise the commentary to § 2K2.1(a)(8). Section 110201 creates a new offense prohibiting certain transfers of handguns to juveniles (18 U.S.C.

§ 922(x)). Section 110401 amends 18 U.S.C. § 922(d) to make it an offense to transfer a firearm or ammunition to a person subject to a restraining order. Section 110401 also amends 18 U.S.C. § 922(g) to prohibit the possession or receipt of a firearm by a person subject to a restraining order.

Amendment 16 offers three options to revise the guidelines to address violations of 18 U.S.C. § 922(x). All three options would amend the statutory index to list § 2K2.1 as the applicable guideline for a violation of 18 U.S.C. § 922(x) and would amend § 2K2.1, comment. (n. 6) to include a person subject to a restraining order in the definition of "prohibited person." Option 1 would amend § 2K2.1(a)(8) to provide for a base offense level of six for a violation of 18 U.S.C. § 922(x). Option 2 would provide for a base offense level of 12 pursuant to § 2K2.1(a)(7). Option 3 would amend § 2K2.1(a)(6) to provide for a base offense level of 14 "if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person or was underage."

We believe that § 2K2.1 is the appropriate guideline for a violation of 18 U.S.C. § 922(x) and support Option 1. As discussed in our comment to Amendment 15, we believe that the context in which the transfer occurs should provide the basis for determining the severity of the offense. A licensed dealer who transfers a firearm to a juvenile may often be more culpable than a lay person who transfers a firearm to a juvenile. (Currently, under § 2K2.1 an offense involving the transfer of a firearm by a licensed dealer to a juvenile or prohibited person receives a base offense level of

12). The dealer, who is likely to know the prohibition against transfers to juveniles, who sells a firearm to a juvenile is more culpable than, for instance, a father who gives his son a firearm. A base offense level of 14 as proposed under Option 3 is therefore unreasonably high. If the offense involves a transferor who is a prohibited person, or if the transferor intended the firearm to be used in connection with an offense, the offense level will be enhanced accordingly. U.S.S.G. § 2K2.1 provides numerous opportunities to increase punishment when the circumstances of the transfer so warrant. In light of the statutory amendments to 18 U.S.C. §§ 922(d) and 922(g), we support the amendment to the definition of "prohibited person" in § 2K2.1 to include a person subject to a restraining order.

Amendment 17
(Semiautomatic Firearms)

Amendment 17 invites comment in response to section 110501 of the Violent Crime Control and Law Enforcement Act of 1994, which directs the Commission "to provide an appropriate enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved." We believe that the guidelines already adequately account for the use of a semiautomatic firearm.

Section 110501 does not specify whether the use or possession of a semiautomatic firearm warrants a more severe penalty than use or possession of any other type of firearm or weapon. If the particular danger associated with a semiautomatic firearm could be identified, perhaps the Commission could fashion an appropriate enhancement. Section 110501 does not give the Commission a

deadline for responding to the directive, and until there is data to indicate that the present enhancements are inappropriate, the current enhancements should suffice.

In our experience, most firearm offenses involve the use of a semiautomatic firearm. There is no evidence indicating that the current gun enhancements do not provide appropriately harsh enhancements. There is nothing to suggest, for example, that sentencing courts frequently depart upward in cases involving guns because the weapon involved was a semiautomatic. Further, the government has available 18 U.S.C. § 924(c), which requires five years in addition to any other sentence, if a gun is used or possessed during and in relation to a crime of violence. The present weapon enhancements in the guidelines comply with the Congressional mandate.

Amendment 18
(Use of Explosives to Commit a Felony)

Amendment 18 invites comment as to how to amend § 2K2.4 in response to sections 110502 and 320106 of the Violent Crime Control and Law Enforcement Act of 1994. Section 110502 directs the Commission to provide an enhanced penalty for a defendant who has previously been convicted under 18 U.S.C. § 844(h). Section 320106 changes the mandatory minimum penalty for a violation of 18 U.S.C. § 844(h) from five years to a range of five to fifteen years for a first offense, and from ten years to a range of ten to twenty-five years for a second offense. In effect, Congress has replaced the fixed mandatory minimum with a minimum mandatory minimum and a maximum mandatory minimum.

It is unclear why Congress replaced the fixed mandatory minimum with a range, a provision that makes little sense in the guidelines system mandated by the Sentencing Reform Act of 1984. We therefore support the second possible approach suggested by Amendment 18, which would require "application under § 2K2.4 of the minimum term of imprisonment required by statute, with a departure recommended when this sentence, combined with the sentence for the underlying offense, does not provide adequate punishment." We believe that § 2K2.4 ensures that a defendant will be subject to at least the minimum mandatory minimum sentence for a first or second conviction under 18 U.S.C. § 844(h). Absent any data to indicate what circumstances require a consecutive sentence of more than the minimum mandatory minimum, we believe such a determination is best left to the discretion of the sentencing court.

Amendment 19
(Felon in Possession of a Firearm)

Amendment 19 invites comment in response to section 110513 of the Violent Crime Control and Law Enforcement Act of 1994, which directs the Commission to "appropriately enhance penalties" for a conviction under 18 U.S.C. § 922(g) (felon in possession of a firearm) if a defendant has one or two prior convictions for a violent felony (as defined in 18 U.S.C. § 924(e)(2)(B)) or serious drug offense (as defined in 18 U.S.C. § 924(e)(2)(A)).

We believe that the Commission has already complied with this directive. Under § 2K2.1(a)(4), a defendant who has been convicted of a controlled substance offense or crime of violence as defined in § 4B1.2 receives a base offense level of 20. The definition of

"crime of violence" and a "controlled substance offense" in the statute differs somewhat from the definition of these terms in the § 4B1.2. We believe that the definitions established in the guidelines appropriately enhance the penalties for a defendant who has prior convictions for a crime of violence or controlled substance offense. Indeed, a defendant subject to the enhanced offense level under § 2K2.1 (a)(4) is also penalized for the prior convictions in the calculation of the criminal history score under Chapter Four.

Amendment 20
(Theft of Firearms)

Amendment 20 presents two options to revise § 2B1.1(b) (theft) and the statutory index in response to sections 110504, 110511, and 110515 of the Violent Crime Control and Law Enforcement Act of 1994. These sections create federal offenses prohibiting possession of a stolen firearm or explosive under a number of circumstances. Section 110504 makes it a crime to steal a firearm which has moved in interstate commerce (18 U.S.C. § 924 (k)). Section 110511 makes it an offense to possess a stolen firearm which has moved in interstate commerce (18 U.S.C. § 922(j)). Section 110515 makes it a crime to steal a firearm or explosive from a licensed dealer (18 U.S.C. §§ 844(l) and 924(l)).

Two guidelines cover offenses involving stolen firearms. U.S.S.G. § 2K2.1 (firearms) provides for a base offense level of at least 12 for an offense involving a stolen firearm, and includes a two-level enhancement if the firearm is stolen (unless the only count of conviction is a stolen firearm offense). Under §

2B1.1(b)(2), however, a theft of a firearm or destructive device results in a one-level increase, with a minimum offense level of seven. Amendment 20 attempts to reconcile the inconsistency between these two guidelines.

Option 1 would amend § 2B1.1 by deleting § 2B1.1(b)(2) and adding a cross reference to §§ 2D1.1, 2D2.1, 2K1.3 or 2K2.1 if the offense involved theft of a firearm, destructive device, explosive or controlled substance. Option 2 would amend § 2B1.1 by deleting § 2B1.1(b)(2) and adding an application note. The application note would state that an upward departure to an offense level comparable to that provided in §§ 2D1.1, 2D2.1, 2K1.3, or 2K2.1 may be warranted, if the offense involved "the unlawful taking, receipt, transportation, transfer, transmittal, or possession of a firearm, destructive device, explosive material, or controlled substance."

We support Option 2. A departure best addresses those rare circumstances where the offense involves the theft of a firearm but § 2K2.1 is not applied because the defendant is not convicted of a firearm offense. We therefore oppose adding a cross-reference to the theft guideline.

We oppose the references to the drug guidelines in both options. None of the new offenses created in sections 110504, 110511 or 110515 involve theft of a controlled substance -- they all address stolen firearms. There has been no showing that there is any need to provide for either a cross reference or a specified departure for an offense that involved theft of a controlled substance. Instead of specifically addressing the new offenses,

the proposed changes have the unintended consequence of creating more of a real offense system in conflict with the structure and purpose of the guidelines.[6]

Amendment 21
(Use of a Weapon During a Violent or Drug Trafficking Crime)

Amendment 21 would amend the statutory index in response to section 110518 of the Violent Crime Control and Law Enforcement Act of 1994. Section 110518 adds a new subsection (n) to 18 U.S.C. § 924 to provide for a maximum sentence of 20 years for a person convicted of conspiring to commit an offense under 18 U.S.C. § 924(c). In addition, section 110518 amended 18 U.S.C. § 844 by adding a new subsection (m) to increase the maximum penalty to 20 years for a violation under 18 U.S.C. § 844(h).

Amendment 21 would amend the statutory index to make § 2K1.3 (possession of explosives) the applicable offense guideline for a conviction under 18 U.S.C. § 844(m) and § 2K2.1 the applicable offense guideline for a conviction under 18 U.S.C. § 924(n). We support this amendment.

Amendment 22
(Immigration, Naturalization, Passports)

Amendment 22 consists of four proposed amendments to the guideline provisions applicable to immigration offenses. Section 60024 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory penalties for bringing in or harboring an alien and provides for increased punishment if death or serious

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[6]In drafting the guidelines, the Commission found that a real offense system was impractical and "risked return to wide disparity in sentencing practice." U.S.S.G. Ch. 1, Pt. A(4)(a), at 5.

bodily injury results. Amendment 22(A) seeks comment as to whether to increase the offense levels of § 2L1.1 (smuggling, transporting, or harboring an unlawful alien).

We do not believe that the offense levels of § 2L1.1 need to be increased. As we stated in our general remarks, a new, higher maximum allows a court to punish more severely defendants who commit the most egregious form of the offenses, but there is nothing to indicate that Congress wanted an across-the-board increase in punishment. Congress did not direct a general increase in the guidelines applicable to such offenses, which Congress could easily have done had Congress so desired.

Amendment 22(B) invites comment in response to section 130001 of the Violent Crime Control and Law Enforcement Act of 1994, which revises the penalties for violations of 8 U.S.C. §§ 1252(e) (failure to depart) and 1326(b) (reentry) and creates a new offense for reentry after conviction for three or more misdemeanors involving drugs, crimes against the person, or both. The amendment seeks comment as to whether the guidelines applicable to these offenses should be amended.

We believe that the applicable guidelines are appropriate. Section 130001 contains no directive to the Commission to amend the guidelines to reflect the revised penalties. We do not believe that every revision of a statutory penalty requires an increase in the offense levels of the applicable offense guideline. We believe that the offense levels for reentry after a felony or aggravated felony conviction are already quite substantial. Indeed, § 2L1.2

requires an increase of 16 levels for reentry after a conviction for an aggravated felony -- an increase unmatched by any other guideline. In addition, any defendant subject to an offense level increase due to a prior felony conviction is also penalized for that conviction under Chapter Four (criminal history).

We do not support raising the offense level to account for misdemeanor convictions. We believe that Chapter Four adequately covers prior convictions and any particularly egregious criminal record may be addressed by a departure under § 4A1.3, p.s. (adequacy of criminal history).

Amendment 22(C), published at the request of the Department of Justice, would revise § 2L1.1 to increase the base offense level for certain immigration offenses and to provide enhancements for any bodily injury that may have occurred as a result of the offense. There has been no data to indicate any necessity for revising this guideline, and we therefore oppose this amendment.

Amendment 22(D), published at the request of the Department of Justice, would amend § 2L1.2, comment (n. 1) to suggest an upward departure for an unlawful entry offense where a deported defendant with no criminal record repeatedly reenters the United States. We believe that such an amendment is unnecessary, especially since the application note already states that in such instances "a sentence at or near the maximum of the applicable guideline range may be warranted." The Justice Department has offered no data to indicate that the current application note has resulted in insufficient punishment. Further, Congress did not increase the maximum penalty

for unlawful entry by a defendant who has no criminal record. The severity of guideline penalties for a reentry offense is based on whether the defendant received felony convictions. Under the proposed amendment of the Justice Department, however, a defendant with no criminal record could be sentenced, through a departure, more harshly than a person with a criminal history, because the base offense level of eight applies to persons who may or may not have prior convictions.

Amendment 23
(Passport and Visa Offenses)

Amendment 23 proposes two amendments in response to section 130009 of the Violent Crime Control and Law Enforcement Act of 1994, which increases the statutory maximum penalties for passport and visa offenses. Section 130009 also increases the statutory maximum penalty if the offense is committed to facilitate a drug trafficking crime or to facilitate an act of international terrorism.

Amendment 23(A) invites comment as to whether §§ 2L2.1 and 2L2.2 should be amended in light of the statutory amendments. We do not believe that the provisions of section 130009 warrant any amendment. Congress increased statutory maximums in section 130009, but did not mandate that the Commission amend the guidelines at this time. The increased maximums, therefore, must have been intended to permit greater punishment of defendants who commit the most aggravated form of the offense. Because there is no data indicating that the current guideline levels are too low, we see no need to raise them.

We do not support Amendment 23(A). Cases involving international terrorism are very infrequent. There is, therefore, insufficient data to permit drafting a guideline that will not be, for some, inadequate and, for others, excessive. Until there is sufficient data to draft an appropriate guideline provision, the matter is better left to judicial discretion under § 5K2.15, p.s. (terrorism).

Amendment 23(B), published at the request of the Department of Justice, would consolidate §§ 2L2.1 and 2L2.2, increase the base offense level, and provide for enhancements depending on whether the offense was committed to facilitate another offense. We oppose this amendment. The offenses covered are not equally serious. The conduct covered by § 2L2.1 involves trafficking in fraudulent naturalization documents, while § 2L2.2 addresses fraudulent acquisition of papers to evade immigration law. The base offense levels are nine and six respectively. The amendment offered by the Department of Justice would require a base offense level of at least 13 for either offense. There has been no data offered to indicate that the offense levels provided by §§ 2L2.1 and 2L2.2 are inadequate and therefore no reason to raise them.

Amendment 24
(International Terrorism)

Amendment 24, in response to the directive in section 120004 of the Violent Crime Control and Law Enforcement Act of 1994, invites comment on whether to amend Chapter Three or the career offender guideline to provide "an appropriate enhancement" for "any felony that involves or is intended to promote international

terrorism" in response to the directive in section 120004 of the Violent Crime Control and Law Enforcement Act of 1994. We believe that no change in the guidelines is required because § 5K2.15 p.s. already states that an upward departure may be warranted in cases where the offense was committed to promote terrorism. There has been no showing of a significant increase in international terrorism and no showing of frequent departures for terroristic activity to warrant additional changes to the guidelines to supplement § 5K2.15, p.s. (See discussion of Amendment 23.)

