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**COMMENTS OF**  
**THE NEW YORK COUNCIL OF DEFENSE LAWYERS**  
**REGARDING PROPOSED 1995 AMENDMENTS TO**  
**THE SENTENCING GUIDELINES**

Respectfully submitted,

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# NEW YORK COUNCIL OF DEFENSE LAWYERS

## COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 1995 AMENDMENTS TO THE SENTENCING GUIDELINES

### Introduction

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the Proposed Amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred and twenty-five attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense attorneys. In the pages that follow, we address a number of Proposed Amendments of interest to our organization.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Marjorie J. Peerce and John J. Tigue, Jr., Co-Chair, and Robert J. Anello, Paul Corcoran, Michael S. Feldberg, Linda Imes, Peter Kirchheimer, William J. Schwartz, Vivian Shevitz, Audrey Straus, Paul Vizcarrando and David Wikstrom.

PROPOSED AMENDMENT NO. 22 (A)

Comment on §2L1.1 Smuggling, Transporting or  
Harboring an Unlawful Alien

The existing guidelines sufficiently establish offense levels for the smuggling, transporting, or harboring of unlawful aliens. The legislative goals in increasing the maximum penalties for these crimes as evidenced by § 60024 of the Violent Crime Control and Law Enforcement Act of 1994 should be implemented by creating a generally applicable departure policy statement allowing for upward departures in cases involving aggravated, unique circumstances such as smuggling, transporting, or harboring as part of an ongoing criminal enterprise, or as part of conduct involving unusually exploitative or coercive conduct resulting for example in indentured servitude. This would permit the existing base offense level to be applied in more routine circumstances such as instances of individuals who avoid the law in order to cause relatives or domestic help to be brought into the country illegally while providing a flexible framework to deal with the various more serious forms of illegal activity. Upward departures should be reserved for those unusual circumstances that warrant increased penalties.

PROPOSED AMENDMENT NO. 22 (B)

Comment on § 2L1.2 Failing to Deport and  
Re-entering the United States Illegally

The Commission should not disturb the existing guidelines. § 130001 of the Violent Crime Control and Law Enforcement Act of 1994 which both reduces and increases maximum



penalties for certain offenses should be implemented by creating a generally applicable departure policy statement applicable to aggravating circumstances.

PROPOSED AMENDMENT NO. 22(C)

Comment on § 2L1.1 Proposed Amendment  
Increasing the Base Offense Level for Certain  
Immigration Offenses

The Proposed Amendment requested by the Department of Justice which increases the base offense level for immigration offenses committed by certain means and in the event of bodily injury should not be adopted. These matters are currently considered in the application notes which suggests the propriety of an upward departure in certain cases. The current base offense level already sufficiently accounts for the illegal conduct. In addition, the departure policy statement permits the sentencing judge to exercise discretion to meet the circumstances of specific cases where aggravated means are employed or bodily injury results. The current version, providing for a discretionary upward departure also permits the sentencing judge to distinguish between those individuals involved in the crime who are in fact responsible for the injury and a co-conspirator who is not. While a responsible party might deserve an increase in punishment, which is well accounted for in the guidelines a participant whose activity does not cause, nor was intended to cause, such injury should not be punished for his co-conspirator's acts.

PROPOSED AMENDMENT NO. 22 (D)

Comment on § 2L1.2 Upward Departure for  
Certain Circumstances

The Proposed Amendment by the Department of Justice which suggests an additional ground for upward departure in certain cases should not be adopted. The current application notes already suggest that in circumstances involving multiple instances of deportation without a criminal conviction a judge should consider sentencing near the top of the guideline range. That application note appropriately focuses the judge on prior conduct that was not the basis for criminal action. Providing an upward departure for conduct that was not the subject of criminal action inappropriately punishes individuals for actions which for numerous reasons may not have been provable or prosecutable.

PROPOSED AMENDMENT NO. 23 (B)

Comment on Proposed Consolidation of §§2L2.1  
and 2L2.2 Trafficking and Acquiring of  
Documents Relating to Naturalization,  
Citizenship or Legal Resident Status or a  
United States Passport

The Proposed Consolidation of §2L2.1 and 2L2.2 in effect increases the base offense level for both activities: from nine for trafficking in documents; and six for fraudulently acquiring such documents; to a level thirteen. Such a large increase is unwarranted as is the consolidation. The current guidelines appropriately consider the difference in conduct between an individual who trafficks in illegal documents and an individual who, by virtue of his or her circumstances, acquires such a document. This distinction is meaningful and should be

maintained. Individuals who acquire documents as opposed to suppliers typically are motivated by personal circumstances and are less likely to be generally involved in criminal conduct. In addition, the current guidelines already provide significant enhancement for aggravated circumstances.

PROPOSED AMENDMENT NO. 25(A)

Comment on §3B1.4 Using Minor to Commit Crime

The Commission should implement §140008 of the Violent Crime Control and Law Enforcement Act by creating a generally applicable departure policy statement in Chapter Five, Part K (Departures) rather than a mandatory upward adjustment as proposed by §3B1.4. Treatment under Chapter Five, Part K would allow the sentencing judge to exercise discretion to meet the circumstances of the specific case presented. The judge should be permitted to distinguish between those adults who in fact abuse their position of authority over a minor and those who commit crimes at the direction of a minor or as a minor's equal co-conspirator. For example, while an adult gang member who outranks the minor within the gang organization deserves to have his punishment increased for using the minor gang member in the commission of a crime, as adult gang member may not deserve an increase in punishment when he is outranked by his minor gang member co-conspirator. A Part K Departure would, in each of those circumstances, give the judge the flexibility to tailor the sentence to the adult's culpability level. A mandatory upward adjustment outlined in §3B1.4 does not distinguish among adults



of different culpabilities. It could therefore result in punishing an individual merely on the basis of his status as an adult.

PROPOSED AMENDMENT NO. 27(A)

Comment re Adjustment for Elderly Victims

The existing guidelines already sufficiently account for harm to the elderly. Similar to the reasoning relating to punishment of adults who use minors in a commission of a crime, the culpability of the offender rather than the status of the victim should be the guiding principle. §3A1.1 already provides a two-level upward adjustment if the defendant knew that the victim was vulnerable because of, *inter alia*, age. This adjustment allows the sentencing judge to distinguish between offenses against the elderly victims who are in fact vulnerable and against those who are not. An upward departure based solely on the age of the victim, and unrelated to his or her vulnerability, would base punishment on the status of the victim rather than the guilt of the defendant.

PROPOSED AMENDMENT NO. 29

"Safety Valve" Provision (§5C1.2)

We strongly support this amendment, which will make permanent the so-called "safety valve" provision of the Guidelines, §5C1.2, enacted as a temporary amendment unless repromulgated. This provision permits an escape from the harsh mandatory minimum sentences in a very small percentage of drug cases. Since the safety valve provision protects individuals

who, because of their limited role in narcotics offenses, would be disproportionately punished if the mandatory minimums were to apply, the provision should be made permanent.

The Guideline created by this amendment, however, only dispenses with the statutory minimum sentence. It leaves in place the Guideline ranges, which, for low-level violators, may still be too high. While a departure may often be obtained when the defendants fall into the categories which trigger the safety valve, an adjustment of the Guidelines would be a more appropriate way to deal with the overly-harsh sentences that would still apply absent a departure because of quantities involved in the offense. !

#### PROPOSED AMENDMENT NOS. 33-43

##### Summary

The Commission has proposed two "Approaches" to revise the Guidelines to de-emphasize "quantity". Approach 1, Proposed Amendments 33-42, is based on the notion that "quantity" of a substance, when adjusted appropriately for "role" in the offense, is an appropriate measure of the seriousness of the offense, but the Commission assigned too much weight to the quantity factor. Approach 2, Proposed Amendment 43, purports to abandon or severely limit the use of drug quantity to assign offense levels.

We support the first approach. While we believe that the impact of quantity should be modified, and, if an appropriate replacement is proposed, it should be adopted, Proposed Amendment 43 merely builds a new series of aggravating factors on "top" of



the mandatory minimum sentences, and therefore does not reduce the impact of "quantity". We therefore oppose it.

Proposed Amendments 33-42, when considered with the pre-existing "caps" on sentences for certain violators, at least begin to temper "quantity" by mitigating factors. Especially given the Proposed Amendment that assigns importance to the "purity" of the drugs involved, amendments along the line of those proposed in this group achieve a fair (if not perfect) indicator of criminal culpability.

This quantity/purity approach would thus treat as more culpable, for example, a defendant who distributes one kilogram of almost-pure heroin than a defendant involved in distributing the same amount as an aggregate of an aggregate of significantly lower purity. The defendant with access to the pure form is obviously closer to the "top" of the chain and is thus closer to the model of "kingpin" or "mastermind" -- the defendants whom Congress meant to "target" with statutory minimum sentences. Moreover, the impact on society of the "pure" form, capable of substantially greater dilution, is far greater.

We first discuss Proposed Amendments 33-42.

#### PROPOSED AMENDMENT NO. 33

##### Drug Trafficking (§2D1.1)

This amendment is designed to reduce the gradations in the Drug Quantity Table so that "quantity" contributes less to the determination of the offense level than aggravating factors. When the Commission first developed the Table, it "keyed" the

offense level for 1 kilogram of heroin -- the quantity that triggers the ten-year mandatory minimum established by Congress -- at a level 32, which is 121-151 months for a first offender, and for 100 grams of heroin, which triggers the five-year mandatory minimum, at level 26, or 63-78 months for a first offender. Lower offense levels, however, also contain a range that includes a sentence corresponding to the statutory minimum: for example, level 30 is 97-121 months and level 31 is 108-135 months; level 24 is 51-63 months and level 25 is 57-71 months.

All of the options reduce the offense levels so that quantity counts less -- that is, produces a lower guideline.

Option A merely reduces the offense levels to use the lower offense levels, which include the number of months corresponding to the mandatory minimum sentence at the top, as opposed to at the bottom, of the Guideline range. Thus, instead of mandating a level 32 for one kilo of heroin, for example, the Drug Table per Option A would mandate a level 30.

Option B reduces offense levels as well; however, in view of Congress's intent to sentence "kingpins" to the mandatory minimum term (as discussed in the footnote),<sup>1</sup> the Drug Quantity

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1. At 132 Cong. Rec. S. 14300 (Sept. 30, 1986), then Senate Minority Leader Byrd expressed this view:

For the kingpins -- the masterminds who are really running these operations -- and they can be identified by the amount of drugs with which they are involved -- we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The

Table would reduce the levels even further, and envisions that a "kingpin" would reach the level containing the mandatory minimum 10-year term only after having his or her base level enhanced by the 4-level adjustment for organizer. (For a "manager", there would be a two-level enhancement, by which the offense level would reach the level containing the five-year term).

One kilo of heroin would thus carry a base level of 28: with a four-level enhancement as an organizer the defendant would be sentenced at a level 32. With a 2-level enhancement for a manager, the defendant would receive a level 30. Both of these offense levels would, again, include 120 months; however, level 30 would allow a sentence of 97 - 120 months, and level 32 would start at 121 months and allow a sentence even higher, up to 151 months.

Option C combines Option A and Option B. We believe that Option A is the preferable course to take since it de-emphasizes quantity, assigns more weight to "role", and would target those whom Congress meant to target when providing a sentence at the ten-year (or five-year) mandatory term.

We support this reduction in importance of the weight of the drugs involved in the offense, and believe it will yield fairer sentences not only at upper ends of the spectrum, but in cases where mere "quantity" would trigger a mandatory sentence,

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minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail -- a minimum of 5 years for the first offense.



but because of the "safety valve" provision, the statutory sentence is waived and the Guidelines still apply.

The "keying" of mandatory minimum sentences to quantity levels was done with the intent that the highest minima would encompass drug "kingpins". These levels have turned out to be entirely unrealistic, reaching far lower into the distribution chain than originally envisioned. Accordingly, we support raising the weight levels so that the drug quantity table more accurately affects the reality of the drug trade, and so that the ten-year minimum actually applies to "kingpin" quantities rather than lower-level "lieutenant" quantities.