Amendment 25
(Solicitation of a Minor to Commit a Crime)

Amendment 25 offers two proposals in response to section 140008 of the Violent Crime Control and Law Enforcement Act of 1994, which directs the Commission to "provide an enhancement applicable to a defendant 21 or older who involved a person under 18 in the offense." Amendment 25(A) invites comment as to whether this directive should be implemented by amending Chapter Five, part K (departures) or by amending Chapter Three (adjustments). Amendment 25(B), published at the request of the Department of Justice, would amend Chapter Three to provide for a new section entitled "Using a Minor to Commit a Crime." The new section would call for a two-level adjustment if an adult defendant "used or attempted to use any person less than 18 years of age with the intent that the minor would commit an offense or assist in avoiding detection of or apprehension for an offense." The adjustment would require an additional one-level adjustment if the defendant used or attempted to use five or more minors and an additional two-level

adjustment if the defendant used or attempted to use fifteen or more minors.

We believe that the statutory directive should be incorporated in Chapter Three as a two-level adjustment. In cases where the offense involved the use of five or more minors, a court may depart.

Amendment 26
(Gang Enhancement)

Amendment 26(A) invites comment as to whether to amend the guidelines in response to section 150001 of the Violent Crime Control and Law Enforcement Act of 1994. Section 150001 creates a new sentencing enhancement (18 U.S.C. § 521) that applies to a conviction for a drug trafficking offense or a crime of violence if the defendant is a member of a gang, has a prior conviction for either a drug trafficking offense or a crime of violence, and thereby "intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang." Section 150001 defines a "criminal street gang" to be:

> an ongoing group, club, organization, or association of five or more persons: (A) that has as one of its primary purposes the commission of one or more of the following offenses: a federal felony involving a controlled substance for which the maximum penalty is not less than five years, a federal felony crime of violence that has as an element the use or attempted use of physical force against another, and the corresponding conspiracies; (B) whose members engage (or have engaged during the past five years) in a continuing series of these same offenses; and (C) the activities of which affect interstate or foreign commerce.

We believe that the statutory enhancement for gang-motivated crimes of violence or controlled substance offenses can best be incorporated as a ground for departure in Chapter Five by listing the criteria found in 18 U.S.C. § 521. We oppose creating another adjustment in Chapter Three until there is sufficient data on gang activity to permit the drafting of an appropriate provision. Any provision drafted now would be based on speculation rather than a rational determination of how to best address certain types of gang-motivated criminal activity.

The major problem with attempting to enhance a sentence for gang behavior is defining "gang" and "gang-related activity." In the past two amendment cycles, the Commission has not adopted a gang-enhancement because of the difficulty in narrowing a definition to ensure fairness and to avoid collisions with the principles of the First Amendment. The definition in section 150001 is an improvement over definitions offered in the past because it requires the gang to have as a primary purpose violent criminal activity or drug trafficking.[7]

Amendment 26(B), published at the request of the Department of Justice, would amend §§ 2K2.1 and 2K2.5 to provide a four-level enhancement "if the defendant committed the offense as a member of, on behalf of, or in association with a criminal street gang." The definition of "criminal street gang" offered by the Justice Department is the same definition the Department of Justice

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[7]It is unclear why the term "street" is necessary in the definition of a criminal gang.

proposed and the Commission rejected during the past two amendment cycles:

> a group, club, organization, or association of five or more person[s] whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2 (definitions of terms used in section § 4B1.1).

This overly-broad definition of a "criminal street gang" would allow for an enhancement for simple membership in a group that happened to have members who had committed a series of crimes of violence or controlled substance offenses, and therefore could include a fraternity, a union, a business association and a religious group. We oppose Amendment 26(B).

Amendment 27
(Elderly Victims)

Amendment 27(A) invites comment on whether the guidelines should be amended in response to section 240002 of the Violent Crime Control and Law Enforcement Act of 1994. Section 240002 directs the Commission to ensure that the guideline range for a violent crime against a victim age 65 or older is "sufficiently stringent to deter such a crime, to protect the public from additional crimes of such a defendant, and to adequately reflect the heinous nature of such an offense."

We believe that the guidelines provide sufficiently stringent penalties to address crimes of violence against an elderly victim. The guidelines covering violent offenses contain enhancements for the infliction of physical harm. Chapter Three contains a "vulnerable victim" enhancement for offenses that target

particularly vulnerable victims. Finally, Chapter Five states that an upward departure may be warranted in particularly egregious cases.

Section 240002 also directs the Commission to provide for enhanced penalties for a violent offense involving an elderly victim if the defendant has a prior conviction for a crime of violence against a victim age 65 or older. Amendment 27(B) would add an application note to § 3A1.1 (vulnerable victim) to state that an upward departure may be warranted if the defendant had "a prior sentence for an offense that involved the selection of a vulnerable victim." We support this amendment.

Amendment 27(C) invites comment in response to section 250002 and section 250003 of the Violent Crime Control and Law Enforcement Act of 1994. Section 250002 provides for increased penalties for telemarketing fraud involving victims over the age of 55, and section 250003 directs the Commission to ensure that the guidelines adequately punish fraud offenses against victims over the age of 55. We believe that the enhancements available under § 2F1.1 and the victim-related adjustments of § 3A1.1 already account for the exploitation of such victims. Not all persons over the age of 55 are incapable of protecting themselves from fraud. An automatic enhancement based on age, however, presumes just the opposite -- that everyone over age 55 is unable to take care of him- or herself. Whether a victim's age rendered that person particularly vulnerable is better left to the discretion of the court.

Amendment 28
(Three Strikes)

Amendment 28 invites comment on how to incorporate into the guidelines 18 U.S.C. § 3559 (mandatory life imprisonment for persons convicted of certain felonies). We believe that this statutory provision need not be addressed in the guidelines because § 5G1.1 already provides instructions as to how to determine the guideline sentence when a statutorily-required mandatory sentence applies.

Amendment 29
(Safety Valve)

Section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to implement section 80001 (limitation on applicability of mandatory minimum penalties in certain cases). Using emergency amendment authority, the Commission promulgated § 5C1.2. Because of the limited life of an emergency amendment, the Commission must act again in order to have a permanent guideline in place. Amendment 29 would repromulgate § 5C1.2, and invites comment as to whether any additional changes to § 5C1.2 or any other guidelines are necessary to "effectuate congressional intent regarding the 'safety valve' provision."

We urge the Commission to repromulgate § 5C1.2, but with two changes. First the guideline should provide for a two-level reduction from the offense level if a defendant meets the criteria of the safety valve. Second, application note 7 should be revised.

Congress has directed the Commission to revise the guidelines to "carry out the purposes" of the mandatory minimum safety valve

provision. By excluding particular offenders from the rigidity of mandatory minimum sentences, this provision was intended to expand judicial discretion in sentencing. Congress responded in part to concerns expressed by the Commission about how the arbitrariness of mandatory minimum sentences conflicts with the structure and purposes of the sentencing guidelines. In section 80001(b)(1), Congress provided that the guideline range for a defendant subject to a mandatory minimum of five years could be as low as 24 months. Under the current § 5C1.2, however, few defendants (mostly those charged with LSD trafficking offenses) can expect to receive a sentence nearly as low as 24 months without a substantial downward departure. This result occurs because the guideline ranges for drug offenses are scaled to incorporate the mandatory minimum sentences.[8] A defendant convicted of possession of five grams of crack (five-year mandatory minimum) who meets the criteria of the safety-valve will be subject to a base offense level of 26 (63-78 months). With a three-level reduction for acceptance of responsibility and a four-level reduction for minimal role (rarely given), the lowest offense level possible (without a departure) is 19, which yields a range of 30 to 37 months imprisonment.

We believe that the Commission should exercise the full extent of the discretion that Congress gave to the Commission. Drug trafficking penalties are too high for the people who qualify under the safety valve. We recommend adoption of the language the

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[8]U.S.S.G. § 2D1.1, comment. backg'd). See R.M. Scotkin, "The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses," 26 Crim. L. Bull. 50 (1990).

Commission had under consideration when § 5C1.2 was initially promulgated.

In addition, we believe that application note 7 to § 5C1.2 must be revised. We believe the Commission has misinterpreted 18 U.S.C. § 3553(f)(5) in § 5C1.2, comment. (n. 7) by requiring a defendant to provide incriminating information beyond the offense of conviction and authorizing the information disclosed to be used in determining the applicable guideline range. This requirement implicates the Fifth Amendment and echoes the issues raised by interpretations of the guideline for acceptance of responsibility before § 3E1.1 was amended in 1992 to require a defendant to accept responsibility for the offense of conviction only:

> To require a defendant to accept responsibility for crimes other than those to which he has pled guilty or of which he has been found guilty in effect forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentences to which they would otherwise be entitled to consideration.[9]

To avoid impinging on the right against self-incrimination, at a minimum, application note 7 should be revised to provide a defendant with the protections afforded in § 1B1.8 for defendants who provide information concerning unlawful activities of others. Consistent with the policy behind § 1B1.8, the information disclosed pursuant to 18 U.S.C. § 3553(f)(5) should not be used

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[9]United States v. Oliveras, 905 F.2d 623, 628 (2d Cir. 1990). See United States v. Frierson, 945 F.2d 650 (3d Cir. 1991); United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989).

against the defendant. We would be happy to assist the Commission in drafting appropriate language to revise application note 7.

Amendment 30
(Mandatory Restitution for Sex Offenses)

Amendment 30 would revise § 5E1.1 (restitution) in response to provisions of the Violent Crime Control and Law Enforcement Act of 1994 requiring restitution for sexual abuse offenses, telemarketing fraud, and domestic violence. The amendment would revise the commentary to § 5E1.1 to require that any restitution order for sexual abuse offenses, domestic violence, or telemarketing fraud must comply with the statutory requirements. We support the amendment.

Amendment 31
(Violations of Probation and Supervised Release)

Amendment 31(A) would revise § 7B1.3, p.s. in response to section 110505 of the Violent Crime Control and Law Enforcement Act of 1994. Section 110505 amended 18 U.S.C. § 3583(e)(3) to provide that the maximum sentence of imprisonment upon revocation of supervised release is five years. In addition, section 110505 amended 18 U.S.C. § 3583(g) to eliminate the mandatory sentence of one-third the term of supervised release for a violation involving possession of a controlled substance. Finally, section 110505 amended 18 U.S.C. § 3583 to authorize a court to impose an additional term of supervised release to follow a sentence of imprisonment imposed upon revocation of a term of supervised release.

Amendment 31(A) incorporates these provisions in Chapter Seven. Because Congress has mandated these changes, the amendments are warranted, and we therefore support them.

Amendment 31(B) would revise § 7B1.4, p.s. in response to section 20414 and 110506 of the Violent Crime Control and Law Enforcement Act of 1994. Section 20414 requires as a condition of probation or supervised release that a defendant submit to drug testing and refrain from use or possession of a controlled substance. Section 110506 requires revocation of supervised release or probation and a sentence of imprisonment for unlawful possession of a firearm or a controlled substance, or refusal to submit to drug testing. In addition, section 110506 amends 18 U.S.C. § 3563(a) to allow for exceptions to the mandatory revocation requirement based on a positive drug test if the defendant's current or past participation in a substance abuse treatment program warrants an exception.

Amendment 31(B) incorporates these changes in the commentary to § 7B1.4, p.s., and we believe these revisions are appropriate.

Amendment 32
(Statutory Index)

Amendment 32 revises the Appendix A (statutory index) by adding new offenses created by the Violent Crime Control and Law Enforcement Act of 1994. We believe that these revisions are appropriate.

Amendment 33
(Drug Offenses and Role in the Offense)

Amendment 33 presents three options for compressing the drug quantity table to minimize somewhat the impact of quantity on the determination of an offense level for a controlled substance offense. Option A would change the offense level from level 32 to level 30 for the quantity of a drug that triggers a mandatory minimum sentence of ten years and would change from level 26 to level 24 the offense level for the quantity of a drug that triggers a five year mandatory minimum sentence. Option A also makes other changes in the drug quantity table flowing from the changes in the levels relating to quantities that trigger mandatory minimums, but quantities assigned an offense level 22 or below would not be changed.

Option B would revise the drug quantity table based on the Congressional intention that the mandatory minimums be imposed upon persons who are mid- and high-level operatives in drug distribution offenses. Because those persons receive at least a two-level enhancement under § 3B1.1, the offense level for mandatory minimum quantities should be set two levels lower than at present. Thus, for example, a defendant who is accountable for a five year mandatory minimum quantity would have an offense level of 24. If that person were a manager, two levels would be added under § 3B1.1, and the defendant's offense level would then be 26, the offense level currently assigned to five-year mandatory minimum quantities. Offense level 26 yields a guideline range above the mandatory minimum sentence required for that defendant.

Option B, in our opinion, is necessary to prevent a form of double counting. For example Congress has required a five-year mandatory minimum sentence for the manager of a drug organization that has distributed 500 grams of cocaine powder. Under the current guidelines, this should result in an offense level of 26. The defendant, however, will have an offense level of 28 (30, if the defendant is an organizer or leader) because of the aggravating role guideline. If Option B were adopted, there would be no double counting.

Option C combines the changes made by Options A and B. Under Option C, a defendant accountable for 500 grams of cocaine powder would have an offense level of 22. If the defendant were a manager, the offense level would be 24, which for a first offender yields a guideline range of 51-63 months and permits imposition of the mandatory minimum sentence of five years as a guideline sentence.

Options A and B make good sense on their own, and both should be implemented. Option C implements both, and we therefore support it.

Amendment 34
(Mitigating Role)

Amendment 34 would revise § 2D1.1(a)(3) to require the base offense level from the drug quantity table to be no higher than level 28 if the defendant qualifies for a mitigating role adjustment. The amendment is intended to minimize the impact of quantity on the offense level of an offender who plays a minor or minimal role in a drug offense. The Commission took similar action

when it revised the crack house guideline (§ 2D1.8) "to reduce unwarranted disparity by requiring consideration in the guideline of the scale of the underlying controlled substance offense."[10]

We support this amendment. Once a drug offense reaches a certain scale, no significant purpose is served by making the offense level of a minimal or minor participant dependent upon quantity. As a former Assistant United States Attorney has noted, "[m]any drug defendants appear to be easily replaceable cogs in the vast drug distribution machinery. These defendants have quite different levels of culpability than the kingpins who dominate the drug business."[11] Because a minor or minimal participant has no control over the quantity of drugs, the primary measure of the severity of the offense cannot rationally be based on quantity.

Amendment 35
(Role in the Offense)

Amendment 35(A) would revise § 3B1.1 (aggravating role) in three ways. First, the amendment would require that to qualify for a three-level upward adjustment, the defendant must manage or supervise at least four other participants. Second, the amendment would delete the phrase "otherwise extensive" in § 3B1.1(a) and (b). Finally, the amendment would clarify that a defendant may not receive an adjustment for both mitigating role and aggravating role.

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[10]U.S.S.G. App. C.

[11]D. Young, "Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability," 3 Fed. Sent. R. 63 (1990).

We support all three changes. The amendment to subsection (b) would prevent the odd result presently obtained that a defendant who supervises one person in an offense involving five persons gets a three-level enhancement, while a defendant who organizes or leads a four-person offense receives only a two-level enhancement. Deletion of the vague phrase "otherwise extensive" will add clarity to the guideline and help to avoid litigation. Finally, it would seem as a matter of logic that a defendant could not receive adjustments for both an aggravating and mitigating role. The sentencing court should weigh the circumstances to determine which of the adjustments, if either, apply. The third change makes this point expressly.

Amendment 35(B) would revise § 3B1.2 (mitigating role) and the introductory commentary to Chapter Three, part B (role in the offense) in an attempt to clarify the criteria for a downward adjustment for mitigating role. We support portions of this amendment.

We support the revision of the introductory commentary to Chapter Three, part B. The revised version would explain the relationship between the relevant conduct rule of § 1B1.3 and the guidelines of Chapter Three, part B. The revised commentary is an improvement over the present introductory commentary.

We support some of the revisions of the application notes to § 3B1.2. We support the proposed version of application note 1(D), which will explain that the determination of mitigating role should be based on (1) the conduct for which the defendant is accountable

under § 1B1.3 and (2) "whether the defendant is substantially less culpable than a person who committed the same offense without the involvement of any other participant."

We do not oppose the proposed version of application note 1(E), which sets forth three categories of defendants who are "substantially less culpable participants." We support proposed application note 1(F) because it emphasizes that whether a defendant qualifies for a mitigating role depends heavily upon the facts in the case. We do not oppose revised application note 2, which lists characteristics ordinarily associated with mitigating role.

We oppose proposed bracketed application note 5, which would prevent a "mule" from receiving a minimal role adjustment for the quantity of drugs the defendant transported. We do not favor a categorical exclusion of any person because culpability should be based upon all of the facts and circumstances of the case. Indeed, quantity would seem to be an inappropriate factor to measure the culpability of a "mule" or courier. In our experience, the "mule" or courier does not determine the quantity to be transported, but merely serves as a vessel. The courier is normally paid by the delivery -- not by the value of the quantity of drugs or a percentage of the profit from the sale of those drugs. There are factors other than quantity that make a particular mule substantially less culpable than other participants and therefore deserving of a mitigating role adjustment.

We oppose proposed bracketed application note 6 for the same

reason. Application note 6 would disqualify a defendant from receiving a mitigating role adjustment if the defendant possessed a firearm in connection with the offense. Whether a defendant possessed a weapon is one factor among many that should be considered in determining the role of the defendant in a particular offense. In addition, possession of a dangerous weapon undoubtedly will increase the defendant's offense level, so using that factor to preclude a mitigating role adjustment is a form of double-counting.

We do not oppose application note 8, although we would suggest deletion of the gratuitous comment in the last sentence which states that a court is not required to make a finding that a mitigating role is warranted "based solely on the defendant's bare assertion." It has not been our experience that federal judges base a determination upon any "bare assertion" -- let alone if such an assertion comes from a defendant in a criminal case. In addition, it is the role of the court -- not the Commission -- to make factual and legal findings in a particular case.

Amendment 36
(Drug Trafficking and Aggravating Role)

Amendment 36 would amend §§ 2D1.1 and 2D1.11 and their commentary to add a minimum offense level for possession or use of a weapon and an enhancement for serious bodily injury. In addition, Amendment 36 presents two options to revise § 3B1.1 (aggravating role). Option 1 would require a five-level upward adjustment if the defendant was an organizer or leader of an offense that involved ten or more participants. Option 2 would

amend the commentary to § 3B1.1 to recommend as appropriate a sentence "towards the upper limit of the applicable guideline range" if the defendant was an organizer or leader of an offense that involved ten or more participants.

We do not support Amendment 36. There is no evidence that the existing enhancement for possession of a weapon is inadequate. Further, anytime a weapon is involved in a drug trafficking crime, the prosecutor may charge a variety of offenses to punish that conduct, including an offense that requires a five-year consecutive sentence. Until there is a showing that there is a problem, we do not see the need for Commission action.

The scale of a drug trafficking offense is already adequately reflected in the drug quantity table. The bigger the scale of the offense (i.e., the greater the number of participants and the longer the time of distribution), the greater the quantity for which a manager or leader will be held accountable. We find it difficult to distinguish -- based solely upon who handled the transactions -- between a defendant who personally distributed a quantity of drug yielding an offense level of 42 and a defendant who organized others who distributed that same quantity of the drug, also yielding an offense level of 42. While a defendant's leadership role is a factor to consider, it should not be dispositive nor should it alone be enough in every case to call for a sentence near the upper limit of a guideline range.

Finally, Amendment 36, at the request of the Practitioners' Advisory Group, invites comment on the Group's complex proposed

weapons enhancements for §§ 2D1.1 and 2D1.2. For reasons similar to those set forth above, we do not support the proposal of the Practitioners' Advisory Group.

Amendment 37
(Marijuana Plants)

Amendment 37 would amend the drug quantity table in § 2D1.1(c) and its commentary to revise the equivalency between marijuana plants and marijuana in cases involving 50 or more marijuana plants. Under the amendment, the equivalency between marijuana plants in offenses involving over 50 plants would be the same as the equivalency used in cases involving under 50 plants -- one plant = 100 grams of marijuana, unless the weight of the actual marijuana is greater. We support the amendment.

The current ratio for 50 or more plants is derived from 21 U.S.C. § 841(b) and makes one plant the equivalent of one kilogram of marijuana. This ratio is unrealistically high because only in the rarest instances, under ideal growing conditions, can a yield approaching one kilogram per plant be achieved. That formula inflates offense levels and leads to unfairly disproportionate punishment. The Commission adopted the equivalency of one plant = 100 grams of marijuana based on studies of the actual yield of marijuana plants and the reality that not all plants produce usable marijuana.[12] We believe that this amendment provides a more rational approach to sentencing in cases involving marijuana plants and is consistent with the Commission's policy for cases involving

[12] See § 2D1.1, comment. (backg'd).

fewer than 50 plants that "each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater."

Amendment 38
(Crack Cocaine)

Amendment 38 invites comment as to whether to amend the guidelines "with respect to the 100 to 1 ratio" between crack cocaine and powder cocaine, and if so, what ratio should be substituted.

We believe, as we have indicated in previous testimony on the matter of crack cocaine, that the proper ratio between crack cocaine and powder cocaine is one to one instead of 100 to 1. The Commission's Special Report to Congress contains no scientific data to support a distinction between the penalties for crack and powder cocaine. The report reveals that there is no data to indicate a significant pharmacological difference between the two substances and that available scientific data does not distinguish between the two. Because there is a dearth of evidence to support the assumptions made by Congress when it created the disparate penalties[13], logic and fairness would indicate that there is no reasonable or fair justification to differentiate between crack and powder cocaine for purposes of sentencing. Indeed, the report points out the anomalous result of the disproportionate penalties where "crack dealers at the street- and mid-levels receive longer sentences than their powder counterparts, and crack street dealers

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[13]U.S. Sentencing Com'n, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 195 (Feb. 1995).

get average sentences almost as long as the mid-level powder brokers and suppliers from whom they get their drugs." [14]

Amendment 39
(§ 2D1.1)

Amendment 39 presents two options to revise the manner in which the drug trafficking guideline deals with determining quantity in cases involving a series of drug transactions. Option 1 would limit the computation of the offense level to the greatest amount with which the defendant was involved in a specified period of time. The options presented are 12 months, 180 days and 30 days. Option 2 would limit the computation of the offense level to the largest single quantity with which the defendant was involved on any one occasion.

Both options address the potential for unfairness and lack of uniformity in sentencing that may occur in cases involving a series of transactions. The current method aggregates all quantities involved until the defendant is arrested. That method makes the scale of the offense too dependent on how many transactions were allowed to take place before the defendant was arrested and encourages sentencing manipulation. For example, when authorities delay making an arrest of a street dealer who sells relatively small amounts of drugs on any given occasion, the current method calls for cumulating amounts over a period of time to arrive at an offense level. This can result in a habit-supporting street dealer who makes a number of small sales over an extended period of time

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[14] Id., at 175.

receiving the same sentence as a dealer who regularly sells that amount at one time. We realize that it can be necessary to delay making an arrest of a small-time dealer in an attempt to get closer to the person's supplier. This understandable law enforcement strategy, however, does not justify one sentence for the small-time dealer who is arrested immediately and a much heavier sentence for the small-time dealer whose arrest has been delayed because of law enforcement needs unrelated to the defendant's culpability.

The legislative history of the mandatory minimum sentencing provisions in the Anti-Drug Abuse Act of 1986 (from which the offense levels in § 2D1.1 were derived) seems consistent with the snapshot approach. A snapshot approach also is consistent with the DEA's classification scheme and with the approach Congress took in the continuing criminal enterprise offense, 21 U.S.C. § 848. Finally, a snapshot approach would alleviate some of the difficulties faced by the court when it tries to calculate quantity involved in an offense that occurred over a long period of time.

We prefer Option 1 and believe that the court should consider the number of transactions made in any continuous 30-day period. We believe the 30-day period is most appropriate because it is consistent with the "investigation/prosecution priority classification scheme" of the DEA that was in effect when Congress enacted mandatory minimum drug penalties.

Amendment 40
(Drug Purity)

Amendment 40 invites comment on a revision to § 2D1.1(c) drug quantity table which would make drug purity a sentencing factor.

Amendment 40 would revise the drug quantity table to require use of the actual weight of the controlled substance. Amendment 40 would also revise the commentary to the drug trafficking guideline to set forth rebuttable presumptions as to the purity of drugs by type.

We support Amendment 40 as it achieves Congress's objective to narrow the wide disparity in sentences imposed for similar criminal offenses. There is no meaningful similarity between an offense involving distribution of ten grams of cut heroin and an offense involving distribution of ten grams of uncut heroin. The uncut heroin will be diluted several times over before finally being sold to someone who will consume the drug. To give each the same offense level results in unwarranted disparity.

Amendment 41
(Drug Quantity Determination For Pills)

Amendment 41 would revise the drug quantity table of § 2D1.1(c) to use the number of pills, capsules, or tablets to determine the quantity of Schedule I and II depressants and Schedule II, IV, and V controlled substances. We support this amendment because it simplifies the operation of § 2D1.1(c) and avoids the anomalies present in the current drug quantity table.

The question raised by this amendment is similar to the issue presented by LSD, which is sold by dose and not by weight. A pill can be big or little, heavy or light, contain much filler or little filler. The important quality of the pill is the strength of the controlled substance in the pill. Amendment 41 recognizes this and proposes a formula that would base punishment on the number of pills. The formula proposed in amendment 41 is similar to the

formula already applied cases involving anabolic steroids. As far as we know, there have been no problems in applying the anabolic steroids formula, and we recommend promulgation of Amendment 41.

Amendment 42
(Chapter Two, Part D - Miscellaneous Issues)

Amendment 42 is a twelve-part amendment that addresses a number of miscellaneous issues for offenses involving drug guidelines.

First, this amendment would add a note following the drug quantity table defining the terms "hashish" and "hashish oil." The terms are not defined by statute or in the guidelines. The amendment would adopt the dictionary meaning of those terms, and we support this addition to the asterisk footnote of the drug quantity table.

Second, this amendment addresses how to determine the weight of marijuana that has a moisture content sufficient to render the marijuana unusable without drying. The amendment would revise application note 1 to § 2D1.1 to state that the weight of the marijuana without the excess moisture (the dry weight) should be used.

We believe that the language added by the Commission in 1993 to application note 1 calls for use of the dry weight. Amendment 484 revised application note 1 to state that the term "mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used." The moisture in the marijuana is a material that must be removed before the marijuana can be used.

At least one case decided since Amendment 484 took effect, however, has approved the use of the weight of the marijuana with moisture.[15] It therefore seems advisable to add to application note 1 language that indicates that the principle already enunciated in that commentary calls for use of the weight of the marijuana without the excess moisture.

Third, Amendment 42 proposes a new application note 20 to the commentary of § 2D1.1 to clarify what constitutes a marijuana plant. The term "plant" is not defined in the guidelines, resulting in litigation about what constitutes a marijuana plant. Amendment 42 proposes an amendment that is consistent with what the circuit court decisions have said and that should forestall future litigation about the meaning of "plant." We therefore support the addition of application note 20.

Fourth, this amendment would amend the drug equivalency table of application note 10 to provide equivalencies for khat and

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[15]United States v. Klinginsmith, 25 F.3d 1507 (10th Cir. 1994). Klinginsmith, however, is not a good precedent for the proposition that the sentencing court should use the weight of the marijuana with excess moisture. The decision indicates that the offense took place a year before Amendment 484 took effect but does not indicate when sentencing took place. The marijuana was weighed shortly after being seized, and the weight was 82.55 kilograms. When reweighed about three weeks after being seized, the marijuana weighed 80.3 kilograms. When reweighed again about eight months after being seized, the marijuana weighed 76.72 kilograms. The expert who weighed the marijuana attributed the loss in weight to loss of moisture. The defendant, however, did not argue that the marijuana contained excess moisture at the first two weighings. The district court found that the quantity was at least 80 kilograms, and the Tenth Circuit found this holding not to be clearly erroneous. The appellate court did not mention application note 1 at all but relied on cases decided before Amendment 484 was promulgated.

levoalpha-acetylmethodol (LAAM). We support this change.

Fifth, this amendment deletes the distinction between d- and l-methamphetamine in the drug equivalency table in application note 10. The synopsis asserts that there is no basis to distinguish between l-methamphetamine d-methamphetamine because the former is "not made intentionally, but rather is a botched attempt to produce d-methamphetamine." We disagree with that assertion based on our experience handling methamphetamine cases.

Different isomers are used in making the two varieties of methamphetamine. D-ephedrine is used to make l-methamphetamine and l-ephedrine is used to make d-methamphetamine. In short, l-methamphetamine is not a botched attempt to make d-methamphetamine. Although l-methamphetamine is seen only rarely, the procedure to determine if a substance is d- or l-methamphetamine is routine and can be done whenever a laboratory is utilized to identify a substance as methamphetamine.

The justification for treating l- and d- methamphetamine alike is the assumption that since no one would intentionally manufacture l- methamphetamine, an offense involving l-methamphetamine can be treated as an attempt to manufacture d-methamphetamine. This rationale fails because l-methamphetamine is the intended result and not an attempt to manufacture d-methamphetamine. Since l-methamphetamine is a weaker form of d-methamphetamine, we oppose abolishing the distinction between the two substances.

The amendment also would treat dl-methamphetamine the same as d-methamphetamine, even though dl-methamphetamine has a potency

equivalent to 50% of that of d-methamphetamine. Dl-methamphetamine is a distinct form of methamphetamine and involves a different chemical process from that for making d- or l-methamphetamine. Dl-methamphetamine is produced by a phenylacetone/P2P process where the end result is intended -- dl-methamphetamine. We oppose treating dl-methamphetamine the same as d-methamphetamine because of the potency difference. We suggest that instead the Commission add dl-methamphetamine to the drug equivalency table using the formula, one gram of dl-methamphetamine = 500 grams of marijuana.