PROPOSED AMENDMENT NO. 34 !

Drug Trafficking (§2D1.1)

This Proposed Amendment limits the impact of quantity on defendants who obtain a mitigating role adjustment under 3B1.2. We support this lessening of the impact of "quantity" on low-level defendants who may be "involved" in an offense "involving" huge quantities. While the major actors in such an offense are perhaps rightfully thought more culpable because of their efforts to distribute, for example, 200,000 kilos of marijuana instead of 20,000 kilos, the differences in quantity vis-a-vis a low level distributor, off-loader, or the like, are often fortuitous. Where the differences do not reflect on culpability, there should be, as proposed, a "cap" on the offense level.

The Commission invites comment on whether the "cap" should be at level 28 or otherwise. Since Proposed Application Note 16 provides that the "cap" on base offense level "is in addition to, and not in lieu of, the appropriate adjustment from §3B1.2 (Mitigating Role)", the ultimate offense level where a defendant receives a four-level mitigating role adjustment would be 24, and would provide an authorized term of 51-63 months. Where a defendant received a lesser mitigating role adjustment, the term would be higher.

While we strongly support reducing the reliance on "quantity" alone to increase sentences, we take no position on whether the proposed "cap" is appropriately set at 28. !

PROPOSED AMENDMENT NO. 35(A)

Aggravating Role

We support the elimination of the criteria in § 3B1.1 that the criminal activity be "otherwise extensive," which can be unwieldy and creates confusion in application.

We oppose, however, the amendment to § 3B1.1(c) which provides for a 2 level enhancement for the supervision of only one person. We believe that such an enhancement is too harsh and that the supervision of one other person is adequately dealt with within the guidelines themselves and the Court's ability to sentence within the applicable range.

We also oppose the addition to Proposed Application Note (1) which would include, in certain cases, participants in the number triggering role enhancement regardless of whether

those participants are criminally responsible. This dilutes the concept of higher moral culpability because of higher degree of responsibility. There is a qualitative distinction between supervising fellow criminals and supervising innocents. It is not the supervision of more numbers which increases the moral culpability. Essential to the concept of increased culpability for supervision is the fact that the actor takes responsibility for other criminals. Dilution of the requirement that supervisors be criminally responsible is a dilution of the culpability. Moreover, practical application in "unusual" cases will be confusing, and only lead to inconsistent and uneven results.

We oppose the suggestion in Proposed Application Note 2 that one can be held responsible as a manager or supervisor if they "indirectly" supervise another. This is vague to the point of being potentially incomprehensible and has the potential of sentencing someone for the conduct of another, without any apparent requirement that the defendant knew of or participated in the actions of the person for whom the defendant is now being held responsible.

We endorse that portion of Application Note 3 which clarifies that the supervisor enhancement should not apply to those otherwise worthy of mitigating role reductions. If a person's responsibility is so low as to merit reduction, limited supervisory authority does not merit enhanced culpability.

With respect to the suggestion in Application Note 3 that a §3B1.1 adjustment precludes a §3B1.2 adjustment, although



we recognize that it generally would be inconsistent to apply both of these sections to the same person, we believe that any categorical prohibition would potentially and unfairly preclude appropriate application in unusual cases, and urge that that unusual possibility be provided for in the amendment. Consistent with 28 U.S.C. § 994(j) we also urge that consideration be given to directing courts in the first instance to consider mitigating role adjustments before consideration of aggravating role adjustments, at least in the case of first time non-violent offenders.

PROPOSED AMENDMENT NO. 35(B)

Role in the Offense

Recognizing that the current Introductory Commentary to Section 3, Part B, includes consideration of relevant conduct in determining role in the offense, the NYCDL nonetheless strongly opposes consideration of "relevant conduct" in the role adjustments and urges that that provision be stricken from the current and proposed commentary. We believe that the offense of conviction is the only conduct which should be considered in calculating one's role for sentencing purposes. Inclusion of matters in the role calculation which are "relevant conduct" but not proven by the government beyond a reasonable doubt is yet another dismemberment of a defendant's constitutional rights. Should this trend continue, careful charging instruments will essentially result in a defendant being sentenced almost entirely on conduct proven only by a preponderance of the

evidence. We urge that the Commission stem this ongoing erosion of defendants rights.

The NYCDL opposes eliminating the compromise language permitting a three level decrease if the conduct falls between minor and minimal role. There is no reason to limit flexibility and discretion eliminating the possibility of compromise where the mitigating conduct is truly equivocal. The only explanation of the removal of the compromise language is a desire to further limit judicial discretion.

We endorse the complete removal of prior Application Notes 1 through 3 and in particular the insertion of the terminology "substantially less culpable" to define a person entitled to a mitigating role adjustment.

As noted in connection with our comments on aggravating role, we oppose an outright prohibition on role adjustments for both aggravating and mitigating roles, as is contemplated by Proposed Application Note No. 3. We believe such a prohibition precludes application in unusual cases, and urge that the possibility in unusual cases for such an application be retained.

We note our strong opposition to Proposed Application Note 5 which bars minimal role adjustment for anyone who transports narcotics. This regularly aired proposal appears aimed in part at the hundreds of intestinal smuggler cases at JFK Airport in the Eastern District of New York. These cases are the arch typical minimal role. These defendants swallow cocaine and heroin wrapped in condoms to import it into the U.S.



Subsequently they retrieve the drug filled condoms from their bowel movements. The entire process from start to finish is disgusting and degrading to the defendants. Moreover it is highly dangerous to the courier. Blocked intestines and burst balloons which spill large amounts of drugs into their bodies occur regularly. This requires emergency surgery. Numbers of these couriers die. The manner of apprehension of these mules frequently demonstrates their minimal involvement. They are often apprehended after the customs inspector notices these novice criminal's extreme nervousness. Alternatively they arrive knowing no English, without funds, not knowing where they are going. The owners of the drugs do not trust them with this knowledge.

The couriers are usually paid small amounts of money. They are usually met upon arrival. They are rarely aware of the extent of the conspiracy beyond the recruiter. They are frequently from rural parts of Latin America or Africa with no awareness of the nature of this country's drug problems or of the significance and impact of their acts. Most are deported after serving their sentence and are permanently barred from re-entry into the U.S.

These mules almost always meet all minimal role definitions. It appears that the purpose of application note five is directly aimed at increasing the sentences of the minimally involved intestinal carriers. Yet these first offenders are non-violent people who frequently will never be

permitted to return to the U.S. and therefore bear little threat of future danger to the public. There is common agreement among prosecutors, the defense bar and judges in the Eastern District of New York that these mules are the definition of what constitutes minimal involvement.

The NYCDL also opposes Application Note 6 which would bar minimal role reduction for anyone with a gun. Firearms are punished by severe firearms enhancements throughout the guidelines as well as in the code itself. Presumably, role reductions for weapons carriers are rare because the act of carrying a weapon usually betokens a significant role. In the rare case where such a person has a minimal role, the mitigation should apply. The weapon enhancement will also apply. A less culpable weapons carrier should be punished less severely than a more culpable weapons carrier.

With respect to Proposed Application Note 8 we do not understand what relevance the "circumstances of the defendant's arrest" has to a determination of role in the offense, and accordingly suggest that that language be stricken since it will likely only lead to confusion. Moreover, the last sentence of Proposed Application Note 8 is redundant and unnecessary. It is a first principal of Federal sentences that the court should consider, and may or may not accept, all available information and so we also urge that that sentence be stricken.

PROPOSED AMENDMENT NO. 36

Drug Trafficking (§2D1.1)

This Proposed Amendment would, *inter alia*, significantly increase the importance of firearm use or presence in a drug offense. We have significant problems with this amendment because, especially with regard to defendants who commit offenses involving relatively small quantities drugs, this enhancement would permit a huge increase in a sentence for what amounts to gun offenses that are not proven beyond a reasonable doubt. We believe that the law should not permit so dramatic an increase in a defendant's sentence based on conduct that might even have been conduct for which a defendant was acquitted.<sup>2</sup> !

This Proposed Amendment would seriously increase sentences based on conduct -- serious conduct involving firearms -- that the government would be spared from proving beyond a reasonable doubt. Especially in cases involving relatively a tiny amount of narcotics, the significant 4-level increase in sentence, with a mandate that the offense level be no less than 20 "if the offense involved the discharge of a firearm", and the 2-level increase "if the offense involved possession of a dangerous weapon," with a mandate that the level must be 18, would result in a dramatic increase in jail time based on conduct

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2. See United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992) (Newman, J., concurring, and questioning whether, given the significant impact of "relevant conduct", the law should allow the use of acquitted conduct when it might be the "tail" that "wags" the sentencing dog).



not only proven only by a preponderance, but on conduct that the defendant did not even perform himself.

One example makes the point: if a defendant commits an offense involving 5-10 grams of heroin (or 25-50 grams of cocaine) -- relatively small amounts in the scheme of things -- he or she would have a base offense level of 14, which, for a first-time offender yields a sentence of 15-21 months. If, however, the Proposed Amendment came into play because a gun was discharged by someone else, or even carried by someone else, the prosecution could succeed in convincing a court to impose the adjustment for weapons, mandating at least a 20 (for an offense "involving" the "discharge" of a weapon) or 18 (for an offense "involving" the "possession" of a weapon). The latter would yield a sentence of 33-41 months (level 20), or 27-33 months (level 18). To more than double the sentence for a low-level drug dealer based on conduct not proven beyond a reasonable doubt is, we suggest, offensive to basic notions of Due Process, and would target defendants for longer sentences who do not deserve such enhancement.

We oppose the adjustment, and just as strongly oppose the use of language concerning "discharge" or "possession" of a weapon that focuses more on whether the weapon was "involved" than whether the given defendant was himself responsible for that "discharge" or "possession". The Commission has requested comment on alternative language for weapons increases. Specifically, the Practitioners' Advisory Group proposed that

there be an enhancement of 2 levels where a dangerous weapon was "actually possessed by the defendant, or the defendant induced or directed another participant to actually possess a dangerous weapon, and a corresponding enhancement of 3, 4, and 5 levels for actually (or inducing another) to threaten use, brandish, or discharge a weapon." While we again decry the substantial increase of sentences based on conduct that could be charged as a criminal offense but which is not proven beyond a reasonable doubt, we prefer the proposed language which focuses on what the defendant "actually" did. Adjustments should be applied only to the individual who possessed, threatened, brandished, or discharged the gun -- or at most only to those as to whom foreseeability is more than a theoretical possibility. Given the statements of various courts that "guns are tools of the narcotics trade", an adjustment that is not limited has the potential of too-universal application.

As to Proposed Amendment 36's proposal to amend 3B1.1 ("Aggravating Role") by increasing punishment for "an organizer or leader" where the offense "involved at least ten other participants", we suggest that such an increase is not appropriate in many cases. Often, it is a mere fortuity that more, rather than less, people are "involved". Further, there is often difficulty in counting "participants". Finally, we believe that the number of participants "involved" does not necessarily increase true culpability, unless the defendant was responsible for procuring the participation of those others. The quality of

the leadership function, rather than the absolute number of followers, is, we think, the better measure of culpability.

If there is to be any change, we prefer option 2, which provides that it "typically will be appropriate" to sentence "towards the upper limit of the applicable guideline range" where there are "at least ten other participants," instead of option 1, which requires a 5-level increase without more. Option 2 will give a court the ability not to increase the sentence where it is not deserved.

PROPOSED AMENDMENT NO. 37

Drug Trafficking (§2D1.1)

We support the amendment to make equivalent one marihuana plant and 100 grams of marihuana. There was no legitimate basis to treat the equivalencies differently for a greater number of plants, as is presently the case.

PROPOSED AMENDMENT NO. 38

Drug Trafficking (§2D1.1)

It is the position of the NYCDL that the 100 to 1 ratio of crack to cocaine is irrational. It increases exponentially the punishment for crack as compared to the drug to which it is most similar -- that is, cocaine -- and of which it is but a simple refinement. There is no rational basis for the hugely disproportionate treatment and we urge that it be dramatically relieved, perhaps in the area of 2-1 or 5-1.