Sixth, the amendment would revise commentary to § 2D1.1 and § 2D1.11 to state expressly that if a weapon is present, there is a rebuttable presumption that the weapon is connected with the offense. Currently, the commentary provides that the weapon enhancement applies unless it is "clearly improbable" that the weapon was connected to the offense. We support this amendment because it resolves circuit conflict over the burden of persuasion.

Seventh, this amendment would revise application note 12 of § 2D1.1 to provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity is used to determine the offense level unless the completed transaction establishes a larger quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to product that amount. We support this amendment.

If a drug trafficking case involves negotiating a quantity, § 2D1.1 bases offense severity upon the amount under negotiation.

This, we believe, is a fair way to determine offense severity, but only if the defendant was reasonably capable of trafficking in the quantity under negotiation and actually intended to traffic in that quantity. If the defendant was not reasonably capable of trafficking in the quantity under negotiation, then the defendant's intention is irrelevant. Likewise, if the defendant did not intend to deliver (or purchase) the amount under negotiation, then the defendant's reasonable capability is irrelevant. This amendment would revise application note 12 to embody this policy.

Eighth, this amendment would add an application note to provide guidance in a case in which the defendant may not have known or reasonably foreseen the type or quantity of drug that the defendant personally transported or stored. We support this amendment as consistent with the notion of avoiding unwarranted sentencing disparities.

Drug offenses carry harsh penalties, including long mandatory minimum prison terms and maximum prison terms of up to life. The consequences to a defendant of a mistaken belief are serious. A defendant who reasonably believes that the suitcase contains a kilogram of marijuana (a level 10 offense under the guidelines) faces far more severe punishment if the substance turns out in fact to be cocaine (level 26 under the guidelines, with a five-year mandatory minimum) or heroin (level 32 under the guidelines, with a ten-year mandatory minimum).

A defendant who mistakenly, but reasonably, believes the substance carried across the border is marijuana is not as culpable

as a defendant who knows and intends to import heroin. To treat them alike results in unjustified disparity. While it would be preferable to account for this difference in culpability in the drug trafficking guideline itself, the data available at this time probably would not permit the drafting of an appropriate specific offense characteristic. This amendment would make the guidelines fairer by indicating that there is a basis for a downward departure in such a situation.

Ninth, this amendment would add an application note to § 2D1.1 to address cases in which a clandestine laboratory is used to manufacture a controlled substance but the manufacturing process has not been completed. The commentary would create a rebuttable presumption that the expected yield is 50 percent unless the defendant or the prosecution provide the court with a basis for making a more accurate determination. The Commission seeks comment upon whether the percent should be 50 and upon whether the formula should be applied to the most or the least amount of precursor chemicals on hand.

The theoretical yield assumes that all precursors react perfectly -- something that does not happen in the real world. The theoretical yield also assumes a highly skilled manufacturer and the most sophisticated laboratory equipment -- something that rarely occurs when a controlled substance is manufactured illegally. We therefore support use of a 40 percent formula applied to the most precursor chemical on hand.

Tenth, this amendment would add an application note addressing personal use quantity in a drug trafficking case. The new commentary would state that in such a case there is a basis for a downward departure (to a sentence within the range that would apply if the personal use amount were disregarded) if the defendant can establish that a portion of the drug was for personal use. We agree that this is a matter that the Commission must address, but we think that an amendment of the guideline is the appropriate course of action.

Because simple possession and personal use do not directly affect persons beyond the defendant, drug trafficking is punished more severely than simple possession and personal use. The drug trafficking guideline bases offense severity on quantity because the greater the quantity trafficked, the greater the number of persons directly affected. When an offense involves a defendant who has engaged both in trafficking and possessing for personal use, the guideline issue is whether the possessing for personal use is a part of the same course of conduct or common scheme or plan as the trafficking. Including the personal use amount overstates the seriousness of the trafficking offense, and we believe that the Ninth Circuit is correct in concluding that "drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution."[16] We believe that the appropriate course of action

[16]United States v. Kipp, 10 F.3d 1463, 1465-66 (9th Cir. 1994).

is to change the second sentence of proposed application note 23 to state, "Any quantity that the court determines that a defendant possessed for the defendant's own consumption shall not be included."[17]

Eleventh, this amendment would amend the commentary to § 2D1.2 (drug offenses occurring near protected locations) to state that there is a basis for a downward departure if law enforcement authorities rather than the defendant determined the location of the drug transaction. We believe that this is a matter that the Commission must address, but we think that the most appropriate course of action would be to adopt our proposal published by the Commission in connection with amendment 11.

Twelfth, this amendment would revise commentary to § 2D1.8 (renting or managing a drug establishment; attempt or conspiracy). The changes made by this amendment are technical in nature, and we support this part of Amendment 42.

Amendment 43
(Drug Trafficking - Approach 2)

Amendment 43 presents two options to restructure § 2D1.1 so that the severity of a drug trafficking offense would no longer be based primarily on the quantity involved in the offense. Under Option 1, quantity would be completely irrelevant and the base offense level would be determined only by the type of drug. There would be three categories of drugs with an offense level assigned

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[17]A sentencing court, of course, can account for the personal use quantity in selecting where within the guideline range to sentence.

to each category. (The amendment presents a range of options as to what the base offense level would be for each category.) If the offense involved more than one drug transaction within a specified period of time, the base offense level would be increased by two levels. Option 1 uses specific offense characteristics found in § 2B3.1 (robbery), including increases for possession or use of a weapon and extent of injury. In addition, Option 1 would incorporate an enhancement for aggravating role, which is already found in § 3B1.1, by providing for an increase of four or two levels depending on whether the defendant was a leader, organizer, manager or supervisor. The aggravating role enhancement in Option 1 would be further increased by two to six levels, if the offense involved five or more other participants. In lieu of a mitigating role adjustment from Chapter Three, Option 1 would provide for a two-level decrease if the defendant "functioned in the offense as a peripheral." Option 1 would retain the current two-level enhancement for use of an aircraft or vessel and the cross-reference to the murder guideline if a murder is committed.

Option 2 is similar to Option 1 but allows for limited consideration of quantity. Option 2 would provide an enhancement "based on the greatest amount of drugs that the defendant was associated with on any one occasion."

We do not support either option. We do not agree that quantity is an inappropriate basis for measuring the severity of drug trafficking offenses. Congress certainly views quantity as an appropriate measure of severity -- the mandatory minimum penalties

for drug offenses are based primarily on quantity. By eliminating quantity as a sentencing factor in the drug trafficking guideline, Option 1 equates the distribution of one milligram of heroin with the distribution of 1,000 kilograms of heroin, a questionable result. Further, Option 1 as drafted reduces punishment for defendants who have very high offense levels under the current guideline and increases punishment for defendants with low offense levels under the current guideline. For example, a defendant who sells three kilograms of heroin to an undercover DEA agent has an offense level of 36 under present § 2D1.1. Under Option 1, that defendant's offense level would be 20 to 28 (depending upon the level selected by the Commission). Conversely, a defendant who sells a small rock of crack cocaine to an undercover DEA agent has an offense level of 12 under present § 2D1.1. Under Option 1, that defendant would have an offense level of 20 to 28 (depending upon the level selected by the Commission). There is, in our judgment, no justification for increasing punishment for small dealers.

Option 2 would account to some extent for the quantity of drug involved in a drug trafficking offense. Quantity is significant in Option 2 for offenses that would, under the current drug table, call for an offense level of 26 or higher. Depending upon which base offense level would be chosen (the range for the categories of drug are 20-28, 18-26, and 10-18), certain defendants will have a higher offense level than under the current guideline and other defendants will have a lower offense level. Either way, defendants with higher offense levels under the present guideline would either

be less adversely affected by an increased offense level or would benefit more from a decreased offense level than those defendants with lower offense levels under the present guideline.

We oppose Option 2 for the same reasons we oppose Option 1. The problem with the present drug trafficking guideline, as we see it, is not that the quantity is a significant factor in determining the severity of an offense, but that the offense levels in the quantity table are too high. (See discussion of Amendment 33.)

Amendment 44
(Money Laundering)

Amendment 44 would consolidate §§ 2S1.1 and 2S1.2 and make modifications to tie the offense levels more closely to the underlying offense that was the source of the proceeds. The consolidated guideline would call for an offense level that is the greatest of three options -- (1) the offense level equal to that for the underlying offense that produced the funds, if that offense level can be determined; (2) 12 plus an adjustment from the fraud table, if the defendant knew or believed the funds were the unlawful proceeds of an unlawful activity involving drug trafficking; and (3) eight plus an adjustment from the fraud table for value of the funds. The consolidated guideline would also provide enhancements if (1) the defendant knew or believed that the transactions were designed to conceal the proceeds of criminal conduct or were to be used to promote further criminal activity; and (2) sophisticated efforts at concealment were involved.

We believe that the consolidated guideline would improve considerably the current method for determining the severity of a

money laundering offense. We have found that prosecutions under 18 U.S.C. §§ 1956 and 1957 are being pursued increasingly to address offenses that traditionally would not be considered "money laundering." This practice results in prosecutions of offenses under the money laundering statute even when the underlying offense is indistinguishable from the conduct alleged to constitute the money laundering offense. To better reflect the relative seriousness of the offense conduct, we believe that when the offense level for the underlying offense can be determined, the base offense level should be that applicable to the underlying offense for which the defendant would otherwise be accountable. In addition, we believe that the base offense level under § 2S1.1(a)(3) should match the base offense level in § 2F1.1.

Amendment 45
(Supervised Release)

Amendment 45 invites comment, at the request of the Committee on Criminal Law of the Judicial Conference, on whether to amend the supervised release policy statements "to permit greater consideration of the individual defendant's need for supervision after imprisonment, to permit greater judicial flexibility in the imposition of supervised release, or to relieve the growing burden on judicial resources devoted to supervising defendants." This amendment also asks whether to amend § 5D1.2 to eliminate the requirement that any prison sentence of over one year be followed by a term of supervised release. In addition, the amendment asks whether to amend § 5D1.2 to reduce the required length of terms of supervised release. We support this amendment.

Supervised release was originally set up to replace parole, which was seen as an arbitrary system of post-imprisonment supervision. While the length a defendant served on parole was determined in large part on the remainder of the original term of imprisonment, supervised release was intended to respond to the needs of the individual defendant. To function effectively as a means for easing an ex-prisoner's transition back into society, the available terms and conditions of supervised release should be flexible enough to provide the court with the ability to tailor the post-incarceration supervision accordingly. The lack of flexibility in the current requirements under § 5D1.1 conflicts with the original purpose of supervised release and creates unnecessary burdens on judicial resources.

Amendment 46
(§ 5G1.3, p.s.)

Amendment 46 sets forth two options for amending § 5G1.3, which deals with whether a sentence imposed on a defendant subject to an undischarged term of imprisonment should be concurrent or consecutive. The policy expressed in § 5G1.3 is that the artifact of separate sentencing should not result in greater punishment. A defendant who is sentenced for multiple offenses in multiple proceedings should not be punished than if that defendant had been punished in one proceeding. Both options would amend § 5G1.3(c), which applies if neither § 5G1.3(a) nor § 5G1.3(b) apply.

Option 1 would not change the policy of the guideline but would clarify the application of § 5G1.3(c) by explaining in more detail the method a court should use to determine the applicable

guideline range. As Option 1 explains, the guideline range would be calculated as if the defendant were being sentenced not only for the offense of conviction but also for the offense for which the defendant is subject to an undischarged term of imprisonment. Option 1 would also revise the commentary to explain in more detail how the guideline should be applied.

Option 2, on the other hand, would gut current § 5G1.3(c) by adding a new subsection that would limit the applicability of the policy of § 5G1.3(c) to undischarged terms that resulted from a federal guideline sentence. If the undischarged term of imprisonment resulted from any other sentence, proposed new subsection (d) would instruct the court, in essence, to do whatever the court wanted.

We support Option 1 and oppose Option 2. Option 1 builds upon and clarifies the Commission's policy to avoid unfair punishment. We are aware that there have been complaints that in some cases it is very difficult to calculate the applicable guideline range. We believe that by providing examples of typical cases and including step-by-step application instructions, Option 1 will clear up any confusion regarding the application of § 5G1.3(c), and thereby promote more consistency in sentencing defendants who are subject to an undischarged term of imprisonment.

We oppose Option 2. It is inconsistent with the Sentencing Reform Act because it does not set forth a principled way to determine sentence. Instead of providing a uniform method to determine an appropriate sentence for a defendant subject to an

undischarged term of imprisonment, Option 2 will foster disparate sentencing. Whether a 60 month federal sentence runs concurrently with or consecutively to a 60 month state sentence has a tremendous impact on a defendant. Discretion of that significance should not be left unguided.

U. S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

MARCH 14, 1995

We appreciate the opportunity to appear before you today to discuss the proposed amendments to the Sentencing Guidelines. We will focus on three major issues of concern to the Department of Justice at today's hearing. Those issues include: (1) the proposed controlled substance and role-in-the-offense guidelines; (2) the proposed money laundering guidelines; and (3) the manner in which the Commission should implement Congressional directives. Appendix A to our written statement addresses additional amendment proposals.

An overriding concern for the Department, one which we share with others involved in the federal criminal justice system, is that the sentencing guidelines are becoming increasingly complex. Prosecutors across the country have voiced concern that the complexity of the guidelines, the number of issues requiring factual hearings, the proliferation of guideline amendments, and appellate litigation over guideline issues have made their work particularly difficult. Of course, the many recent directives to the Commission by Congress in the Violent Crime Control and Law Enforcement Act of 1994 have only compounded this problem. In this cycle we ask the Commission to strike a balance between the need to provide clear guidance to users of the guidelines and the need to avoid unnecessary amendments and further complexity. The Department looks forward to working with the Commission and others in future attempts to ensure the guidelines do not become overly burdensome and complex in their application.

DRUG AND ROLE AMENDMENTS (Amendments 33-43)

Amendments 33 through 43 propose a number of amendments to the guidelines concerning controlled substances and role in the offense which would result in a major restructuring of the guidelines. We strongly oppose adoption of these amendments.

The Department of Justice opposes excessive change in the guidelines.

The guidelines system cannot readily absorb the breadth of change that the drug and role amendments would produce, particularly in a year when numerous other guideline amendments are required by new statutes. The wholesale revision of the drug and role guidelines will affect a large number of federal offenders. Determining which set of guidelines to apply in a particular case would present problems in itself because in some cases the proposed amendments would call for higher sentences than the current guidelines, and the *ex post facto* clause would prevent application of the guidelines in effect at the time of sentencing. To make the determination of which set of guidelines to apply, it would often be necessary to calculate the applicable sentencing range under both the current and amended guidelines, thus doubling the number of potential litigation issues. The new guidelines would also produce litigation regarding many substantive issues at a time when numerous issues under the current guidelines have been resolved.

The Department of Justice opposes unnecessary change in the guidelines.

We also object to the present effort to revise the drug and role guidelines because the Commission has not adequately assessed the effect of significant, recent changes in both the guidelines and relevant statutes which were enacted to moderate the effect of drug quantity on sentencing.

Change in Relevant Conduct Guideline. In 1992, the Commission revised the relevant conduct guideline, §1B1.3, to provide that a defendant's relevant conduct based on jointly undertaken activity is not necessarily as broad as the scope of the entire conspiracy. Moreover, relevant conduct need not be the same for every conspirator. This amendment was intended to have a limiting effect on relevant conduct, particularly in the case of offenders whose activities were undertaken as part of a large conspiracy.

Effect of Quantity Capped at Level 38. Similarly, in the last amendment cycle, the Commission reduced to level 38 the maximum base offense level tied to drug quantity so as to moderate the impact of quantity on drug sentencing.

Safety Valve. Finally, the "safety valve" exemption from mandatory minimum sentences, 18 U.S.C. §3553(f), enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 and

embodied in guideline §5C1.2, can be expected to have an effect on both guideline and mandatory minimum sentences. The Commission should study the effect of the current safety valve guideline before seeking further amendment to the guidelines. Additionally, if the Commission is concerned that use of quantity inappropriately ensnares "low-level, non-violent drug offenders" (see Synopsis of Amendment 43), the Commission should consider expanded use of the safety valve to minimize the effect of quantity for those select defendants rather than seeking to amend the guidelines for all drug defendants.

The Commission has not determined what impact these rather significant revisions have had on sentencing in controlled substance cases. Until the Commission analyzes the need for the Amendments 33 to 43 in light of these past revisions, the Commission should avoid further disruption to federal sentencing.

The Department of Justice believes that quantity is an appropriate measure of the seriousness of drug-trafficking offenses.

The purpose of the proposed drug amendments is to reduce further the impact of drug quantity on the sentence as a measure of the seriousness of a drug-trafficking crime, and in the case of Amendment 43, Option 1, to eliminate the effect of quantity completely. As noted above, many steps have already been taken

to reduce the effect of quantity on the ultimate sentence in appropriate cases.

We continue to believe that, in most cases, the quantity of a controlled substance involved in a trafficking offense is an important measure of the dangers presented by that offense. Assuming no other aggravating factor in a particular case, the distribution of a larger quantity of a controlled substance results in greater potential for greater societal harm than the distribution of a smaller quantity of the same substance.

In establishing mandatory minimum penalties for controlled substance offenses, Congress relied on quantity as well as the type of substance involved to set appropriate sentence levels. Thus, the most serious drugs of abuse carry the highest statutory penalties, regardless of whether violence or other criminal activity is present in a particular case. And, greater quantities of the same substance result in higher mandatory penalties, regardless of other factors.

The proposed aggravating factors for firearms use, injury, and other non-quantity considerations cannot remedy the disproportionality that would result from eliminating or severely reducing the impact of drug quantity. Reliance on such factors undervalues the dangers presented by the unlawful sale of large quantities of drugs in the absence of these other factors.

Finally, we predict that minimizing the use of quantity as a proxy for dangerousness and harms caused to society will result in a much more complex and time consuming sentencing process. Relying on specific offense and offender characteristics to try to fill the void left by eliminating quantity differentials will complicate sentencings at every stage in the process.

Summary of specific objections.

While we object to Amendments 33 through 43 on the general grounds presented above, we also have specific objections to many of the proposals. It may be useful to highlight a few of these to demonstrate the particular difficulties that can be expected if the Commission were to embark on this major revamping of the drug and role guidelines at the present time.

Amendment 43, Option 1, which eliminates drug quantity as a factor in sentencing entirely, is particularly problematic. First, setting the appropriate offense level when quantity is eliminated or greatly reduced as a factor is extremely difficult. For example, Amendment 43, Option 1, proposes a base offense level of 20-28 for heroin trafficking with no variation based on quantity.[1] An offense level from within the proposed 20-28 range would represent a significant increase over current base

[1] We assume the Commission would choose a single offense level from within this range in order to assure compliance with the statutory requirement that the maximum term of imprisonment in an applicable range not exceed the minimum by more than 25 percent or six months. 28 U.S.C. §994(b)(2).

offense levels for a small-scale heroin trafficker and a significant reduction for a large-scale one. (Current base offense levels for heroin trafficking range from 12 to 38.) We believe that it is impossible to choose an offense level that captures the varying degrees of harm caused by the whole spectrum of drug trafficking when all other factors are equal; a single offense level will be too high for some offenses and too low for others. Additionally, a base offense level not based on quantity could provide an incentive for dealers to increase their trafficking since quantity would not affect the ultimate sentence while it could greatly increase profit. The need for a dramatic flattening of sentences by eliminating or significantly reducing drug quantity as a factor has not been demonstrated.

While Amendment 43 presents the most extreme example of reducing the impact of drug quantity on sentences, other proposals are problematic as well. The effect of many of the amendments would be to lower guideline sentences for drug traffickers without regard to the impact of mandatory minimum sentences. Amendment 40 directs the user to apply the guidelines on the basis of the weight of the actual controlled substance (or a quantity determined through a presumed purity level established by the proposed amendment), instead of the quantity of the mixture or substance of which the controlled substance is a part. As a result, Amendment 40 directly conflicts with applicable mandatory minimum sentences, which are based on the weight of a

"mixture or substance containing a detectable amount" of the controlled substance. 21 U.S.C. §841(b)(1)(A) and (B).

Other proposed amendments also inappropriately increase the tension between the sentencing guidelines and mandatory minimum sentences: Amendment 33 compresses the drug quantity table; Amendment 37 addresses the equivalency between marihuana plants and marihuana by weight (and directly contravenes the statutory equivalency); and Amendment 39 arbitrarily limits the quantity of the controlled substance to that possessed or distributed within a specified time frame (as opposed to the entire quantity proven). If such changes were made, in many cases the mandatory minimum penalties would trump guideline sentences, and offenders with different levels of culpability under these trumped guidelines would all be treated alike under the mandatory penalties. Thus, the amendments would diminish a defendant's incentive to accept responsibility for an offense. A sentencing system that incorporates both mandatory minimum and guidelines sentences must strive for compatibility, not friction, between the two structures.

We are also troubled by aspects of the proposed role-in-the-offense adjustments in Amendment 35. First, the amendments provide a level of detail that could lead to numerous disputes over definitions. For example, whether a defendant has all or only most of the characteristics listed in a proposed application

note regarding mitigating role would distinguish a minimal from a minor player, and whether a task is considered "unsophisticated" would also have a bearing on this decision. (See Application Notes 1 and 2 to proposed guideline §3B1.2.) Litigation focusing on these issues could become extremely burdensome for both the prosecution and defense, as well as for the district courts and courts of appeal.

Another problem is that while the role amendments would apply to all cases, their implications in non-drug cases may not have been sufficiently explored. For example, the amendment proposes deleting language from the aggravating role guideline, §3B1.1, regarding criminal activities that are "otherwise extensive." Under the current guideline an offender who supervised an "otherwise extensive" criminal activity would be subject to an aggravating role increase even though fewer than five people were involved. An extensive fraud scheme could make use of modern technology and relatively few people to accomplish its goal. The organizer, leader, or supervisor of such an activity should be subject to an increased sentence based on his or her role in the offense despite the fact that few people were supervised. Similarly, the proposed mitigating role amendments are problematic when viewed in the white collar context. For example, they provide that a characteristic ordinarily associated with a mitigating role is that the total compensation or benefit to the defendant was very small, compared to the total profit

typically resulting. (Proposed Application Note 2, guideline §3B1.2.) An employee of a company may commit an offense to benefit the company and gain very little personally. While small personal gain may make sense to identify a low-level drug offender, it does not necessarily translate in a legitimate business context.

There are many other particular problems with Amendments 33 through 43. Because of these, as well as our general objections to the proposed amendments, we urge the Commission not to adopt this group of amendments.

Crack and powder cocaine sentencing.

Amendment 38 addresses crack and powder cocaine sentencing. The Commission requests comment as to whether the guidelines should be amended with respect to the current 100:1 quantity ratio between crack and powder cocaine. In connection with the Commission's recent "Special Report to the Congress: Cocaine and Federal Sentencing Policy," the Department expressed its views on crack and powder cocaine sentencing. We reiterate these views, as follows:

> Although cocaine base (crack) and cocaine hydrochloride (cocaine powder) are chemically similar, there are significant differences in the predominant manner the two substances are ingested and marketed. Based on these differences and the resulting harms to society, the Department of Justice rejects any proposal to equate crack with cocaine powder and believes that traffickers of crack cocaine should be subject to higher penalties than traffickers of like amounts of cocaine powder.

Current research shows that crack is a more dangerous and harmful substance for many reasons. The most common routes of administration of the two drugs cause crack to be the more psychologically addictive of the substances. The quicker, more intense, and shorter-acting effects of crack contribute to its greater abuse and dependency potential as compared to snorted cocaine powder. Moreover, identifiable social and behavioral changes occur much more quickly with crack use than with the use of cocaine powder.

Crack can easily be broken down and packaged into very small and inexpensive quantities for distribution -- sometimes as little as single dose quantities. Crack is thereby marketed to the most vulnerable members of society, including those of lower socioeconomic status and youth. Additionally, the open-air street markets and crack houses used for the distribution of crack cocaine contribute heavily to the deterioration of neighborhoods and communities. Both the scale of marketing and its open and notorious nature enable many, who would not previously have had access to cocaine powder, to purchase, use, and become addicted to crack cocaine. Moreover, the present crack market is associated with violent crime to a greater extent than that of cocaine powder. Crack cocaine has thus had a severe, negative impact on many families and communities, and in particular, on minority communities.

The seller of crack is well aware of its addictive qualities and the familial and community devastation it engenders. Thus, we believe that crack cocaine traffickers should be sentenced more heavily than cocaine powder traffickers. Although we recognize, as a policy matter, that an adjustment in the current penalty structure may be appropriate, any such adjustment must reflect the greater dangers associated with crack as opposed to cocaine powder.

Furthermore, we do not believe that specific offender characteristics in the Sentencing Guidelines will be able to account for all of the differences in harms caused by the substances, both because of the systemic nature of some of those harms and because of problems of proof in individual cases. Before making any final recommendations, the Sentencing Commission should consider and report to Congress about the impact any suggested changes would have on law enforcement's efforts against crack and cocaine powder trafficking and any impact these changes may portend for the level of use of the substances.

MONEY LAUNDERING (Amendment 44)

The Commission has proposed a sweeping amendment of the money laundering guidelines, §§2S1.1 and 2S1.2. The amendments would substantially lower the penalties for many serious money laundering offenses even though Congress determined money laundering to be a significant offense and established 10- or 20-year penalties (depending upon the offender's intent). The Department opposes the amendment as proposed.

To the extent that revision of the money laundering guidelines is prompted by a perceived disparity between these guidelines and the fraud guidelines, we suggest the Commission review the fraud guidelines -- which we believe generally to be inadequate -- before weakening the money laundering guidelines. We urge the Commission to consider this entire area of the law comprehensively. However, if the Commission is intent upon proceeding now with a revision of the money laundering guidelines in isolation, we strongly suggest certain revisions to the proposed amendment, as set forth in Appendix B.

The proposed amendment of guideline §2S1.1 would reduce the offense level for many money laundering offenses to a level equivalent to, or slightly above, the level applicable to a fraud offense involving the amount of money laundered. This decrease would apply both to money laundering related to white collar

offenses and money laundering related to a myriad of other serious offenses, such as arms violations, murder for hire, other violent crimes and exploitation of children. In many cases the amendment would also reduce the offense level for money laundering related to drug trafficking, which now starts at level 23 or 26 under guideline §2S1.1, and 22 under guideline §2S1.2, and increases depending on the amount of funds laundered. The only cases generally spared from reduction are those in which the money launderer committed the underlying unlawful activity and the offense level for that activity is equal to or greater than the currently applicable money laundering offense level. We do not believe this reduction of sentences is appropriate.

The suggested change appears to respond to the class of money laundering cases in which the money laundering activity is not extensive, including "receipt and deposit" cases -- those in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a financial institution account identifiable to the person who committed the underlying offense. We agree that application of the current guideline to receipt-and-deposit cases, as well as to certain other cases that do not involve aggravated money laundering activity, can be problematic. We have taken steps internally to address these concerns through prosecution guidelines. In view of the Commission's continuing

concern, we believe it is not inappropriate to treat these non-aggravated cases separately in the guideline.

Nevertheless, we do not agree that past sentencing anomalies arising from this narrow class of cases requires an overall downward adjustment in the money laundering guidelines. We seek a middle ground. Attaining this middle ground is particularly imperative in view of the emergence of a class of professional money launderers, who commingle licit and illicit proceeds, drug and non drug-predicated.

To this end, we are submitting a proposed alternative -- based on the format of the proposed amendment -- that would:

1) set the base offense levels at 16 and 12 (as opposed to the proposed levels of 12 and 8);

2) add to the higher category (which currently only applies to offenses involving controlled substances) offenses involving a matter of national security or munitions control, a crime of violence, a firearm, an explosive, and exploitation of children; and

3) carve out "receipt and deposit" cases, to be sentenced at a level of 8 plus the amount established by the fraud table

in guideline §2F1.1 corresponding to the value of the funds.[2]

The effect of this scheme is to set a moderate base offense level in the ordinary money-laundering case, to decrease it where the money laundering activity is very limited, and to increase it where the money laundering activity is significant. A copy of our proposed alternative is attached.

In addition, our proposed alternative makes the following technical corrections:

- The proposed amendment applies the underlying offense level in cases where the defendant committed the underlying offense. Our proposed alternative adds two levels in order to ensure that a defendant who commits the underlying offense and launders the proceeds does not go unpunished for the laundering offense. Congress has determined that money laundering is a separate offense and the Commission should follow that determination.

- The proposed amendment contains a specific offense characteristic relating to two intents identified in §1956 (concealment and promotion), for which 2 levels are added.

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[2] The base level of 8 corresponds to the base level of 6 for fraud plus two levels for more than minimal planning, which is likely to be present in the vast majority of such cases.

Our proposed alternative provides an alternate enhancement of 1 level for the remaining §1956 intents (tax evasion and avoidance of currency reporting requirements).

- Our alternative includes as sophisticated money laundering the use of the services of an individual or organization engaged in the business of money laundering. Sophisticated money laundering would be subject to a two-level enhancement. This addition is intended to reach both the individual who solicits the services and the launderer, defined for these purposes as one who collects a commission (or other benefit). We believe that it is appropriate to impose a more severe punishment on those who launder for profit or engage professional money launderers.

We vigorously oppose certain portions of the proposed commentary:

- The note on "value of the funds" which limits the amount laundered to "the loss attributable to the offense" (i.e., the amount of a fraud less any amounts that can be recouped by the victim) is inappropriate. While this concept is arguably relevant to a fraud guideline, it has no relevance to an amount laundered. That is, if the defendant transfers all of the victim's money to his account in the Cayman Islands, he should not be credited for amounts that

ultimately can be repaid. The harm in money laundering is properly measured by the funds themselves.