PROPOSED AMENDMENT NO. 39

Drug Trafficking (§2D1.1)

We support the "snapshot" approach to drug quantity determinations. The absence of consideration of the "time/quantity" factor by the Commission was, in fact, recently addressed by Chief Judge Newman in United States v. Lara, slip op. 1745, \_\_\_ F.2d \_\_\_ (2d Cir. February 2, 1995) (holding that the Commission had not adequately considered the interplay between "time" and "quantity"). As Judge Newman noted, the current method of aggregating quantities traps less "stereotypical drug dealer" in the net of harsh sentences and overstates culpability in too many cases. !

We think a "set" period is justified; the notion that a too-harsh result can be handled by departures, while helpful, is not fully workable, as indicated by the fact that, though the Second Circuit held that the "time/quantity" factor had not been adequately provided for in the Guidelines, it nonetheless reached different conclusions as to what period was appropriate to consider for the three defendants before the Court in that case.

While any limited period will, we think, improve the operation of the Guidelines, if Option 1 (which deals with shortened periods of 30 days, 180 days, or 12 months) is accepted, we endorse the shortest period -- 30 days -- because the "snapshot" during that period is more likely to snare those whom Congress meant to cover, and not less culpable defendants who do not operate at a high level. Further, to set a limitation

as this will help balance what is now a too-arbitrary power of the police to decide whom to arrest and when to do it. The goal of reducing the arbitrary enforcement of the Guidelines is a worthy one without more.

Option 2 provides, instead, for using the highest quantity "involved on any one occasion" when the offense involved a number of transactions. That option is also preferable to aggregating quantities.

PROPOSED AMENDMENT NO. 40

Drug Trafficking (§2D1.1)

We wholly support the notion presented by this amendment of "tempering" quantity with a "purity" factor. Thus, what this Proposed Amendment would do is to prevent the use of a "gross" weight of drugs when a portion of the drugs is but "filler"; for all cases (except those involving marijuana, hashish, and hashish oil), the "weight of actual controlled substance in the mixture" would determine the "quantity". Further, because the drugs are not always available, the amendment provides that, where "case specific" information is not available and where the controlled substance consists of at least one kilo of heroin, cocaine, crack, cocaine base, or methamphetamine, there will be a rebuttable presumption that the purity is 75%. (The presumed purity is 50% in cases of other drugs). Thus, if an offense, for instance, involves a defendant who transported one kilogram of unrecovered cocaine, the offense level will be determined based on 75% of that quantity.



We support the effort to increase "proportionality" in sentencing by adjusting for purity. If the goal in the sentencing process is to distinguish between the different levels of a drug organization, then it dis-serves the goal to treat an offender "involved" with a kilogram of 100% pure cocaine, for example, the same as one "involved" with drugs aggregating one kilo gram but with a far lower purity; the former is obviously closer to the "top" and is more culpable. Since there will be a way to reduce quantity where purity is less, the quantity-driven offense levels will more appropriately address differences in culpability.

PROPOSED AMENDMENT NO. 42

Offenses Involving Drugs (Chapter Two,  
Part D)

We endorse this 12-part Proposed Amendment in that it clarifies a number of issues that commonly arise in drug offense sentencing and, as such, will increase predictability in the sentencing process. While we, in the New York districts, do not see much litigation over marijuana offenses, the amendments will have the desirable effect of preventing the need for the extensive litigation over issues such as the definition of "marijuana plant" and over the unwarranted use of the weight of moisture in the plants that can so increase a sentence in a way that overstates culpability.

We specifically endorse the revision of Application Note 12 in the Commentary to 2D1.1, to provide that, in cases involving the negotiation of drugs, the negotiated quantity

determines the offense level unless the completed transaction establishes a larger quantity or the defendant shows that he or she was not reasonably capable of producing the negotiated amount or did not intend to produce it. We have seen much litigation over the issue of how to interpret this Commentary. Proposed Application Note 12 will put an end to arguments that would unduly increase sentences where, for instance, a government agent gets a defendant, during negotiations, to agree to produce a kilogram of cocaine, but where the defendant actually delivers a lesser quantity. As the Note would provide, the quantity delivered, where no further delivery is scheduled, "more accurately reflects the scale of the offense" in a quantity-driven sentencing structure.

We also specifically endorse Proposed Application Note 21, which recognizes that there may be an "unusual case" where a defendant who actually possesses a quantity of drugs may not have known or reasonably foreseen that quantity. We endorse the notion that the defendant who falls into this category should not be sentenced for the full amount actually possessed, and are heartened by the Proposed Application Note directing the Court that a downward departure may be warranted in such circumstance. We would prefer, however, an amendment that directs the lower sentence and does not rest on the court's discretionary departure authority. The type of defendant who will fit into the categories to which this Application Note is addressed are the extremely low-level defendants, sometimes duped about quantity

and sometimes remunerated without regard to a higher quantity. If they have not foreseen the higher quantity actually possessed, they should not be sentenced to a higher level. There should be no discretion to deny a departure in these circumstances.

We also endorse Application Note 2 proposed for 2D1.2, which provides that, if an offense is committed near a "protected location" but "did not create any increased risk for those this guideline was intended to protect" or "the location was determined by law enforcement agents", a downward departure may be warranted. Once again, we would prefer a directive that the increased level pertaining to a "protected location" does not apply, rather than a directive that a discretionary departure "may" be warranted: after all, if a guideline is addressed to "protect" against a certain "risk", as this application note confirms to be the case, then it simply should be deemed inapplicable where the risk is not implicated, or at least where the government itself is responsible for creating the increased risk. Absent this further revision, however, we believe that a departure would be well warranted where the risks to which the guidelines are directed do not exist.

#### PROPOSED AMENDMENT NO. 43

##### Drug Trafficking (§2D1.1)

We finally come to Proposed Amendment 43. Although we welcome efforts by the Commission to find alternatives to quantity (and monetary) driven guidelines, we oppose Amendment 43 because we do not believe it appropriately resolves the problems



inherent in the guidelines. Though it purports to de-emphasize "weight" and replace weight with a system more dependent on other selected offense characteristics, weight would remain the determining factor because of the mandatory minimum sentences. Additionally, we believe that weight, as refined by purity, role in the offense, and other factors, in fact does provide a more useful basis than that suggested in Proposed Amendment 43 on which relative levels of culpability can be determined. Finally, we oppose the amendment because it is our belief that there should be no radical change in the Guidelines such as this without adopting a change which will truly be effective; such a change would alter the usefulness of prior case law and substantially lessen predictability in sentencing.

As to our first concern, the proposal will not in fact remove the primary role of weight. The continued existence of mandatory minimum sentences means that for the great majority of sentences as for when the safety valve does not apply, the statutory minimums still drive the sentence regardless of the Guidelines. That is, a defendant "involved" with 100 grams of heroin will receive a five-year minimum and a defendant "involved" with one kilo will receive ten years. Proposal 43 would not alter this base.

Instead, it would superimpose on the minimum sentence set by weight a second system of substantial offense characteristic enhancements. A true system replacing weight with offense characteristics is impossible given the continued

existence of the statutory minimum sentences. Whatever position we may take on a proposal that truly replaces weight with offense factors, this is not such a system.

Second, "corrected" weight is, we think, a workable, although not ideal, measure of culpability. Where weight is corrected by purity, as proposed by Amendment 40, as well as by the "snapshot" proposal and weapon enhancements currently in place, the end result roughly correlates to levels of moral culpability, since those who deal in multiple kilos of pure weight are closer to the chimerical "kingpin" than those who deal in smaller quantities of diluted drugs. The current system is refinable, but achieves some measure of "rough justice".

Lastly, although we welcome efforts by the Commission to rationalize a difficult area of the guidelines, there is value to continued predictability which we believe should not be forsaken unless the change will truly work. There is a substantial body of case law on weight, lab reports, vicarious liability, scienter, distinction between types of drugs, knowledge of weight, and knowledge of one drug versus another. The ability to forecast a result from this body of law is an advantage to the practitioner that militates against change when in this instance statutory mandatory minimums will continue to define the area in terms of weight regardless of any change.

We thus endorse certain of the refinements to the present narcotics related Guidelines and reject Proposal 43.

PROPOSED AMENDMENT NO. 44

Money Laundering Guidelines, §2S1.1

The NYCDL agrees in principle with the Commission's Proposed Amendment to the money laundering guidelines. Proposed Amendment No. 44, which parallels last year's Proposed Amendment 11 (which was not adopted), "consolidates §§2S1.1 and 2S1.2 for ease of application, and provides additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with the relative seriousness of the offense conduct . . . . [] chiefly by tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds."

Under new §2S1.1, violators of either 18 U.S.C. §1956 or §1957 would be sentenced to the greater of (1) 8 plus the number of levels which would be added for a fraud or theft of the same amount as the laundered funds; (2) 12 plus the number of levels that would be added for a fraud or theft of the same amount, if the defendant knew or believed that the funds were derived from narcotics trafficking; or (3) the offense level of the underlying offense, if the defendant committed the offense or was "accountable" for its commission under §1B1.3. The NYCDL welcomes the efforts on the Commission's part both to simplify the money laundering guidelines and to tie them more closely to the underlying activity.

We wish to note our view, however, that the Specific Offense Characteristics set forth in subdivision (b) are



considerably more problematic. Subdivision (b)(1) provides for a two-level upward adjustment if the defendant believed that the money laundering transactions were "designed...to conceal or disguise the proceeds of criminal conduct," or believed that the funds were to be used to promote further criminal conduct. These two "specific offense characteristics" are already elements of the 18 U.S.C. §1956 violation itself. (See §§1956(a)(1)(A)(i), (a)(1)(B)(i), (a)(2)(A), (a)(2)(B)(i), (a)(3)(A), (a)(3)(B).) We thus anticipate that this two-level enhancement will apply virtually across the board in all §1956 prosecutions.<sup>3</sup>

A second problem we wish the Commission to consider is the appropriateness of treating violators of 18 U.S.C. §1957 the same as violators of 18 U.S.C. §1956 at sentence. Section 1957 is essentially a lesser-included offense of §1956, imposing liability for conducting financial transactions with the proceeds of specified unlawful activity. The statute does not require proof of intent either to promote the underlying activity or conceal its proceeds; neither does it require that the defendant know that the funds involved in the transaction were derived from specified unlawful activity. Under the previous guideline,

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3. It is true that §1956 also imposes money laundering liability on anyone conducting the requisite financial transactions with the intent either to evade taxes (e.g., §1956(a)(1)(A)(ii)), or to avoid a reporting requirement (e.g., §1956(a)(1)(B)(ii)). But it will be the rare defendant, if indeed one can be hypothesized, who conducts a financial transaction to avoid either a reporting requirement or to avoid paying taxes on it who does not also, a fortiori, conduct the transaction with the intent "in whole or in part to conceal or disguise the proceeds of criminal conduct," thus meriting the two-level upward adjustment under subdivision (b).

defendants convicted of §1957 violations were sentenced under a base offense level of 17 (rather than 23, for §1956 violations). Under the Commission's Proposed Guideline, violators of §1957 will generally receive the same sentence as violators of §1956. We question the advisability of increasing the penalties for §1957 violations simply to streamline the guideline. Furthermore, under the Proposed Guideline, the government could, in close cases, or in cases where portions of the proof are troublesome or lacking, simply indict a person for the §1957 violation, and then seek to establish -- by a mere preponderance of the evidence -- the elements of "actual" money laundering as offense-level enhancements. As we wrote in our comments to Proposed Amendment No. 11 last year, we question the advisability of trading the government burden of proof for the advantage of fewer guidelines.