- We oppose as confusing and unnecessary the note which makes reference to "actual money laundering." Money laundering is a term defined by statute.

- Finally, we propose to add commentary to clarify the use of the term "proceeds" in paragraph (a)(2) of the amendment. There is a small category of money laundering cases under section 1956 involving international transportation of currency to promote specified unlawful activity which does not have as an element of the offense that the funds be proceeds. Our proposed commentary makes clear that if otherwise appropriate, the base offense level set forth in subsection (a)(2) applies to these cases as well.

With the incorporation of these suggested changes, the Department would support amendment of the guideline if the Commission is intent upon moving forward now.

LEGISLATIVE DIRECTIVES TO THE COMMISSION

The Violent Crime Control and Law Enforcement Act of 1994 (the "Crime Act") contains a number of directives to amend the guidelines to provide enhancements for various factors. Where such a directive exists, the Commission should implement it through a guideline provision, not a recommendation to depart from the guidelines.

One such directive to the Commission concerns solicitation of a minor to commit a crime. It requires the Commission to:

> promulgate guidelines or amend existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense.

Section 140008 of the Crime Act. The Act specifically directs the Commission to consider a number of factors in implementing the directive: the severity of the crime, the number of minors involved, the fact that involving a minor in a crime of violence is generally more serious than involving a minor in a drug trafficking offense, and the possible relevance of the proximity of age between the offender and the minor.

Despite the clear language of the directive to amend the guidelines to provide that the offender "shall receive" an appropriate sentence enhancement, the Commission has invited comment as to whether the directive should be implemented through a policy statement on departure from the guidelines.

Amendment 25(A). Such a policy statement does not satisfy the statutory directive since it would not impose an appropriate sentencing enhancement. Under a policy statement recommending upward departure, a court faced with a defendant who solicited a minor to commit a crime would not be required to increase the sentence, regardless of the seriousness of the offense, the nature of the involvement, or the possibility of recruitment of a number of youths. A policy statement recommending departure does not establish a clear disincentive to adult criminals who train children in the ways of criminality and fails to counteract the explosion of youth crime that is plaguing our country. We strongly urge the Commission to adopt the guideline amendment the Department previously proposed, Amendment 25(B). This amendment would provide a two-level enhancement for soliciting a minor to commit a crime and additional enhancements if more than five minors are solicited.

The Crime Act also requires the Commission to amend the guidelines to provide "an appropriate enhancement" for any felony that involves or is intended to promote international terrorism, unless this factor is an element of the crime. 120004 of the Crime Act. Amendment 24, however, refers to the existence of a current policy statement recommending upward departure in such cases, §5K2.15. The amendment also inquires <u>whether</u> the guidelines should be amended to address the directive and, if so, how.

Again, a policy statement recommending departure does not meet the statutory directive to the Commission "to amend its sentencing guidelines to provide an appropriate enhancement . . . ." Congress was presumably aware of the current policy statement, yet it mandated an amendment. Congress has thus required a guideline enhancement that specifies the consequences for any felony that involves or is intended to promote international terrorism in order to combat this serious threat to public safety.

In sum, we urge the Commission to follow closely directives enacted by Congress relating to sentencing.

We would be pleased to answer any questions you may have.

APPENDIX A

HIV INFECTION (Amendment 1)

Amendment 1 seeks comment regarding guideline amendments for offenses in which an HIV-infected person engages in sexual activity with knowledge of his or her HIV infection and with the intent through such sexual activity to expose another person to HIV. See Section 40503 of the Crime Act. In our view, an offender who acts with knowledge of his or her HIV infection and with intent to infect another effectively transforms a sexual offense into an attempted homicide and, in some cases, into an eventually completed homicide. Engaging in such conduct should be subject to a severe sanction.

We believe that the Commission should provide a guideline enhancement to address sexual offenses by a defendant with knowledge that he or she is HIV-infected regardless of whether or not the defendant intended to infect another with HIV. Additionally, the Commission should consider the possibility of a departure in the context of crimes of violence not constituting sexual offenses, when an offender with knowledge of his or her HIV infection engages in conduct that can cause the infection of another.

We do not believe that an HIV enhancement should depend on whether the victim was actually infected with the virus. Currently, the sexual abuse guideline includes enhancements if the victim sustained varying levels of bodily injury. Guideline §2A3.1(b)(4). If an HIV enhancement related solely to whether the victim became HIV-positive, the risk of HIV infection and the fear of such infection in the mind of the victim would be overlooked.

INTERNATIONAL PARENTAL KIDNAPPING (Amendment 4)

The Commission has requested comment on two approaches to implement the International Parental Kidnapping Crime Act of 1993 which makes it unlawful to remove a child from the United States with intent to obstruct the lawful exercise of parental rights and establishes a three-year maximum term of imprisonment for such offenses (18 U.S.C. §1204).

Option 1 establishes a separate base offense level of 12 within the kidnapping guideline §2A4.1 for international parental kidnapping. We believe level 12 is too low given the significant difficulties that arise with international kidnapping cases in returning the child to the custodial parent. Finding a child outside the United States and obtaining cooperation of the State

Department and foreign law enforcement authorities in investigating the case are particularly problematic.

Because proposed level 12 makes it likely that a defendant who accepts responsibility for the offense will receive a sentence of probation and not serve any time in prison, or only a few months at most, there will not be an adequate deterrent to the commission of the offense. United States Attorneys have reported that the likelihood of little or no prison time has already created difficulties in enforcing the law, which requires significant cooperation and effort by the State Department and on the part of other countries.

We do not believe option 2, which references the statute to the obstruction of justice guidelines, is appropriate because parental kidnapping may not involve a court order and may not fit well into the obstruction guideline.

CIVIL RIGHTS (Amendment 14)

Amendment 14 contains two options designed to effect the Congressional mandate to increase sentences in hate crime prosecutions. Option 1 goes well beyond that mandate and will have an impact on the sentencing structure for virtually every case prosecuted under the federal criminal civil rights statutes. That impact will be felt most strongly in federal police prosecutions where sentences could be reduced by as much as 30 months. These official misconduct prosecutions comprise approximately one half of the criminal civil rights cases prosecuted by the Department. Any wholesale lowering of sentences in these very important prosecutions is ill-advised, particularly in the face of recent Congressional action designed to provide for harsher punishment in this area.

Option 2, proposed by the Department, is narrowly drawn to address the specific concerns of Congress without weakening the Department's enforcement effort in the official misconduct area. In addition, under Option 1 sentences in many hate crime prosecutions will either be reduced or not significantly increased, while Option 2 provides for an across-the-board, if modest, bump in sentences for convictions of racially violent behavior. Consequently, the Department strongly supports the adoption of Option 2, and strongly opposes Option 1.

Impact of Option 1

Most official misconduct cases involve beatings by police officers that result in some form of bodily injury to the victim. In many cases, a dangerous weapon is used, such as a baton or gun. Under the current guidelines a sentence for such crimes is computed under §2H1.4(a)(2) by adding six offense levels (the

civil rights adjustment) to the applicable underlying offense -- aggravated assault as defined under §2A2.2. After adding points for serious bodily injury and the use of a dangerous weapon, an aggravated assault offense level of 23 is obtained for a total base offense level of 29 (23+6). Under the scheme published as Option 1, the civil rights adjustment would be decreased by as much as four levels, resulting in a total base offense level of 25, not 29, or a decrease in sentence of approximately 30 months.

Similarly, in a cross-burning conspiracy resulting in neither personal injury nor property damage -- a typical prosecution brought by the Department -- the proposed approach in Option 1 has the potential of lowering the sentence by two levels. Under the current guidelines this conspiracy to violate civil rights is calculated pursuant to §2H1.1(a)(1), resulting in a base offense level of 15 and a sentence of 18-24 months. Under the proposed amendment, the offense level could be as low as 13 (10 plus the new three-level bump for hate crimes), a six-month sentencing reduction.

Even in those cases specifically earmarked by Congress for more severe punishment, hate crimes, the changes proposed in Option 1 result, at best, in only modest increases from present levels and, at worst, in reductions of sentencing levels. Thus, for example, in certain types of racially motivated conspiracies, Option 1 could actually decrease punishment by about six months, as discussed above. In the typical racially motivated beating case brought under 18 U.S.C. §245, only a one-level gain is achieved over present numbers, and even that incremental increase is not secured without cost. Under the present guidelines the sentencing court looks to the underlying offense, aggravated assault at a level 15, and if applicable, adds upward adjustments for serious bodily injury (4) and use of a dangerous weapon (4) for a total underlying offense score of 23. In addition, two levels are added pursuant to §2H1.3(a)(3) for an offense level of 25 or 57-71 months.

Under the Option 1 proposal the same underlying offense calculations would be made, but no two-level civil rights adjustment would be added automatically. Instead, the minimum three-level upward adjustment mandated by Congress in the Crime Act would be factored in, but only if there is a finding by the court that the defendant selected his victim because of race or some other impermissible factor. This finding is subject to the highest standard of proof -- beyond a reasonable doubt. While it is likely that in most civil rights prosecutions such a finding would routinely be made, the upward adjustment under the proposed plan is not automatic, as it is under the existing scheme, but would be subject to some measure of judicial discretion.

As Option 1 reduces sentences in two of the most significant types of civil rights cases brought by the Department, and

replaces the current two-level adjustment with a less certain three-level enhancement in hate crimes, it is unacceptable.

Option 2 - The Preferred Approach

Accommodating the Congressional mandate for increased sentences in hate crimes need not result in a wholesale revamping of the civil rights guidelines with its concomitant lowering of the guideline range in police cases.[1] Instead, as presented in Option 2, minor adjustments can be made to the present guideline scheme.

Under Option 2, sentences in hate crime cases would increase as Congress intended. For example, in a cross-burning conspiracy with no injury or damage, the base offense level would be 16, an increase of one level over present calculations and an increase of as much as three levels over Option 1. In the typical racial violence case resulting in serious injuries and involving the use of a dangerous weapon, the guideline level would be 26 (15 for aggravated assault plus eight for injury and use of weapon, plus three for the civil rights adjustment). This represents a one-level increase over present calculations and is identical to Option 1. Finally, in a cross-burning prosecution without a conspiracy, the base offense level under proposed Option 2 would increase from 10 under the existing calculation for §2H1.3, to 11.

Alternatives Within Option No. 1

Option 1 provides two choices. First, it allows for the possibility of a two-level increase for conspiracy. Second, in official misconduct cases it provides a range of upward adjustments of two to four levels. While the Department strongly opposes Option 1, if the Commission decides to adopt it, we believe the Commission should also adopt the two-level conspiracy adjustment and the four-level adjustment for official misconduct cases.

SEMIAUTOMATIC ASSAULT WEAPONS (Amendment 15)

Amendment 15 addresses the new ban on the manufacture, transfer, or possession of semiautomatic assault weapons by including violations of this new ban in the existing firearm guideline, §2K2.1. Without any further amendment the unlawful possession of this type of dangerous weapon will be treated in

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[1] This is not to say, however, that a reconsideration of the guidelines in police cases might not be appropriate in the near future. A significant sentencing problem in these cases is the guidelines' relative insensitivity to various degrees of assault.

the same manner as a violation involving an ordinary firearm (other than one possessed solely for lawful sporting purposes).

We urge the Commission to provide more severe sentences for violations of the new ban on semiautomatic assault weapons than for violations involving ordinary firearms. Assault weapons should be treated in the same manner as other particularly dangerous weapons, such as machineguns, which are subject to a similar ban. Under the firearms guideline the unlawful possession of a machinegun is subject to a base offense level of 18 (27-33 months of imprisonment for a first offender), rather than a level 12 for ordinary guns (10-16 months for a first offender, which is subject to a split sentence including only five months of imprisonment). Guideline §2K2.1. The newly enacted prohibition of semiautomatic assault weapons must result in a substantial sentence if the ban is to be meaningful.

JUVENILE HANDGUN VIOLATIONS (Amendment 16)

Amendment 16 applies to violations of the recently enacted provision prohibiting: (1) the possession by a juvenile of a handgun or ammunition suitable for use only in a handgun, and (2) the transfer of a handgun or handgun ammunition to a person the transferor knows or has reasonable cause to believe is a juvenile. 18 U.S.C. §922(x). The Commission proposes three options to address the youth handgun provision. The first would assign an offense level of 6 (0-6 months of imprisonment) to the offense. The second would assign an offense level of 12 (10-16 months, subject to a split sentence including five months of imprisonment). The third would assign an offense level of 12 to the transferee but level 14 to the transferor. (It would also apply offense level 14 in the case of any transfer of a firearm if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person, such as a convicted felon or underage person.)

We favor Option 3 with a modification. Option 3 assigns offense level 12 to the juvenile offender who unlawfully possesses a handgun.[2] This offense level would provide a sufficient upper limit for purposes of juvenile incarceration and a sufficient period of imprisonment for a juvenile possessor who has been transferred to adult status (ordinarily because of a

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[2] The new youth handgun statute provides that a juvenile who is a first offender is subject only to six months of probation for unlawful possession of a handgun or ammunition. Although the sentencing guidelines do not apply to juvenile delinquency proceedings, the maximum of the guideline range serves as a maximum for the juvenile proceeding, unless departure is warranted. Policy Statement §1B1.12.

prior record). Without subjecting a repeat offender to a period of incarceration, the provision would have little deterrent value.

Option 3 assigns offense level 14 to a transferor who knew or had reasonable cause to believe that the transferee was a prohibited person or was underage. Because of the one-year statutory maximum term of imprisonment for violations of the youth handgun provision (except where the transferor had reasonable cause to know that the juvenile intended to possess the handgun or ammunition in the commission of a crime of violence), level 14 is too high in the context of transfers that only violate this provision. The unlawful transfer of a handgun or handgun ammunition in violation of the newly enacted section 922(x) should be subject to an offense level of 12, more in keeping with the one-year statutory maximum term of imprisonment than offense level 14.

Offense level 14 should apply to transfers to underage persons <u>by firearms licensees</u> in violation of 18 U.S.C. §922(b)(1), which is subject to a maximum term of imprisonment of five years. Offense level 14 should also apply to the unlawful transfer of firearms to prohibited persons, such as convicted felons, whose unlawful possession would result in an offense level of 14.

<u>SEMIAUTOMATIC WEAPONS</u> (Amendment 17)

Amendment 17 seeks comment on how the offense level for an offense involving a semiautomatic firearm should be modified to address the directive in the section 110501 of the Crime Act to provide an appropriate enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved. The Commission also requests comment on whether such an increase should apply to all semiautomatic firearms or those that have characteristics that make them more dangerous than other firearms.

The statutory directive is clear that the enhancement must apply to all semiautomatic firearms as defined by Congress in the same section of the Crime Act directing the Commission to provide for an enhancement. We do not believe that the Commission has authority to limit the enhancement to certain semiautomatic firearms. However, it would be appropriate for the Commission to provide an additional enhancement to recognize particularly dangerous semiautomatic firearms, such as semiautomatic assault

weapons, in the context of amending the guidelines in accordance with this Crime Act directive.

CONSPIRACY TO VIOLATE 18 U.S.C. §924(C) (Amendment 21)

Amendment 21 addresses a provision of the Crime Act that creates a new offense of conspiring to violate 18 U.S.C. §924(c), which makes it unlawful to use or carry a firearm during and in relation to a federal crime of violence or drug trafficking crime. 18 U.S.C. §924(n), as enacted by section 110518 of the Crime Act. The maximum term of imprisonment for the new offense is 20 years, but life if the firearm is a machinegun or certain other dangerous weapon. The Crime Act also makes a parallel amendment with respect to conspiring to violate 18 U.S.C. §844(h), which makes it unlawful to use fire or an explosive to commit a federal felony or to carry an explosive during a federal felony. 18 U.S.C. §844(m).

Amendment 21 would include the new conspiracy offenses in the firearms guideline, §2K2.1, and the explosives guideline, §2K1.3, without further amendment. In both cases the resulting offense level would be at least 18 (27-33 months of imprisonment for a first offender). By contrast, the substantive offense of using a firearm, explosive, or fire is subject to a mandatory five-year term of imprisonment.

We recommend that the guideline sentence for the conspiracy offense be aligned with the mandatory prison terms for the substantive offense. As proposed, the guideline would provide a windfall for a conspirator whose unlawful conduct was interrupted by law enforcement efforts just prior to completion.

IMMIGRATION, NATURALIZATION AND PASSPORTS (Amendments 22 and 23)

The Commission has published for comment amendments submitted by the Department that would increase the base offense levels and provide appropriate enhancements for alien smuggling and passport and visa offenses. These proposed increases are commensurate with the significant increases in the maximum penalties enacted by Congress in the Crime Act. The current offense levels in the guidelines for alien smuggling (§2L1.1), and passport and visa fraud (§§2L2.1 and 2L2.2), which often do not result in prison terms, are far too low to provide an effective deterrent to persons committing crimes in violation of the immigration laws and provide little incentive to law enforcement officials to investigate and prosecute the cases.

Section 60025 of the Crime Act more than doubled the penalties for alien smuggling. The offense levels for guideline §2L1.1 should be increased accordingly as set forth in the

Department's proposal published for comment as amendment 22(C). The proposed commentary published as amendment 22(D) is needed to address a problem with guideline §2L1.2 that has arisen in the courts and to clarify that an upward departure may be made with respect to unlawful entry by persons with repeated prior instances of deportation.

Amendment 23 addresses the significant increase in penalties for passport and visa fraud. The Secretary of State and the Assistant Secretary of the Bureau of Diplomatic Security and Acting Inspector General, writing in strong support of Amendment 23 related to passport and visa statutes for which the State Department is responsible, have emphasized the urgent need to raise these offense levels. We agree with the need to increase these guidelines. We understand that Commission staff has suggested some minor changes to the published proposals. We would be pleased to work with the staff and representatives of the State Department to fine-tune the proposals if necessary.

We strongly urge the Commission to adopt the significant increases in offense levels to ensure that the guidelines appropriately reflect the intent of Congress in significantly increasing the maximum penalties for immigration offenses.

TELEMARKETING FRAUD (Amendment 27(C))

Section 250002 of the Crime Bill provides the potential for an additional 5-year sentence for fraud convictions that involve telemarketing and an additional 10-year sentence for such convictions if the offense targeted persons over the age of 55 or victimized ten or more persons over the age of 55. The Commission has invited comment on this section.

We believe guideline §2F1.1 does not adequately address telemarketing fraud. First, while §2F1.1(b)(1) appears adequate to address the sheer quantum of actual or intended loss, §2F1.1(b)(2) currently provides only a two-level increase for an offense which involved more than one victim. The Department's experience in prosecuting telemarketing fraud has shown that in many cases, the owners and operators of a fraudulent telemarketing enterprise seek out large numbers of victims over a substantial period of time. In recent years, federal prosecutors have reported a number of cases in which the victims of a single telemarketing scheme -- often elderly victims -- can literally be counted in the thousands. To place such large-scale schemes on a par with small-scale investment swindles affecting a few victims appears inequitable. We urge the Commission to consider an additional two- to four-level enhancement under §2F1.1(b) where the offense involved a scheme to defraud large numbers of victims (*e.g.*, 100 or more).

Additionally, §2F1.1 does not address an increasingly prevalent phenomenon in telemarketing fraud: the operation of a scheme which targets previously defrauded victims for a different fraud. Federal law enforcement officials have observed numerous instances in which telemarketers operate so-called "recovery rooms." In these telemarketing schemes, the operators deliberately target victims whom they have already defrauded under one business name by contacting the victims and offering, for an often substantial fee, assistance in recovering the victim's money. Such flagrant conduct is not adequately addressed under either guidelines §2F1.1 or §3A1.1. The Commission should consider including a separate two- to four-level enhancement for an offense which involves a scheme to defraud the same victim or victims more than once.

We also note that the generalized calculation of loss under §2F1.1(b)(1) may not adequately take into account the drastic impact which some frauds directed at older persons can have. Many of the victims of telemarketing fraud schemes are older Americans who entrusted all or substantially all of their life savings to the defendants. This trend is likely to continue, as some burgeoning types of telemarketing frauds, such as those purporting to offer investments in wireless cable partnerships, frequently invite prospective victims to "roll over" their IRA funds, in blocks of at least $10,000, into the fraudulent investment scheme. Because many telemarketers have routinely spent the proceeds of their fraud on luxury items which cannot be recovered for victims (*e.g.*, drugs and lavish vacations and parties), there may be little or nothing on which a sentencing court can draw to provide some measure of restitution for the victims. The Commission may therefore wish to take into account whether an offense causes substantial financial hardship to one or more victims.

Increasing sentences based on these general attributes of telemarketing fraud should ameliorate much of the concern regarding elderly victims. Additionally, in particularly aggravated cases, departure may be appropriate.

APPENDIX B

MONEY LAUNDERING

[The following indicates the Department of Justice's alterations of the proposed Sentencing Commission money laundering guideline, as published in Amendment 44, through shading of additional material and strike-out of material to be deleted.]

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

(a) Base Offense Level (Apply the greatest):

(1) The offense level for the underlying offense from which the funds were derived plus 2 levels, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under §1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) ~~12~~ 16 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or the manufacture, importation, or distribution of a controlled substances ~~[or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism]~~; or

(3) ~~8~~ 12 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) Apply the greater:

(A) If the defendant knew or believed that (i) ~~(A)~~ the financial or monetary transactions, transfers, transportation,

or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (ii) ~~(B)~~ the funds were to be used to promote further criminal conduct, increase by 2 levels; or

(B) If the defendant (i) intended to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986, or (ii) knew or believed that the transactions were designed in whole or in part to avoid a transaction reporting requirement under State or Federal law, increase by 1 level.

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

(c) Special Instruction for Receipt and Deposit Cases

The offense level is 8 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds where all of the following are present:

1) the defendant's money laundering conduct is limited solely to the deposit of the unlawful proceeds into a domestic financial institution account that is readily identifiable as belonging to the person who committed the specified unlawful activity;

2) the offense was not intended or designed, either in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity, to violate section 7201 or 7206 of the Internal Revenue Code of 1986, or to avoid a transaction reporting requirement under State or Federal law; and

(3) the specified unlawful activity did not involve a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or

the manufacture, importation, or distribution of a controlled substance.

Commentary

Statutory Provisions: *18 U.S.C. §§1956, 1957.*

Application Notes:

1. *"Value of the funds" means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.*

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited $50,000 derived from a bribe together with $25,000 of legitimately derived funds, the value of the funds is $50,000, not $75,000.

Criminally derived funds are any funds that are derived from a criminal offense, e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for $200,000 that is worth $120,000 and deposits the $200,000 in a bank; the value of the criminally derived funds is $200,000, but the loss is $80,000). ~~*If the defendant is able to establish that the loss, as defined in §2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the 'value of the funds.'*~~

Subsection (a)(2) applies even where the funds are not proceeds of unlawful activity, where the offense involves a financial or monetary transaction, transfer, transportation, or transmission from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of a specified unlawful activity described in that subsection.

2. *If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of §3D1.2 (Groups of Closely-Related Counts).*

3. *Subsection (b)(1)(A) is intended to provide an increase for those cases that involve ~~actual money laundering~~ i.e., efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.*

4. *In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying acts from which the funds were derived.*

5. *Subsection (b)(2) is designed to provide an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the "layering" of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate, or if the offense involved the use of individuals or organizations engaged in the business of money laundering, i.e., those who receive payment or other benefit for conducting or assisting in the transaction.*

6. *The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet all the specified criteria. When these criteria are met, the offense level under this guideline is 8 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds. The offense level under subsection (c) is not subject to enhancement under any other subsection of this guideline.*

For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

* * *

NATIONAL RAINBOW COALITION

Comments of the National Rainbow Coalition

on the United States Sentencing Commission's

Report on Cocaine and Federal Sentencing Policy

March 14, 1995

Submitted By Angela Jordan Davis
Executive Director,
National Rainbow Coalition

PO Box 27385 • Washington, DC 20005 • (202) 728-1180 • fax (202) 728-1192

I. INTRODUCTION

On behalf of the National Rainbow Coalition, I appreciate this opportunity to address the United States Sentencing Commission on its report on Cocaine and Federal Sentencing Policy issued on February 28, 1995. The National Rainbow Coalition is a multiracial, multi-issue national membership organization founded by Reverend Jesse L. Jackson. Its mission is to move the nation and the world towards social, economic, and racial justice through methods which include research, education, legislation, litigation, and independent political action.

The criminal justice system in this country is a case study of racial injustice and discrimination. From arrest through sentencing, the criminal process is rife with evidence of the inappropriate consideration of race. One need only examine the targeting of law enforcement and arrests in inner cities and prosecutorial decisions about who receives special sentencing considerations for cooperating with law enforcement agents to see clear evidence of the disparate treatment of people of color. This evidence does not only exist at the law enforcement stage. The underrepresentation of people of color in legal and other decision-making positions in most prosecutor and defender offices as well as the judiciary, results in the inappropriate, although often unconscious, consideration of race at various stages of the criminal process. Of course, we are all now fully aware of the disproportionate number of African-American and Latino men in prison, on probation, or on parole in this country.

Perhaps the most glaring and outrageous example of racial discrimination and injustice in the criminal justice system and in the nation is the disparity in penalties for crack and powder cocaine in federal sentencing policy. Although the Commission's report recognizes and fully documents this disparity, it sadly falls short of making the recommendations necessary to remedy the injustice. The Commission recognizes that the 100-to-1 differential between crack and powder cocaine is irrational and should be amended, but it does not recommend a 1-to-1 ratio; nor does it recommend the repeal of the mandatory minimum statutes which created the disparity. We strongly urge the Commission to make these recommendations so that this stark example of racial discrimination and injustice in the federal criminal justice system can be remedied.

II. THE CURRENT STATUS OF THE LAW

In 1986, Congress passed a law enacting mandatory minimum penalties for federal cocaine offenses. In establishing these penalties, the law distinguished between two forms of cocaine -- powder and crack. First-time offenders who sold <u>five hundred</u> grams of <u>powder</u> cocaine were subjected to a mandatory minimum sentence of five years in prison. First-time offenders who sold only <u>five</u> grams of <u>crack</u> cocaine were subjected to the same mandatory minimum sentence.

In 1988, this disparity was extended to the possession of crack cocaine. A five year mandatory minimum sentence was established for the mere <u>possession</u> of crack cocaine. The

penalty for possession of every other drug -- including powder cocaine -- is a maximum of one year in prison.

III. THE DISCRIMINATORY EFFECT OF THE LAW

The disparate treatment of crack cocaine in the federal sentencing scheme has resulted in one of the most striking examples of racial discrimination in our country today. This Commission found that although almost two-thirds of crack cocaine users are white, almost 90% of crack defendants are African-Americans, while only 4% are white. On the other hand, about 45% of powder cocaine defendants are white, 30% are African-American, and 23% are Hispanic. Consequently, African-Americans convicted on cocaine charges receive much longer prison sentences than whites because of the form of cocaine used.

The Commission recognized that there is no rational justification for the 100-to-1 ratio but suggests that there may be justification for some differential between the two forms of cocaine. The Commission based this finding on its conclusion that crack has a greater potential to create dependency, is more readily available to young and poor people, and is more associated with systemic violence.

Despite the Commission's findings regarding the potential of crack cocaine for dependency, the Report found that cocaine produces the same physiological and psychotropic effects in any form. The Report noted that both powder and crack cocaine produce aberrant behavior and psychoses and have the risk of addiction. With regard to the appeal of crack cocaine to young

and poor people, there is no rational basis for establishing a greater penalty for these reasons, even if they are true. Finally, there is no discernible difference in the level of violence associated with crack and powder cocaine. Indeed, Dr. Paul Goldstein, Associate Professor of Epidemiology at the University of Illinois, an expert who has previously testified before this Commission, has found no difference in the level of violence between the powder cocaine and crack cocaine markets. Given these facts, there is no rational basis for any distinction in the penalties for possession or distribution of crack and powder cocaine.

Whether or not one accepts the Commission's broad conclusion that crack cocaine causes greater harm to society than powder cocaine, there is one indisputable fact which compels the elimination of any disparity in sentencing for crack and powder cocaine offenses. The fact that powder cocaine can be quickly and easily converted to crack cocaine negates any rationale for distinguishing between these two forms of the same drug. The easy convertibility of powder to crack cocaine no doubt has resulted in scenarios in which purchasers of powder cocaine (which is more readily available to white, more affluent users) may be arrested before they have the opportunity to convert the powder to crack. Whether a cocaine user is sentenced to probation or five mandatory years in prison should not depend upon the fortuity of the timing of an arrest.

In addition, this easy convertibility of powder to crack

cocaine has resulted in extremely egregioius conduct by some police officers. Here in the District of Columbia, undercover police officers admitted to selling powder cocaine to young, African American men and encouraging them to convert the powder to crack cocaine before arresting them. It is behavior like this which has led some to believe that this disparate treatment of African Americans and Latinos is racist in its intent as well as its effect.

Finally, policy decisions about where arrests are made and who is arrested have added to the discriminatory impact of the 100-to-1 differential. The presence of law enforcement, drug sweeps and undercover operations in inner city areas inhabited by African Americans and Latinos, and their virtual nonexistence in suburban areas where cocaine is no doubt just as available, has resulted in the overrepresentation of people of color in prisons and jails across the country.

IV. THE COMMISSION'S RECOMMENDATIONS

Despite all of the evidence of the discriminatory effect of the federal cocaine laws, the Commission declined to recommend that Congress repeal the mandatory minimum penalties which have caused this disparity in sentencing. The Commission also declined to recommend that the penalties for crack cocaine distribution and possession be amended to be the same as the penalties for powder cocaine distribution and possession. Instead, the Commission chose to recommend that the 100-to-1

quantity ratio be "re-examined and revised," and indicated its intent to to develop a model for Congress to consider in determining whether to revise the current sentencing scheme. Further, it expressed its intent to identify the harms it perceives as substantially associated with crack offenses and to determine the extent to which these harms can be addressed in the guideline system.