We continue to support strongly the Commission's proposal to lower the offense level for money laundering by bringing it into line with the level applicable to the underlying conduct. Under the Proposed Guideline, base offense levels start at 8, 12 or the offense level for the underlying offense, whereas currently violators are sentenced at levels of 17, 20 or 23. Level 8, the bottom of the proposed base offense levels, is premised upon the base offense level of 6 from §2F1.1, plus the two-level enhancement for "more than minimal planning," which is a specific offense characteristic under 2F1.1 and which is built into the proposed structure of §2S1.1. The Synopsis states that



the Commission has made the assumption that heartland money laundering cases will all involve more than minimal planning. We believe that this approach is incorrect. The "more than minimal planning" enhancement under §2F1.1 presents too low a standard for increasing the offense level in most cases and too high a likelihood that the enhancement will apply across the board. Virtually every financial crime will involve "planning" that meets the "more than minimal" standard; the average level of planning in financial crimes has thus already been taken into account in formulating the base offense level of 6 under §2F1.1. We therefore believe that since "more than minimal planning" is not a meaningful barometer in terms of punishing conduct which represents a greater danger to the public, or a greater obstacle to detection by law enforcement, it should not form a part of the theoretical underpinning of the base offense level of 8 under Proposed §2S1.1.

We recognize that there will be money laundering cases, or other financial crime cases, in which the defendant's meticulous or complex planning, i.e., "sophistication," merits an upward enhancement. A better approach, we believe, would be to fix the base offense level for money laundering at 6 -- the level prescribed for most financial crimes -- and abandon altogether the discredited and virtually universally-applicable enhancement for "more than minimal planning." In cases in which a defendant's planning is more extensive than is typical in money laundering cases, and has posed a greater threat to the public or

greater difficulty in detection, then an upward adjustment for "sophisticated" money laundering under subdivision (b)(2) would be warranted. Given the vagueness of the term "sophisticated," however, we believe that either a better definition, or specific examples, or both, should be provided. Proposed Application Note 5, which states in circular fashion that the "sophisticated" enhancement will apply where "...sophisticated steps were taken to conceal the origin of the money" is not as helpful as one would wish since "sophisticated" is not defined, and because "steps to conceal the origin of the money" will likely have been taken in every case.

Finally we wish to observe that while we strongly support the effort to bring money laundering levels down from levels 20, or 23, to levels which are generally commensurate with the level 6 or level 8 conduct which produced the money in the first place, in cases where the underlying conduct is punished by a comparatively high base offense level, the Proposed Guideline imposes much more punishment than is currently imposed under the guidelines. This may be warranted in cases where the money launderer actually committed the underlying conduct too, but Proposed §2S1.1 goes much further, setting the base offense level for money laundering at the level for the underlying conduct if the defendant "would be accountable for the commission of the underlying offense under §1B1.3 (Relevant Conduct)...." In light of the broad ambit of §1B1.3, particularly the breadth of the "common scheme or plan" language in §1B1.3(a)(2), the proposal

threatens to punish money launderers for the conduct which produced the money in the first place, even if they did not commit it. We question whether this is what the Commission intended, and respectfully suggest a reexamination of the application of this section to those defendants whose "accountability" is accessorial.<sup>4</sup>

Furthermore, any guideline like the Proposed Money Laundering Guideline, which keys a defendant's base offense level to any criminal activity for which he or she is "otherwise accountable" under §1B1.3, raises the spectre that a defendant will be sentenced for conduct not only that was uncharged, but for conduct as to which the defendant was acquitted. We reiterate the objection of the NYCDL to a sentencing court's consideration of acquitted conduct in determining the offense level under the relevant conduct section of the guidelines.

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4. For example, Defendant A travels to the far East and returns carrying two kilograms of heroin. Defendant B, a friend of Defendant A who works at a bank and who knows all about A's venture, agrees to transfer the \$300,000 proceeds to A's pseudonymous Caribbean account, then back to A's brokerage account. At sentence, A is sentenced at level 32 for the narcotics. Defendant B, on the other hand, pleads guilty to money laundering. Under Proposed §2S1.1, B's base offense level is 32 because he is "otherwise accountable" for the acts committed as part of the common scheme or plan with Defendant A under §1B1.3. B also receives a two-level upward adjustment for disguising proceeds, under subdivision (b)(1), and an additional two-level upward adjustment for moving funds out of the country under subdivision (b)(2), for an adjusted base offense level of 36.



PROPOSED AMENDMENT NO. 45

Supervised Release (Chapter Five, Part D)

The NYCDL endorses any efforts by the Commission to allow the sentencing courts flexibility in determining what, if any, term of supervised release should be imposed. In our experience, the sentencing court is in the best position to ascertain whether a particular defendant should be sentenced to a term of supervised release. We accordingly believe that both §5D1.1 and 5D1.2 should be amended as suggested in the issue for comment, and we believe that the Court, in its discretion, should be able to decline to impose any term of supervised release in appropriate cases. Although the current Application Notes to §5D1.1 provide that in exceptional cases the Court may depart downward from the mandatory term of supervised release, we believe that this decision more appropriately should be placed in the Court's discretion in all instances, without needing to consider downward departure criteria.

COMMENTS OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.  
ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES  
INVOLVING HIV-INFECTED INDIVIDUALS AND BODY FLUIDS

SUBMITTED TO THE UNITED STATES SENTENCING COMMISSION  
MARCH, 1995

To the Commission:

Lambda Legal Defense and Education Fund submits the following comments in response to the Commissions' recent announcement of proposed guideline amendments focused on HIV-infected defendants and the expanded definition of certain crime elements to include HIV-infected body fluids. 60 Fed. Reg. 2430 (Jan. 9, 1995). As the nation's oldest and largest national legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS, we are grateful for the opportunity to address this important issue currently before the Commission.

The three HIV-related amendments currently under consideration include specific offenses involving an HIV-positive individual's intentional exposure of another to HIV through sexual activity; expansion of the definition of a dangerous weapon to include "infectious bodily fluid of a person;" and extension of the definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" to include HIV-infection through exposure to body fluids. In addition to these amendments, the Commission has invited comment on whether enhanced penalties for "willful sexual exposure to HIV" will affect HIV testing behavior.

For the reasons set forth below, we believe that these proposed amendments invariably are vague, over-inclusive and

unnecessary, and create enforcement nightmares while undermining important individual rights and proven mainstream public health policies. The singling out of a particular disability for special treatment under the law also runs counter to the important principles of fair and equal treatment at the heart of antidiscrimination laws such as the Rehabilitation Act of 1973 and the Americans with Disabilities Act. We address in turn each of the proposed amendments, and the related legal and policy implications of these proposals.

I. Guideline Amendments Relating to Theoretical Sex Offenses Involving Intentional Exposure Of Another to HIV Are Unnecessary and Unsound

The first HIV-related issue on which the Commission invited comment concerns whether there should be guideline amendments relating to offenses in which an HIV-infected individual engages in sexual activity with knowledge of his or her infection status and with the intent through such sexual activity to expose another to HIV.<sup>1</sup> Even without the difficulties of enforcement and the public health dilemmas which such a proposal would engender, the amendment is ill-advised in that it is difficult to even identify known incidents in which the conduct addressed by the amendment has occurred.<sup>2</sup> Without any evidence that the type of conduct described -- sexual contact engaged in by someone who knows his or her HIV-status and sets out to deliberately infect another person through that contact -- is more than an exceedingly rare event, there is no issue of public safety appropriately addressed through the criminal code to support the



adoption of such an amendment.

It is important to emphasize what numerous experts in the field of law and public health have repeatedly pointed out -- that criminal statutes are never appropriate or effective means of combatting HIV infection.<sup>3</sup> In the eight years since the General Accounting Office reported similar consensus, there have been no significant changes in the type or frequency of behavior posing risks of HIV transmission to warrant rejection of this conclusion at this stage of the HIV/AIDS pandemic.<sup>4</sup> Efforts to curb significant routes of transmission of HIV should rely on public health law and measures for effective solutions to activity that poses a real risk to the health of our citizens.<sup>5</sup> At the same time, if an identified type of conduct in fact occurs so rarely that it cannot reasonably be characterized as a genuine threat to public safety, then the criminal law functions of deterrence and retribution are not applicable.<sup>6</sup>

Even the most narrowly drafted HIV criminal statute will likely prove counterproductive in the critically important fight against the spread of HIV infection. A statute that requires defendants to know of their HIV infection at the time of the criminal act will discourage persons from determining their HIV status and entering HIV-related education and treatment programs.<sup>7</sup> As one commentator has aptly noted, "The social and economic cost of this strategy outweighs any benefit likely to result from prosecuting the few individuals who use the intentional transmission of HIV as a means of causing serious

injury or death to another person."<sup>8</sup>

II. The Proposed Amendments of the Definitions of a "Dangerous Weapon," "Serious Bodily Injury" and "Permanent or Life-Threatening Bodily Injury" to Include "Infectious Bodily Fluid of a Person and Infection By HIV-Infected Bodily Fluids"

The negative effect of prosecutions and convictions produced by the perception, or characterization, of the body fluids of an HIV-infected individual as a "dangerous weapon" have been widely noted, particularly as they concern conduct posing virtually no demonstrated risk of transmission. One commentator has suggested that convictions for this type of conduct "surely fuel the misinformation, hysteria, and discrimination surrounding the HIV epidemic, and hurt the criminal law's social objective of educating the public..."<sup>9</sup>

The characterization of private medical information as a deadly weapon would pose new dangers for people known or believed to have HIV. This is particularly true in the context of the current proposal, which provides no guidance as to the circumstances under which such a definition would apply to someone with HIV. In theory, once the definition of a deadly weapon is amended to include even HIV-infected body fluids (such as saliva) which have never been implicated in transmission of the virus, conduct such as spitting could be treated as a criminal act.

The amendment of the sentencing guidelines in this manner is additionally problematic because of the potential for abuse posed by the fact that most defendants are likely to be disfavored

minorities such as gay or bisexual men, intravenous drug users, and racial minorities, who almost exclusively have been the defendants in previous attempts to criminalize conduct in cases involving HIV/AIDS.<sup>10</sup>

Even victims of violent crimes, and their families, could face the additional threat of a personally invasive inquiry concerning private aspects of their health and lives for the purpose of justifying the violence they experienced. Indeed, precisely this scenario occurred earlier this year in a Mississippi state court prosecution of a man who confessed to the execution-style slaying of two gay men.<sup>11</sup> In that case, the defendant's attorney persuaded the trial judge to allow the post-mortem testing of the dead victims' bodies on the argument that if either proved to be HIV-infected, it would have been "tantamount to carrying a loaded weapon," and thus the defendant could raise the defense of justifiable homicide. Although the jury ultimately rejected this defense, the judge's allowance of the discovery and introduction of the dead men's HIV status on the belief that this information was relevant to the defendant's culpability produced the widespread publication of the men's private medical and personal information, and caused considerable anguish to their families and friends. It also stoked the fears of those who already experienced discrimination on the basis of their sexual orientation or perceived HIV status that this judicial approval of the concept of HIV as a deadly weapon could provoke more serious violence against them.



There is an alarming amount of discrimination and violence directed against those with HIV disease.<sup>12</sup> Moreover, the effects of this violence are far-reaching. The fear of encountering violence "prevents many with HIV from obtaining medical care, counseling, referral to support groups, and other supportive services."<sup>13</sup>

### III. The Impact of Enhanced Penalties For Intentional Sexual Exposure to HIV on HIV Testing Behavior and Other HIV-Related Prevention and Treatment Activities

There is little question that criminal sentence enhancements that focus on a defendant's knowledge of his or her HIV status will undermine the continuing efforts of public health officials to encourage individuals voluntarily to be tested for HIV infection. Such measures place a premium on an individuals' ignorance of his or her HIV status and create a disincentive to be tested; clearly prosecution for an AIDS-related sex offense becomes far more difficult when the prosecutor is unable to prove the defendant's prior knowledge of his HIV infection. Regardless of the actual application, the clear message that the proposed amendment sends is that a record of HIV testing alone can be the basis for criminal penalties.

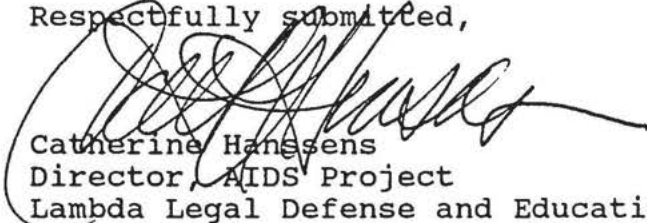
Further, amending the guidelines' definitions of "deadly weapon," "serious bodily injury," and "permanent or life-threatening bodily injury" to include the body fluids of an HIV-infected person or the transmission of HIV will discourage testing in a more far-reaching way by raising the specter of punishment even for otherwise legal and frequently harmless

conduct when engaged in by a person known to be HIV-infected. The adoption of these amendments would only lend credence to the fear and ignorance that breed discrimination and the violence which increasingly accompanies it.

#### IV. Conclusion

Criminal enhancement penalties focused on the presence of a virus recognized as a protected disability under federal antidiscrimination laws run counter to the salutary purposes of these hard-won protections while serving neither legitimate law enforcement nor public health goals. Criminal law measures have been widely recognized as ineffective in responding to public health crises, and in fact serve the opposite effect of driving affected individuals underground, away from the treatment and prevention services which remain the best hope of stemming the tide of HIV infection.

Respectfully submitted,



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1. While neither the language of the proposed amendment nor the Congressional directive contained in Section 40503 of the Violent Crime Control and Law Enforcement Act of 1994 specify the offenses which would be the subject of such an amendment to the Guidelines, consensual sex on the part of a person with HIV is not a federal crime, and so we assume that sex offenses defined under 18 U.S.C. §§2241-2244 were the intended focus of these amendments.

2. Enforcement of any guideline providing for the sentence enhancement of HIV-transmitting conduct would be problematic, particularly as defined in the proposed amendment, which requires that the HIV-positive defendant have knowledge of his or her HIV serostatus, and then engage in sexual activity with the intent of exposing another to the virus.

First, the government would have to prove that the defendant was both actually infected and aware of his or her infection at the time of the commission of the offense. Since many people are tested anonymously, this would be difficult to prove in many cases, and a post-arrest test result would be irrelevant because the defendant could have become infected after the incident which forms the basis for the criminal charge.

Second, proof of the requisite mental state would be a significant difficulty, as the government would have to prove that the defendant knew or believed that his or her conduct was likely to transmit the virus, and that this result was intended by the defendant's conduct. (Some researchers have estimated that the risk of HIV transmission to a woman as a result of a single act of unprotected heterosexual intercourse with an infected person is approximately .2%. Norman Hearst & Stephen B. Hulley, "Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients the Best Advice?," 259 JAMA 2438, 2439 (1988).)

3. E.g., Michael Closen, et als., "Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure," 46 Ark. L. Rev. 921, 935 (1994).

4. The General Accounting Office reported in 1987 on the consensus among public health officials that the criminal law is an ineffective means of controlling the spread of the HIV virus, and that prevention and education activities instead are the best available tools to control spread of the epidemic. General Accounting Office, AIDS Prevention: View on the Administration's Budget Proposals 2,4 (1987).

5. Id.



6. Any policy aimed at affecting public health should be assessed in terms of the measure's cost and effectiveness. See Closen et als., supra note 1, at 932 n. 46. While "a large portion of human conduct creates at least some risk to others...only conduct that creates a substantial and unjustifiable risk to another is generally criminalized." Id. at 940 n. 72; Gene P. Schultz, "AIDS: Public Health and the Criminal Law," 7 St. Louis U. Pub. L. Rev. 65, 88-89 (1988).

7. Stephen V. Kenney, "Criminalizing HIV Transmission: Lessons From History and a Model for the Future," 8 J. Contemp. Health L. & Policy 245 (1992).

8. Id.

9. Thomas W. Tierney, Comment, "Criminalizing the Sexual Transmission of HIV: An International Analysis," 15 Hastings Int. & Comp. L. Rev. 475, 487 n. 105 (1992).

10. See Closen et als., supra, at 924.

11. Sate of Mississippi v. Marvin McClendon, no. 9254, Circuit Court for the Second Judicial District of Jones County, Mississippi (1995).

12. The HIV-Related Violence Project, funded by the New York State Department of Health and developed by the New York City Gay and Lesbian Anti-Violence Project, has collected data on HIV-related violence since 1990. The Project's data demonstrate that HIV-related violence is increasing at a sobering rate: since its inception only four years ago, the Project has provided services to nearly 500 people who were specifically targeted for violence because of the perception or knowledge that the victim had HIV. In 1990, the Project reported 26 cases of violence motivated by HIV bias. In 1991, that number increased to 86 reported cases in one year, and in 1992, there were 118 new reported cases involving victims of violence motivated by the perpetrator's HIV-related fear and bias. The reported incidence of violence motivated by HIV has continued to increase, with the violence affecting heterosexuals and women<sup>+</sup> as well as gay men.

13. Terry Maroney, HIV and Hatred: Hazardous to Your Health, Health/PAC Bulletin 14, 19 (Winter 1993). People with HIV infection report that fear of violence, the experience of

harassment and the perception of being in danger have made some virtual prisoners in their own homes. Id. at 15-16.

The threat of violence against those with HIV or those perceived to have HIV is compounded by the fact that most people living with HIV in the United States are already at an elevated risk for violence, i.e. gay men, women, people of color, children and the poor. Id. at 14. HIV continues to affect, and infect, all communities.

**COMMENTS ON PROPOSED AMENDMENTS TO  
SENTENCING GUIDELINES FOR UNITED STATES COURTS**

DATE: MARCH 6, 1995

FROM: JEFFIE J. MASSEY  
ATTORNEY AT LAW  
DALLAS, TEXAS

TO: UNITED STATE SENTENCING COMMISSION

ATTENTION: MICHAEL COURLANDER, PUBLIC INFORMATION SPECIALIST

These written comments are submitted in accordance with the instructions that appear at 60 C.F.R. 2430 (January 9, 1995), and in support of the adoption of amendments to Chapter Two, Part S of the Sentencing Guidelines (Guidelines) (specifically §§ 2S1.1 and 2S1.2) dealing with Money Laundering and Monetary Transaction Reporting.

The following issues will be addressed *infra*: (1) What the base offense level for a violation of 18 USC §1956 should be and how specific offender characteristics should be designed to enhance punishment for sophisticated schemes of concealment; (2) Whether or not the base offense level for a violation of 18 USC §1956 should assume "more than minimal planning"; (3) Whether the table contained in §2F1.1 or the table proposed at 60 C.F.R. 2465 should be used; (4) Whether for a fraud offense, the "loss" from the offense should be used rather than the "value of the funds", when those amounts differ; and (5) Whether or not §1B1.10 should be amended to make these amendments retroactive.



## INTRODUCTION

### A. THE MONEY LAUNDERING STATUTES (18 USC §§1956 & 1957)

As acknowledged in the "Background" section of the proposed amendments to Chapter Two, Part S of the Guidelines, the statutes dealing with money laundering were originally enacted as part of the Anti-Drug Abuse Act of 1986.<sup>1</sup> The purpose of the laws was clearly stated by Congress: they sought to strike directly at the profit motive of drug dealers, seeking to bring "the proceeds of organized crime well within the reach of federal law." Carpenter, K., *Money Laundering*, 30 Am.Crim.L.Rev. 813, 817 (1993). Subsequent to its enactment, 18 USC §1956 was amended to greatly expand the definition of "specified unlawful activity", thereby making its provisions applicable to a multitude of "white collar" fraud offenses totally unrelated to the original group of offenses in the area of manufacture, importation, sale, or distribution of controlled substances.<sup>2</sup>

18 USC §1956 has always contained liberal definitions, such as those of "transaction" and "financial transaction", which included the simplest of acts, such as making a deposit (cash, check, or other monetary instrument) into a bank account.

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<sup>1</sup> Specifically, see the Money Laundering Control Act of 1986, Subtitle H of Anti-Drug Abuse Act of 1986, Public Law 99-570, 100 Stat. 3207 (1986).

<sup>2</sup> The original "Introductory Comment" to Chapter Two, Part S, which discussed the "essential nature" of "[m]oney laundering activities" to "organized crime" was deleted effective November 1, 1990, as (among other things) "outdated". See U.S.S.G., App. C (Amendment 342).

The expansive manner in which the Department of Justice began to routinely use this statute caused no small amount of concern in the legal and business community that the reach of this statute, originally intended to scrutinize *illegal* business operations was being expanded to include every type of *legal* business operations.<sup>3</sup>

## B. POLICY STATEMENT OF THE GUIDELINES

From the beginning, the Sentencing Commission has been sensitive to the fact that, in the "real world" of criminal justice, the job that they were tasked to do involved making a choice on a very fundamental and very important issue.

The Commission initially sought to develop a pure real offense system. . . . In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. . . . The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. . . . Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.<sup>4</sup>

Through the years, the Commission has exhibited a willingness to respond to

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<sup>3</sup> Cf, Thompson, L. and Johnson, E., *Money Laundering: Business Beware*, 44 Alabama L. Rev., 703 (1993).

<sup>4</sup> U.S.S.G., Chapter 1, Part A, Sec. 4, p 5 (1994).

comments and criticism directed at the operation of the Guidelines from all facets of the criminal justice system. As evidenced by the number of amendments to the Guidelines over the past seven years, the Commission recognizes that the Guidelines must be adjusted to take into account legislative amendments, judicial interpretations, and, not least of all, injustices resulting from over-zealousness on the part of prosecutors.

The proposed amendments to Chapter Two, Part S of the Guidelines address some issues that result from a combination of the afore-mentioned factors. With a maximum sentence of twenty (20) years and relatively high base offenses level of twenty-three (23) and twenty (20), offenses under 18 USC §1956(a)(1)(A) and/or §1956(a)(1)(B), have been included in the vast majority of "white collar" fraud prosecutions filed in recent years in some jurisdictions.<sup>5</sup> Given the tremendous advantage it gives to the government in plea negotiations, it is easy to see why prosecutors are enticed to include these counts in prosecutions that involve nothing more than the receipt and deposit of funds into a bank account. As a result, a multitude of "white collar" fraud defendants have received lengthy sentences--sentences far in excess of what their "real offense" conduct can or should justify.

In a perfect world, the policies of the Department of Justice would not allow prosecutors to use the money laundering statutes in cases that really have nothing

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<sup>5</sup> I am most familiar with cases in the Northern and Eastern Districts of Texas, but, through research have knowledge of similar practices in other venues.



to do with money laundering. In a perfect world, juries would not be confused by the lengthy and complicated instructions they receive from judges. In a perfect world, the judicial review process would not be so slow or so cumbersome so as to prevent a meaningful review of every sentencing issue, and the resolution of those issues in a uniform and consistent manner throughout the circuits.

Lacking this perfect world, this Commission has the power and should use their power to correct resulting inequities in the sentencing of defendants and not hesitate to "make appropriate adjustments [as] they become necessary".

### **ISSUES RELEVANT TO PROPOSED AMENDMENTS**

**ISSUE ONE: WHAT THE BASE OFFENSE LEVEL FOR A VIOLATION OF 18 USC 1956 SHOULD BE AND HOW SPECIFIC OFFENDER CHARACTERISTICS SHOULD BE DESIGNED TO ENHANCE PUNISHMENT FOR SOPHISTICATED SCHEMES OF CONCEALMENT.**

Basically, the proposed amendments offer three options for determining a base offense level:

(1) use the offense level for the underlying offense from which the funds were derived;

(2) use level 12 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds, if the defendant knew or believed the funds were proceeds from one of a group of offenses having to do with controlled substances, violence, firearms, explosives and terrorism; or,

(3) use level 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds.<sup>6</sup>

The published notice characterizes options (2) and (3) as "fallback" offense levels "that will apply primarily in cases in which the underlying conduct cannot be determined". For whatever it is worth, this observer cannot readily imagine a scenario where the underlying conduct could not be determined. Since money laundering is, by definition, the laundering of proceeds from some "specified unlawful activity", the underlying conduct should be identified in the government's charging instrument.

In general, it makes the most sense to tie the money laundering punishment to the "specified unlawful activity" punishment as closely as possible. Thus, the explanation in the published notice that proposed paragraph (a)(2) [option (2) above] is at level 12 because it is "consistent with the current guideline structure which generally treats drug-related offenses as at least four levels more serious than typical economic offenses (e.g. fraud)" seems logical and equitable. Using that same logic, differences in base offense levels for fraud offenses (such as those covered by §2B1.1 and §2F1.1) would justify lower base offense levels than those for offenses that involve controlled substances, weapons, violence, and/or terrorism.