The Commission's report was a thorough and convincing treatise on the discriminatory effects of federal cocaine laws. Unfortunately, its recommendations to remedy the wrongs it found did not come close to meeting the force of its findings.

V. CONCLUSION

Those of us who have studied this issue and lobbied for years for the elimination of this blatant example of racial discrimination expected the Commission to recommend that the mandatory minimum sentences for possession and distribution of crack cocaine be eliminated. We are disappointed, but we are hopeful that the Commission will act quickly and do what is necessary to correct this blight on the federal criminal justice system -- not only for those who are arrested and charged in the future, but for those who are currently incarcerated under this discriminatory law.

The Sentencing Commission cannot control the unfair and inequitable concentration of arrests in inner cities. It cannot control the prosecutorial decisions which often result in lighter

sentences for white defendant. It cannot correct the social and economic problems in our society which lead to drug addiction and violence. But it can do something about the discriminatory crack cocaine laws. And that small step could do so much to correct the racial discrimination that exists in our criminal justice system. We strongly urge this Commission to take that step.

FEBRUARY 14, 1995

DEAR MS. NKECHI TAIFA,

AS YOU MAY KNOW THE SENTENCING COMMISSION IS SEEKING PUBLIC COMMENT ON WHAT THE CRACK COCAINE LAW SHOULD BE CHANGED TO IF CHANGED AT ALL. I AM ONE OF THE MANY SERVING A SENTENCE UNDER THIS CRACK COCAINE LAW. I WAS HOPING THAT YOU COULD HELP US OUT BY CIRCULATING THIS PETITION FOR US AND TURNING IT IN FOR US TO THE SENTENCING COMMISSION PUBLIC INFORMATION DIV. BEFORE MARCH 1, if YOU COULD HELP US IN OUR ENDEAVOR WE WOULD BE MOST GRATEFUL. I HAVE INCLUDED A LIST OF THE FEW OF THE MANY YOUNGMEN SERVING SENTENCES UNDER THIS CRACK LAW SO YOU CAN SEE JUST HOW MUCH YOUR SUPPORT MEANS TO US. THANK YOU!

SINCERELY YOURS,

Marcus Henstead

MARCUS HENSTEAD
1299 SEASIDE AVE.
TERMINAL ISLAND, CA 90731

A FEW OF THE MANY SUFFERING UNDER THE INJUSTICE OF THE CRACK COCAINE LAW.

NAME:	AGE:	SENTENCE LENGTH
LEMEUL JACKSON	26	17 ½ YEARS
NIGEL LOCKE	25	17 ½ YEARS
MARCUS HENSTEAD	24	20 YEARS
KEVIN ROBERSON	31	30 YEARS
ROOSELVELT SIMMS	27	27 YEARS
RAYMOND BINGHAM	22	25 YEARS
JAMES MC PHERSON	32	25 YEARS
ERIC CLARK	22	24 YEARS
JEROME ROBINSON	30	20 YEARS
TIM BURGESS	31	20 YEARS
JAMES ROWE	31	20 YEARS
ROBERT THOMPSON	28	30 YEARS
MICHEAL BAILEY	25	25 YEARS
EDDIE WALKER	26	20 YEARS
WALTER WAYNE	36	21 YEARS
CURRY WILLIAMS	25	20 YEARS
RICHARD CUNNINGHAM	36	27 YEARS
REGINALD CARPENTER	29	25 YEARS
ANDRE RODRIGUEZ	24	27 YEARS
JERRY DAVIS	31	20 YEARS
DOMINIQUE EVANS	30	27 YEARS
RONALD MILLER	28	27 YEARS
KENNETH PAULK	29	25 YEARS

NOTE: THE MAJORITY OF THESE MEN HAVE BEEN INCARCERATED FOR AT LEAST 3½ TO 6½ YEARS. THEIR PRESENT AGE DOES NOT REFLECT THEIR AGE AT THE TIME OF THEIR INCARCERATION. AS YOU CAN SEE THIS LAW IS DESTROYING THE LIVES OF YOUNG AFRICAN-AMERICANS AND IT MUST BE CHANGED TO A 1 TO 1 RATIO AND THAT CHANGE MADE "RETROACTIVE".

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

Dear Commission:

We at _____, feel that the crack cocaine guidelines should be lowered to meet the powder cocaine guidelines and that change be made retroactive for the following reasons:

The Commission in the past has given justice to those suffering under unjust sentences under the LSD and precursor chemical law. If the commission raises powder to meet crack it still will not bring justice to the many young African Americans serving draconian sentences under this crack cocaine law since 1986.

There is no rational or scientific basis for the distinction between crack and powder cocaine as agreed to by all who testified at the crack cocaine hearing of 93.

This statute has been taken advantage of by law enforcement to increase prison sentences for crack defendants by insisting that powder cocaine be cooked into crack (see U.S. v. Walls, DC. DC) One agent testified that it was important to implicate on crack charges because "... it only takes 50gms of crack cocaine to get any target over the mandatory ten years." The difference to one defendant was the difference between 2 years and a possible 20 years and to another a maximum of five instead of a possible twenty five years. There is no argument to justify such a result.

The majority of the crack defendants in prison for crack cocaine got large sentences for small amounts for example. In U.S. v Clary, 8th Cir. F.Supp 846, 768, the judge noted that since 1989 56 of the 57 crack defendants that have come thorugh the E.D. of Missouri have been African American and the total weight of all 56 defendants drug combined weighed 4,000 gms or 4 kilos cocaine comes to this country in kilos weighing 1,000 gms a piece in planes boats and trucks. Usually at 200 - 300 kilos at a time. It should be obvious that this

statute does little to impact the flow of drugs but a lot to destroy the lives of young black males. In addition the 4,000 gms that the 56 defendants possesed would have only gotten them a sentence of 36 - 48 months (3 - 4 years).

64.4% of the people who have used crack cocaine are white, but 93.4% of those serving time for crack violations are black.

Only the drug crack has a mandatory minimum for possesion - a higher amount of powder will not even get a mandatory minimum, even though 80% of the people who use cocaine use it in it's powder form.

For the foregoing reasons we feel the the crack guidelines be lowered to those of powder and that the change be made retroactive.

Date: Sincerely,

PETIT FOR CRACK SENTENCES

1 TO 1 RATIO COCAINE -VS- CRACK

NAME:	NAME:	NAME:
Mike Lizdecker	2. Pavla Reyes	3. Craig Hewitt
Rose Avila	5. B.S. Knight	6. Max Tucker
Scott Larock	8. Moritines Baustincu	9. Yahyah Albaquee
	11. Christine Douglas	12. Julliene Hermann
[illegible]	14. Octavia Perez	15. michele dalton
Damon Collins	17.	18. Roy Morton
[illegible]	20. Burton [illegible]	21. alexander damosa
Makeen Gordon	23. Daniel Morris	24. [illegible]
Lucy Padilla	26. Ken Reed	27. Sandy Dalx
Virginia Rocco	29. Gradley Moeth	30. Micheal Anderson
James Walker	32. Lee Robert	33. Joe Lustra
mike Taylor	35. Sunny Pepper	36. Kelly West
Charles Donald	38. [illegible] Johnson	39. Roberto Mabungo
Jaime Baum	41. Charlie Moore	42. Jean Riffo
Candy Smiley	44. Tye Richardson	45. Jad Johnson
Oscar Jimenez	47. Fred Williams	48. David Barnes
Bernard Powell	50. Linda Bass	51. Angelita Malugad
Shirley Robinson	53. Eric Miles	54. Cristina Rode
Rosemarie Kurtz	56. Larry Howard	57. frank jones
Craig Englebretson	59. Edward Johnson	60. andre White
Dennis Nelson	62. Vannessa Johnson	63. Mark Jackson
Mai Yan Lung	65. Patsy Walker	66. Andy Anderson
Roberta Tish	68. Clyde Marx	69. Lester Clapp
Greg Cinque	71. Helen Bauman	72. Ben Gonzales
Paul Enden	74. Leonard Paulsen	75. Brice White
Naseem Bahaney	77. Stacey Green	78. Andrea Lyshorn
Janice Thomas	80. Maria Scott	81. Miles Bailey
Terry Johnson	83. Robert Landis	84. Robert Goetez
Daniel Alvarado	86. Scott Feldmann	87. Godfrey Okosu
[illegible]	89. [illegible] Portter	90. Sydney Landis

PETIT FOR CRACK SENTENCES

1 TO 1 RATIO COCAINE -VS- CRACK

NAME:		NAME:		NAME:	
1.	SAmon SAM	2.	Nolan Bley	3.	James Stone
4.	Kip Henry	5.	Ronald Sample	6.	Harry Burns
7.	THOMAS Carlisle	8.		9.	Irene Collins
10.	Shawn Bhatia	11.	Francis Stevenson	12.	TERRY JACKSON
13.	dennis Hill	14.	Valerie Smith	15.	
16.	Gary Boytim	17.	Tadao Hori	18.	
19.	Antony Hill	20.	Kim WALKER	21.	Tommy Bolton
22.		23.	CHARles Hill	24.	
25.	Richard Stitz	26.	Lucretia Stilwell	27.	
28.	Jane Stewart	29.	ISAIAH DAVIDSON	30.	Penny Sample
31.		32.	Stock DAVid's	33.	
34.	Tim stickler	35.	Kelly Burnett	36.	
37.	Latrice Carter	38.	Dorothy TAFt	39.	Tim WALKER
40.	Ray Woods	41.	Shane Alkama	42.	
43.	Anthony Trujillo	44.	FRANK MASON	45.	Jermaine Smith
46.	Christopher-Walker	47.	Mark Ortega	48.	
49.	Fred Banks	50.	Bernard Hill	51.	Jason Digby
52.	Manny VARGAS	53.	Alison Bryant	54.	William Stone
55.	Margie Beydek	56.	Joseph Stone	57.	Sonia Bhambra
58.	Stock Christian	59.		60.	
61.	Donald Bardick	62.	Brady James	63.	SOTHEARY SAM
64.	Hye Kin Kyeng	65.		66.	Russell Bingeman
67.	andre gray	68.	LISA SMITH	69.	Marcus Biagio
70.	Timothy Bunde	71.		72.	
73.	Stoeppel CLAUS	74.		75.	Donna Kuseng
76.		77.	Fredrick STOLAR	78.	JANet JACKSON
79.	Rick Woodson	80.		81.	
82.		83.	Peter GARRY	84.	
85.	Kenneth Hill	86.		87.	GLEN WALKER
88.		89.		90.	

PETIT FOR CRACK SENTENCES

1 TO 1 RATIO COCAINE -VS- CRACK

NAME:	NAME:	NAME:
1.	2.	3.
4.	5. James Bassar	6.
7. AJA Carrera	8.	9. James Grant
10.	11. Cenie & Jim Grant	12.
13.	14.	15.
16.	17.	18. Myren Mixon
19.	20.	21.
22.	23. Annie Mae Clayton	24.
25. Bonnie Grand	26.	27.
28.	29.	30.
31.	32.	33.
34.	35.	36. Tim Happis
37.	38. EDWARD MAYS	39.
40. Susan Larsen	41.	42.
43.	44.	45.
46.	47.	48.
49.	50.	51. Amelia Houston
52.	53.	54.
55. Patricia Dawkins	56. Edna Clay	57.
58.	59.	60.
61.	62.	63.
64. Chris Jenkins	65.	66.
67.	68.	69. Parker Johnstone
70.	71.	72.
73.	74. Jerome Daniels	75.
76. Blake Palmer	77.	78. Terry Kercher
79.	80.	81.
82.	83.	84. Mitushira Koshi
85.	86.	87.
88. HAROLD BELLO	89. Alfred Rochman	90.

PETIT FOR CRACK SENTENCES

1 TO 1 RATIO COCAINE -VS- CRACK

NAME:	NAME:	NAME:
1. Alexander Halcomen	2. Conrad Lynche	3.
4.	5.	6.
7.	8.	9.
10. Sophia Oliver	11.	12. Lee Wifang
13.	14.	15.
16.	17. Craig Moss	18. Barbara Henke
19. Malcolm Warren	20.	21.
22.	23.	24. Peggy Harrison
25.	26. Michelle Burke	27.
28.	29.	30. Priscilla Harshman
31. Janet Andrews	32. Alex Caldwell	33.
34.	35.	36. Julia Lehr
37.	38.	39.
40.	41. Frazier Murphy	42.
43. Leslie Dewitt	44. Gerald Burns	45. Amal Moseley
46.	47. Daniel Halsey	48.
49. Jeanie Briggs	50. Maxwell Thompson	51. Diane Hall
52.	53. Maserice Whitney	54.
55. Carmen Locke	56.	57. Lee joseph
58.	59. Cheryl Lebbt	60.
61.	62.	63.
64.	65. Patrice Green	66. James McCullers
67. Cheryl King	68.	69.
70.	71. Theresa Burke	72.
73.	74. Valerie Simpson	75.
76.	77.	78. Sydney Oman
79. Dominique Brown	80.	81.
82. Kathy Gunnaso	83. Lavell Lane	84.
85. Lori Lupton	86.	87. Melinda Janney
		90.

PETIT FOR CRACK SENTENCES

1 TO 1 RATIO COCAINE -VS- CRACK

NAME:	NAME:	NAME:
1.	2.	3.
4.	5. James Tucker	6. Harry Kagell
7.	8.	9.
10. Mona Sanchez	11. Roland Cade	12. John Coffee
13.	14.	15. Brett Hannah
16.	17.	18.
19. Janet Klatt	20. Wayne Nixon	21. Shek Lee Man
22.	23.	24. Julia Cahn
25.	26.	27.
28. Ed Cista	29. George KLAUS	30.
31.	32.	33. Perry Bell
34. James Taylor	35. Max Lackner	36.
37.	38. Van Iden	39. Linda Elias
40.	41.	42.
43.	44. Angelique Hernandez	45. EUGENE Eitel
46.	47.	48.
49. Yoshikazu Hiraki	50. Lisa Eikdahl	51.
52. Melody Calderon	53. Glenn Burnett	54.
55. Adrean Kaye	56. Ron Calip	57. Carolyn Lee
58. Janice Calica	59. Sherry Dunwell	60.
61. Dominique Evans	62. Sara LeDoux	63. Wendy Feldman
64.	65. Alex Jaramillo	66.
67. Shane Fellers	68. Nanito Calibo	69. Robert Lucas
70.	71.	72.
73. Ramona Fusco	74. Maureen Kavenner	75. Sergio Lopez
76.	77.	78.
79. Avril McMillan	80.	81. Tai Lee Kwok
82.	83. Michelle Malman	84. yai lee MIA
85. Willie Caldwell	86.	87.
Tomas Hobart	88. Janice Lutzen	89.