As discussed *supra*, when Congress passed the Money Laundering Act in 1986, they intended to reach persons that were involved in the manufacture,

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<sup>6</sup> From the published notice, we know that option (3) is higher than option (1) because it assumes "more than minimal planning". The wisdom of that assumption is addressed *infra* as Issue Two.

possession, and distribution of controlled substances. Historically, these persons used sophisticated transactions to "launder" and/ or hide the proceeds of their illegal activities, both within and outside of the jurisdiction of United States Courts. The guidelines should endeavor to punish more severely those that "launder" their illegal proceeds through sophisticated means. As mentioned *supra*, it is possible to commit the offense of money laundering by doing nothing more than making a deposit into a bank account. The Guidelines should differentiate between these two types of conduct.

The published notice states:

The amendment uses specific offense characteristics to assure greater punishment when the defendant knew or believed that the transactions were designed to conceal the criminal nature of the proceeds or when the funds were to be used to promote further criminal activity. A further increase is provided under subsection (b)(2) if sophisticated efforts at concealment were involved.<sup>7</sup>

These goals are represented by proposed Paragraph (b)(1) of Specific Offense Characteristics which provides as follows:

(1) If the defendant knew or believed that (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 (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

These two sections basically re-state the provisions of 18 USC §1956(a)(1)(B)(i) and §1956(a)(1)(A)(i), respectively. While the language, on its face, seems to indicate

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<sup>7</sup> See 60 C.F.R. 2463-2464.



that only the type of complicated or sophisticated transactions discussed above would come under these enhancements, such is not the case. I have witnessed and participated in the defense of numerous prosecutions where the above-referenced provisions of 18 USC §1956 were used to successfully prosecute defendants who did no more with their illegal proceeds than deposit them into a bank account held in their own name and/or used in the normal course of their business. There was no "further criminal conduct" that was promoted--their crimes were complete. There was no attempt to disguise the proceeds. The paper trail that was left was obvious and not obliterated in any way. These prosecutions are examples of those that would not succeed in a perfect world. But, since they do, the sentencing guidelines should provide some discrimination between them and those defendants that employ overseas bank accounts and dummy corporations.

Looking to paragraph (b)(2) of Specific Offender Characteristics, one sees language that is more on point. So long as the Commission defines "a sophisticated form of money laundering" to target things like multiple transfers and fictitious names, proper use can be made of these enhancing provisions.

**ISSUE TWO: WHETHER OR NOT THE BASE OFFENSE LEVEL FOR A VIOLATION OF 18 USC §1956 SHOULD ASSUME "MORE THAN MINIMAL PLANNING".**

The published notice specifically requests input on whether or not proposed Base Offense Level (3) correctly assumes "more than minimal planning" , thus

justifying a higher base offense level (8) plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds. As can be seen from the discussion included *supra*, it is not safe to *assume* more than minimal planning. Certainly there are situations where defendants plan and carry out elaborate schemes to disguise the proceeds of illegal activity. An alternative Base Offense Level that is triggered by instances of elaborate schemes is a viable alternative to discriminate between different levels of sophistication, just like Specific Offender Characteristics can be used to make this discrimination.

I believe that the important thing is not the methodology used. The important thing is to not generalize, stereotype or assume that all money laundering defendants are the same because they are most certainly not. Treating them the same is partially how the inequities that exist today came about. Whatever amendments are adopted should strive to eliminate assumptions and across-the-board applications.

### **ISSUE THREE: WHETHER THE TABLE CONTAINED IN §2F1.1 OR THE TABLE PROPOSED AT 60 C.F.R. 2465 SHOULD BE USED.**

The published notice does not indicate any philosophy behind the proposed table other than to say the issue is being raised at the recommendation of the Practitioners' Advisory Group. The proposed table appears to be identical to the existing table in §2S1.1. I am not aware of any identifiable inequities resulting from the application of the table as it has been used in the past. The inequities exist because of the outrageous base offense level in the existing Guidelines. Accordingly, I see no reason to change the table.

**ISSUE FOUR: WHETHER FOR A FRAUD OFFENSE, THE "LOSS" FROM THE OFFENSE SHOULD BE USED RATHER THAN THE "VALUE OF THE FUNDS", WHEN THOSE AMOUNTS DIFFER.**

The first proposed Application Note correctly observes that the value of the funds involved in a transaction is not always the same as the "loss" to the victim or victims associated with that transaction. Too often, prosecutors gravitate towards the largest number associated with the transaction in question and promote it as the value that should be used to enhance a defendant's punishment. Artificially inflating the loss figure in cases such as this adds nothing to the punishment process. Victims are entitled to a fair resolution of the restitution issue, but the government should not be allowed to manipulate a defendant's sentence by arguing for a higher offense level based on a meaningless number. Additionally, as discussed in the Commentary to §2B1.1, and mentioned in Application Note 7 of §2F1.1, the value of a loss should *not* include interest the victim could have earned on such funds had the offense not occurred.

**ISSUE FIVE: WHETHER OR NOT §1B.10 SHOULD BE AMENDED TO MAKE THESE AMENDMENTS RETROACTIVE.**

As mentioned in the Introduction section of these comments, and as I will further address at the hearing, I have witnessed the operation of the Guidelines perpetuating injustices brought about by indiscriminate charging decisions, overwhelmed juries, and inconsistent appellate review. The people that have suffered



these injustices are, for the most part, still in prison. Some have already exhausted all appellate reviews.

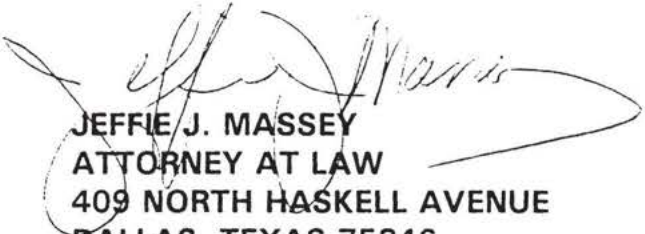
I can see no reason why the proposed amendments should not be made retroactive. Under the proposed amendments, it would be a relatively simple matter of recalculating offense levels using the underlying conduct, which will be the same as the "specified unlawful activity". Assuming that the appropriate provisions differentiating between complicated and "straightforward" transactions are included in the new guidelines, those defendants already in custody will be helped in proportion to the level of their past conduct with the receipt-and-deposit defendants receiving the most relief because they committed the most "straightforward" offenses.

## CONCLUSION

The proposed amendments to Chapter Two, Part S of the Guidelines are a welcome sight! The less than perfect world that is our criminal justice system has operated in such a way to unreasonably punish defendants for a sophisticated crime targeted by Congress in 1986 when the real crime they committed was engaging in a "specified unlawful activity" in an environment that allowed them to be treated like they were members of an international drug cartel. For those defendants that are members of international drug cartels and who do engage in extended, complicated financial transactions to hide, disguise, and dispose of their illegal profits, the

proposed amendments will do little or nothing to alter their length of incarceration. But, for those defendants who committed a "white collar" fraud and had the misfortune to deposit their proceeds into their business account, the relief they deserve is now the light at the end of the tunnel. With the minor changes I have suggested above, I wholeheartedly endorse the proposed amendments.

RESPECTFULLY SUBMITTED,



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Barbara Goodson  
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February 1, 1995

U.S. Sentencing Commission  
1 Columbus Circle wing), 1600 Pennsylvania Ave.  
North/East Falk Lobby  
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Washington, D.C. 200002

Dear U.S. Sentencing Commission,

As your constituent, I know that you are sensitive to keeping our best interests in mind when you vote on important issues in Congress that affect inmates as well as their family members. For that reason I would like to express my concerns about a serious injustice in the American justice system that you can help correct by changing the mandatory sentence to be retroactive for inmates already serving time and a lower sentence level with parole. This would enable families to be reunited with their love ones, that are now incarcerated with long sentences that are unjust and inhumane.

In 1986 and 1988, Congress passed mandatory minimum sentencing laws for drug offenders and firearm offenders. These laws prohibit judges from considering any of the facts of a case when sentencing except for the type of drug and its weight, or the presence of a firearm. The judges simply looks at a grid to find the predetermined sentence, and he cannot depart from this sentence. In most cases that involves crack-cocaine the sentences is often 10, 20 years or more, even for nonviolent offenders and first time offenders. Because there is no parole the offender will serve the entire length of his sentence. I can relate to the injustice of this type of sentencing, because my son, Nathaniel Goodson (23 years old) is currently serving a 12 year sentence imposed by this law.

As a mother, as well as a voter, I echo the concerns of other mothers and voters that minorities are the soul victims to the mandatory sentences. I and other mothers realize that our children have committed a crime and they must pay for it, but the punishment under the mandatory sentence is cruel and unusual punishment for the inmates as well as their families. Doesn't it make more sense for a judge to be able to determine if a nonviolent, first time offender may be better served by treatment, supervision and community service while supporting himself and his family? Taxpayers pay approximately \$20,000 per year to keep my son and other inmates behind bars. Drug offenders now make up 56 percent of the 75,000 federal inmates. Is locking up nonviolent, first-time drug offenders the best use of scarce tax dollars?.

More prisons are not the answers to growing drug problems. Especially when the prisoners are not being rehabilitate and educated to entire back into society as productive citizens. I am not condoning drug usage and selling but I can not condone



constitutional rights to the American tradition of justice that is fair for all. By changing the mandatory sentence and guideline for crack-cocaine to a sentence that is fair as well as humane. I thank you for taking the time to read my concerns and hope that you will share with you colleagues.

Sincerely yours,

*Barbara Goodson*

Barbara Goodson



# THE ALEPH INSTITUTE

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4 Adar II 5755  
March 6, 1995

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

Re: Proposed Amendments to the Federal  
Sentencing Guidelines

The Aleph Institute ("Aleph") hereby submits to the United States Sentencing Commission (the "Commission") its comments and recommendations with respect to the proposed amendments to the Federal Sentencing Guidelines (the "Guidelines") scheduled for hearing on March 14, 1995, to be considered by the Commission in promulgating amendments due to the Congress by May 1, 1995.

### Background Information: The Aleph Institute

The Aleph Institute is a not-for-profit, national educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the personal direction of the Lubavitcher Rebbe, Rabbi Menachem M. Schneerson, O.B.M. Aleph's goal is to serve a

pressing need of our society by addressing significant issues relating to our criminal justice system. In furtherance of that goal, Aleph has created and implemented a host of programs over the past fourteen years that are designed to rehabilitate inmates, counsel and assist them and their families, reduce necessary periods of incarceration and provide moral and ethical educational programs designed to inculcate universal truths and act as a preventative long-term solution to ameliorate society's criminal justice needs.

Aleph has provided extensive and regular in-prison services since its inception. Aleph's educational and counseling programs have focused on moral and ethical teachings that are universal. The main goal is to transform "dead time" into purposeful time, provide an opportunity for inmates and other offenders to restructure their personal priorities and goals, and to maintain the integrity of essential family ties. In most cases, intensive instruction and counseling is integrated with community service work performed in the surrounding area.

Aleph's innovative educational and counseling programs have been recognized as effective in:

- o reducing recidivism, by providing "rehabilitation through education";
- o reducing ancillary societal costs resulting from stresses to the spouses, children and families of incarcerated persons, by providing needed educational and counseling services.





- o addressing jail population management, by providing workable alternatives to institutional incarceration; and
- o breaking the all-too-familiar cycle of learned helplessness under which inmates essentially emerge from jail as even more sophisticated criminals, by creating better relationships and conditions within penal institutions, realigning inmates' value systems and allowing them to use their time more productively.

Aleph's contributions to the criminal justice and corrections systems have been lauded by prison officials, legislators and both federal and state judges. For example, the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, has noted:

"[The Aleph Institute] is doing fine work. Its pre-prison counseling, in-prison education and post-prison assistance to defendants and their families provide standards of compassion and assistance worthy of emulation. Rabbi Sholom Lipskar, the guiding force of the Aleph Institute, and his associates understand and force us to face the fact that each person deserves to be treated with respect as an individual personality and not as an integer, a faceless number."

Jack B. Weinstein, Prison Need Not Be Mandatory: There Are Options Under the New U.S. Sentencing Guidelines, 28 No. 1 Judges' J. 16 (Jud. Admin. Div. Amer. Bar Ass'n 1989).

**Policy Statement: The Aleph Institute**

Aleph recognizes the basic purposes of criminal punishment: deterrence, incapacitation, just punishment and rehabilitation; and supports the Commission in its ongoing efforts to solve both the



practical and philosophical problems of developing a coherent sentencing system to meet the objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984.

Aleph's support is based on two overriding principles:

First, that punishment, however harsh, must always be finely calibrated to account for relevant offense and offender characteristics. The Commission's guidelines system, which accommodates to a great degree those characteristics, and provides for departures from those guidelines where appropriate, is vastly superior to alternative policies regarding sentencing, such as the currently fashionable "mandatory minimum" approach. Aleph has supported this Commission's conclusions as set forth in its August, 1991, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, and has testified previously to this Commission to that effect. Mandatory minimum sentences fail to differentiate between defendants convicted of the same offense by a variety of aggravating and mitigating factors, the consideration of which is essential to provide just punishment. Aleph reiterates its opposition to mandatory minimum sentences. To that end, as noted below, Aleph supports those amendments and options that vest discretion in the sentencing judge to consider individual factors at sentencing, and that focus on a defendant's culpability.



Second, that incarceration, in and of itself, does not provide for rehabilitation, and does little to solve the long-term issues facing our criminal justice system. Indeed, rehabilitation, by definition, implies education and therapy. However, behind the walls, ambitions, dreams and endearments are regularly snuffed out. Monotonous assembly line routines replace opportunities for personal growth. An emotionally scarred and unforgiving individual is the common product -- a man or woman who will one day reenter society alone, stripped of dignity, societal rights and financial resources. In that vein, Aleph is supportive of directives by the Congress to study the problems of recidivism and, specifically, of amendments to the Guidelines promulgated by this Commission that provide that the courts consider a defendant's participation in rehabilitative programs.

Most of the proposed amendments that are the subject of these proceedings are in response to directives of the Congress contained in the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA"). In apparent response to public outcry, the Congress has specifically chosen to enhance punishments for crimes involving violence, drugs, terrorism, children and the elderly. Aleph certainly shares society's concern for safe streets and law and order. However, and while not directly within the ambit of these proceedings, Aleph





also would take this opportunity to record its regret that Congress has not chosen to provide for innovative alternative punishment proposals or the opportunity to subject offenders to additional rehabilitative programs outside of prisons, especially for non-violent first-time offenders.

Specific Comments on Amendments

In light of all of the above, Aleph submits its comments on the following proposed amendments:

Amendment 6:

Aleph supports Option 1, which amends the Statutory Index to reference the new provisions to guidelines in Chapter Two, Part A, when death results from the underlying offense, and which reference would only apply if it is found beyond a reasonable doubt that death resulted from the offense.

Inasmuch as sections 60010, 60011, 60016, 60017 and 60024 of the VCCLEA increase the penalties for various offenses, in some cases to a maximum sentence of death (which is irrevocable) or imprisonment for any term of years or life (with no hope for parole under the present system), the higher standard of proof should apply.

Amendment 11 (Additional Issue for Comment):

The guidelines should be amended to provide a lower base level if an offense is committed in a "protected location" that is



shown to have been selected by law enforcement personnel or someone acting under the direction or control of law enforcement personnel. This recommendation is consistent with Aleph's philosophy that careful consideration of individual aggravating and mitigating factors is essential to provide just punishment, and that an individual should be punished for that individual's own lapse, and not a crime that is exacerbated by the actions of law enforcement personnel or anyone acting on their behalf.

Amendments 27(A) & 27(C):

Aleph believes that the current guidelines provide sufficiently stringent punishment for crimes against the elderly, especially in light of victim-related adjustments. With respect to purportedly inadequately-addressed concerns regarding older victims, commentary may be added to establish a rebuttable presumption related to age. In delineating the various stages of a person's development, the Ethics of Our Fathers ("Pirkei Avot") teach that "at sixty, old age; at seventy, ripe old age." Pirkei Avot, ch. 5, v. 22. Accordingly, if a rebuttable presumption is established, there is authority in our ethical teachings to equate a victim age of 60 for "old age."

Amendment 31(A):

Aleph supports the proposed amendment to the Commentary to



section 7B1.4 of the Guidelines, and particularly supports the express direction in proposed Note 6 that the court shall consider the availability of appropriate programs and the individual's participation in such programs when considering any action against a defendant under 18 U.S.C. § 3565(b).

**Amendment 43:**

Aleph wholeheartedly supports any amendment to the Guidelines that more narrowly focuses on a defendant's culpability. Accordingly, Aleph supports Approach 2, specifically: the enactment of amendment 43 to the Guidelines, to more properly effectuate the Congressional intent to target kingpins and mid-level managers for stiff penalties while avoiding the unintended consequences of low-level, non-violent offenders snared by a too-large net.

Should this commission elect to proceed with Approach 1 (amendments 33-42), Aleph submits the following comments:

**Amendment 34:** Aleph supports the amendment that would limit the impact of quantity in the case of defendants who qualify for a mitigating role adjustment. In light of our philosophy with respect to incarceration per se, Aleph expresses no opinion as to the appropriate offense level.

**Amendment 39:** Aleph supports the amendment that would revise section 2D1.1 of the Guidelines so that the scale of





the offense is based on the quantity in a given time period. A "snapshot" would provide a more accurate method of distinguishing the scale of an offense, and reduce the cumulative sentencing impact of law enforcement decisions as to when to arrest a defendant. Aleph submits that the option using the largest quantity involved at any given time is most relevant to an offender's culpability, rather than any option using any limited time frame.

Amendment 44:

Aleph supports the addition of an application note to section 2S1.1 of the Guidelines, providing that a downward departure may be warranted where the court finds that a government agent influenced the value of funds involved in the transaction in order to increase a defendant's guideline level. This recommendation is consistent with Aleph's philosophy that careful consideration of individual aggravating and mitigating factors is essential to provide just punishment, and that an individual should be punished for that individual's own lapse, and not a crime that is exacerbated by the actions of law enforcement personnel or anyone acting on their behalf.

Conclusion

Modern incarceration not only imposes stunning hardships on the average inmate, the insidious damage it wreaks on families is



often irreparable. It is disheartening that America has managed to establish the world's most elaborate inventory and warehousing hub for human beings -- but generally has accomplished little more. While punishment is clearly necessary in a moral society, confinement itself is a grim failure according to numerous American and international correctional authorities. Many correctional managers openly lament that the scope of their responsibilities have been grotesquely transfigured by the demands of this system. The Herculean tasks of simultaneously coping with prison overcrowding, security and budgetary constraints -- as well as political, administrative and public pressures -- have relegated humanitarian and spiritual concerns to a marginal status. Nevertheless, one highly-regarded academic commentator recently has argued that "[t]he decrease of recidivism and the subsequent reentry of the inmate into society may well depend upon his maintaining ties to the community." Melvin Gutterman, Prison Objectives & Human Dignity: Reaching A Mutual Accommodation, 1992 B.Y.U. L. Rev. 857, 911. Social programs, community outreach and vocational training continue to be viewed as important components of the rehabilitation process. The modern trend to more and bigger prisons -- and indiscriminately longer periods of minimum confinement -- does little to provide for the rehabilitation of offenders.

The Aleph Institute wholeheartedly supports all efforts to



improve and make fairer the application of the sentencing guidelines,  
and to develop innovative programs for the betterment of our society.

Respectfully submitted,

THE ALEPH INSTITUTE

By: 

Isaac M. Jaroslawicz





March 6, 1995

U.S. Sentencing Commission  
1 Columbus Circle, NE, Suite 2-500  
Washington, DC 20002-8002

ATTN: Public Comments

RE: Proposed Guideline Amendments for Sexual Offenses Involving Intentional Transmission of HIV

To the Commission:

This letter is in response to the Commission's request for public comment on the question of sentencing guideline amendments for persons convicted of offenses involving intentional transmission of Human Immunodeficiency Virus (HIV) through sexual contact.

The National Association of Persons with AIDS (NAPWA) welcomes this opportunity to comment on the Commission's guideline formulation process. NAPWA is a national, constituent-based non-profit organization dedicated to improving the lives of the more than one million people in the United States living with HIV/AIDS at home, in the community and in the workplace. Founded in 1983 by a coalition of people with AIDS, NAPWA serves as a national information center and voice for the needs and concerns of all people infected and affected by HIV.

For the reasons set forth here, NAPWA opposes the promulgation of a sentencing guideline specifically addressing intentional transmission of HIV infection. Consistent with this view, we believe that the Commission should not amend the guideline definitions of "dangerous weapon," "serious bodily injury" and "permanent or life-threatening bodily injury."

Because of the public health implications of this issue, we stress that in considering the promulgation of a sentencing guideline that is specifically premised on the defendant's disease status (here, HIV infection) the Commission should consider two related issues. First, the Commission should determine whether a new guideline is required to address a sentencing problem that arisen and which cannot be resolved under existing, general sentencing principles. Second, the Commission should determine whether such a guideline is consistent with public health efforts to control the spread of the disease.



**NATIONAL  
ASSOCIATION  
OF PEOPLE  
WITH AIDS**

Neither of these requirements can be satisfied here.

There does not appear to be any current or historical sentencing problem that needs to be addressed by a new, HIV-specific guideline. In fact, with the exception of one reported case in 1988, the prosecution of persons with HIV infection for intentional transmission offenses in the federal courts appears to be, at best, a rarity. There may be several reasons for this apparent lack of cases, not the least among them being the reluctance of federal prosecutors to undertake what has traditionally been a responsibility of state and local public health and law enforcement officials. In reality, the federal offenses that might conceivably be appropriate for application of an HIV guideline are very limited. These are primarily the sexual abuse offenses, 18 U.S.C. § 2241-2242. Additionally, the homicide offenses, 18 U.S.C. § 1111-1112, and assault offenses, 18 U.S.C. § 111-112, might possibly apply, although it is not at all clear under what circumstances HIV transmission might be charged as a crime under these statutes. Accordingly, we take no position on that question.

Assuming that the Commission limits its consideration of this issue to the parameters of the congressional directive, the actual offense behavior is very limited. Congress specified two elements that must be involved in the offense: first, the defendant's knowledge of his or her own HIV status and, second, an intent to transmit HIV through sexual activities. Congressional concern is thus with a very limited class of cases in which sexual contact is undertaken with the purpose of transmitting HIV. Significantly, the congressional directive does not address offenses in which the defendant is aware of his or her HIV status but acts with a reckless disregard or indifference regarding the risk of transmission. Obviously, if Congress was concerned with cases in which the defendant acted with recklessness or indifference about the risk of transmission of HIV, Congress would not have included the phrase "with intent to transmit HIV" in its directive to the Commission.

Given the very limited number of federal crimes in which an HIV-specific guideline would potentially apply, and given the even more narrow offense behavior defined by Congress, an HIV-specific guideline cannot be justified. There is no basis for concluding that current sentencing standards are inadequate and in need of amendment to address this issue. On contrary, the current guidelines identify grounds for an upward sentence departure as a result of aggravating circumstances, § 5K2.0, and specifically take into account significant physical and psychological injury, § 5K2.2-3. Although we are not aware of any case involving HIV transmission in which these guidelines have been applied, they have the advantage of assessing the actual harm that has resulted from the defendant's actions as opposed to imposing an enhancement that is based solely on the defendant's medical status.

The Commission should also consider whether there is any wisdom in increasing incarceration of persons with a life-threatening illness. No one could seriously argue that the current guideline standards, especially given the potential for aggravating circumstance enhancement, will result in sentences that are too lenient. Although many persons with HIV infection continue live for a significant period of years without symptoms of AIDS, depending on the status of the defendant's health at the time of sentencing, it is statistically likely that in many such cases a sentence imposed under current standards will exceed the length of the defendant's life.



Finally, we turn to the public health implications of this issue. Historically, attempts to address public health issues by criminal sanctions have been unsuccessful, as was made clear in the case of attempting to use criminal laws to address the problem of sexually transmitted disease earlier in this century. With regard to the AIDS epidemic, current public health policy does not support any criminal law intervention. Most significantly, the National Commission on AIDS, which has issued a series of reports and recommendations, has not at any time recommended that criminal sanctions be utilized in any way to respond to the AIDS epidemic. Additionally, the U.S. Public Health Service, Centers for Disease Control and Prevention, has continued to emphasize the need for voluntary, confidential HIV testing, as well as follow-up treatment for those infected. The CDC, like the National Commission on AIDS, does not recommend that criminal laws be utilized to respond to the epidemic. An attempt to use an individual's HIV status as a basis for sentence enhancement would necessarily involve law enforcement intrusion into the defendant's relationship with his or his health care provider and could result in disclosure of otherwise confidential HIV-related information regarding the defendant's HIV status. Such cases weaken public confidence in the confidentiality protections and provide a disincentive for persons at risk for HIV infection to seek testing and treatment. Even if these guidelines were not applied in an actual case, the fact that the Commission had promulgated an explicit HIV sentence enhancement guideline would further the perception that HIV status itself had been criminalized, again providing a disincentive to persons who would otherwise seek testing and treatment for HIV disease. ¶¶

In regard to the Commission's solicitation of comments on amending the definitions of "dangerous weapon," "serious bodily injury" and "permanent or life-threatening bodily injury," for the reasons set forth above, there is no need for such a revision. Moreover, such amendments pose additional problems. First, it is not clear in what circumstances such amendments would apply. Congressional concern has been with sexual activities posing a risk of transmission, while amendments to these definitions might apply in cases involving non-sexual assaultive behavior, such as those involving spitting, biting, or similar behavior. Such cases involve circumstances concerning which the degree of risk of HIV transmission cannot be generalized. Additionally, to add HIV, but not other infectious diseases to the definitions, would pose the risk that persons with HIV would be sentenced on an enhanced basis, but persons with other life-threatening infectious illness (for example, hepatitis B virus or multi-drug resistant tuberculosis) would not face an equivalent sentencing standard. In order to assure sentencing fairness, the Commission would need to undertake a review of infectious diseases, their potential for mortality or other harm, or other conditions before attempting to amend the definitions. Additionally, the Commission would need to specify the circumstances that give rise to the risk of HIV transmission. Thus, although it is HIV itself that might be deemed a "dangerous weapon," HIV is not present in isolation when it is transmitted; it exists in one or more human body fluids. Transmission of HIV occurs only under specific instances of exposure, most typically involving blood to blood contact. Unless the Commission amends the definitions to specify what fluids may transmit HIV and under what circumstances (e.g., duration of exposure, degree of contact to an open wound as opposed to intact skin, specific body fluid involved), a general definitional amendment would not in any way assist the courts in identifying cases in which to impose an enhancement. Needless to say, any attempt to develop such specific standards would involve a scientific undertaking that is beyond the Commission's expertise. Furthermore, the resulting guideline would single out HIV status, as



opposed to any other infectious disease status, that could result in harm to a crime victim.

In conclusion, NAPWA urges the Commission not to enhance sentences or introduce HIV-specific amendments to existing standards. We have had roughly fourteen years of experience with the AIDS epidemic, and there is nothing to suggest that a change in sentencing is now warranted in response to it. We also believe that an HIV-specific standard will do little to advance any legitimate law enforcement objective, but instead will further stigmatize persons with HIV infection who are already subjected to widespread discrimination and unfair treatment in our society. The Commission would indeed be wise to avoid addressing a public health issue that is more properly left to public health officials.

If you need further information, please contact Gary R. Rose, J.D., Associate Director for Federal Affairs in our office. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "William J. Freeman". The signature is fluid and cursive, with the first name "William" written in a stylized, overlapping manner.

William J. Freeman  
Executive Director









Families Against Mandatory Minimums

F O U N D A T I O N

Julie Stewart  
WRITTEN TESTIMONY FOR U.S. SENTENCING COMMISSION  
GUIDELINE PROPOSALS  
March 14, 1995

Amendment 37: Drug Trafficking (Sec. 2D1.1)

37. Changing the marijuana ratio from 1000 grams per plant.

Families Against Mandatory Minimums (FAMM) urges the Sentencing Commission to adopt the weight of 100 grams per marijuana plant regardless of number of plants and to make the change retroactive.

Historical precedence

In its original sentencing scheme, the U.S. Sentencing Commission recognized that marijuana plants should be treated separately from harvested marijuana for sentencing purposes. The 1987 Sentencing Commentaries Drug Quantity Table shows that marijuana plants were ascribed a weight of 100 grams each. (See attached copy.) Under the 1987 guidelines, a defendant convicted of growing 200-399 plants received the same sentence as a defendant convicted of possessing 20-39 kilos of harvested marijuana. Both defendants were sentenced at level 18. In other words, it was understood that marijuana plant yield is one tenth the weight of a kilo of harvested marijuana.

By 1989, the U.S. Sentencing Guideline tables reflect the change in sentencing that the Commission adopted to correspond to the statutory sentencing change of 1,000 grams per plant. The change undermined the honesty in sentencing sought by the Commission and introduced a number of new disparities into the sentencing guidelines.

Scientific evidence

The best-known expert in marijuana yield is professor Mahmoud ElSohly from the University of Mississippi, who grows marijuana for the government. Dr. ElSohly's research since 1975 proves that it is impossible to grow a marijuana plant that produces 1000 grams of useable product.

In his most recent research done between 1990-91, Dr. ElSohly's 24 marijuana plants averaged a yield of 222.37 for one type of marijuana and 273.7 grams for another. Dr. ElSohly's plants were grown outside and situated three feet apart. His research showed that the farther apart the marijuana was planted, the greater the yield.

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Dr. ElSohly also found that the average weight of all dry leaves (the smokeable product) amounted to 27 percent of the weight of a dry plant. The rest of the weight is stems and stalk, which are not consumed.

Dr. ElSohly does not grow male marijuana plants. His most recent report makes it clear that male marijuana plants are inconsequential to marijuana cultivation: "At approximately ten weeks from planting, male plants began to appear in the field and were removed *as a matter of routine.*" (emphasis added)

Dr. ElSohly has testified for the government in a number of drug cases, and has testified for the defense in 4-5 cases. In one of those cases, (U.S. v. Osborn 2:90 CR-13-WCO) Dr. ElSohly testified that he had never seen or grown a marijuana plant that produced one kilogram. The biggest single plant he grew produced about 2 pounds. But even under ideal conditions, ElSohly testified that he would not expect to get an average yield of 1 kilogram of marijuana per plant because that would mean some plants would weigh as much as 5 pounds which, he concluded, is not possible.

At the Osborn trial, ElSohly stated that "a sentencing scheme based on 100 grams per plant would be reasonable, but a !! scheme based on one kilogram or 1,000 grams per plant would be very unreasonable."

### Marijuana cultivation

There are a number of ways to grow marijuana that result in varying yields. The yield of a plant is increased by the amount of growing room it has and the individual attention it receives. It is also effected by the type of seed used, the length of the growing season, and whether it is grown indoors or outdoors. The goal of the grower is to cultivate female plants with flowering tops, known as "buds." At harvest, the buds and the leaves are collected and dried, to be smoked.

Female marijuana plants are genetically programmed to fruit, or bud, when the amount of daily light falls below 12 hours, which in nature occurs in the autumn. Indoors, the budding process can be initiated early, or delayed, by artificially altering the duration of the light. If a plant receives 18 hours or more of light per day, it continues to grow but does not bud. In this way, a grower can keep his plants in the vegetative state until the plants become quite large, before reducing the duration of light to initiate the budding process. Conversely, a grower can initiate the budding process while the plants are still relatively small, simply by reducing the amount of light the plants receive.

The budding process begins after the plants have grown large enough to exhibit their sex, roughly 4-6 weeks after planting.



At that point the males plants are discarded, and the female plants are either encouraged to grow taller or to bud. Depending on the method of cultivation, a plant may be anywhere from a few weeks old and 6 inches tall, to 12-16 weeks old and 6 feet tall, before the budding process is initiated by the grower. The budding process takes between 7 and 10 weeks to produce harvestable yield.

Some growers "clone" their female marijuana plants to reach the budding stage more quickly. The clone is a leafy stem of the female marijuana plant that is stuck into a growing medium (often rock wool) that quickly roots and begins to bud. Although the clones bud more quickly than plants grown from seeds, they remain small and the total yield from cloned plants is significantly less than that from seeded plants.

#### Disparity caused by 1,000 gram weight

Assigning a weight of one kilogram to each marijuana plant over the number 49, introduces unintended disparity into the sentencing guidelines.

The most obvious disparity caused by the 1 kilo/1 plant ratio affects the defendant who is arrested with 50 plants and is subject to a 33 month sentence, at level 20. If he had had one plant less, he would have received a sentence of 10 months, at level 12. Should one marijuana plant be responsible for a 23 month difference in sentence? This kind of sentencing "cliff" is exactly what the Commission has tried to avoid in it's calibrated sentencing grid. The Commission has criticized a similar cliff caused by the 5 year mandatory minimum for 5 grams of crack cocaine, where 1/100 of a gram less results in a sentence of one year.

Another unintended disparity caused by the unrealistic weight of 1,000 grams per plant, occurs because of the timing of the arrest. If John is growing 102 marijuana plants in his garden when he is arrested, he is subject to a 63 month guideline sentence, at level 26. However, if John is arrested one week after harvesting his marijuana, with a total yield of 11 kilograms of dried marijuana, he is subject to a 21 month sentence, at level 16. The Commission could not have intended the timing of an arrest to be a determining factor in the defendant's sentence.

Nor could the Commission have intended to punish growers ten times more harshly than possessors of harvested marijuana. If Mary is growing 75 marijuana plants for her own use and is arrested, she can be sentenced to 51 months, at level 24. The total realistic yield of her marijuana patch (assuming all plants were female) could be 8 kilos of marijuana. If Bill is arrested with 75 kilos of packaged marijuana in his trunk, he can receive the same 51 month sentence, even though his actual yield was 67



kilos greater than Mary's.

The one kilo per plant ratio also exaggerates the disparity in sentence for growers who employ different methods of cultivation. For instance, Bob might use the "sea of green" method that involves growing 1,000 little plants or clones that will yield 25 grams per plant, for a total of 25 kilos. Dave may grow 300 larger plants that yield 100 grams per plant, for a total of 30 kilos. Bob's sentence will be 121 months, while Dave's sentence will be 63 months, even though Dave's plants would have produced more useable yield than Bob's. This problem would not be eliminated by changing the ratio because Bob still grew more plants, but the difference in their sentences would be narrower.

### SOLUTIONS

The U.S. Sentencing Commission can address the disparities outlined above by adopting the 100 gram uniform weight for all marijuana plants regardless of number. The 100 gram weight continues the existing guideline structure for 49 plants or less which, as the Commission recognized in 1987, is a more realistic estimate of actual marijuana plant yield. !:

Lastly, the Commission should make these changes retroactive to effect defendants currently serving guideline sentences based on the unrealistic and unfair sentencing ratio of one plant equals one kilo, after plant number 49.

The retroactivity of the LSD amendment in 1993 did not overwhelm the courts, nor did it release from prison anyone who is a danger to society. The same would be true of the retroactive application of a change in the marijuana guidelines. Many of the people serving marijuana sentences are restricted by the mandatory minimum sentence and would not be eligible for a reduction in any case.

### Marijuana Cases

**Robert Evans** was convicted for aiding and abetting the manufacture of 90 marijuana plants. Robert's sentence started at level 24, but was dropped to level 17 after factoring in acceptance of responsibility and minimal role deductions. He is now serving a 24 month sentence. If the marijuana guideline changes retroactively, Robert will be eligible for a reduction in sentence to probation. He is 30 years old, a first offender, and has a high school education.

Harold Prentzel was convicted for growing 80 marijuana plants in his home in Alaska. At sentencing, the judge followed the guidelines and sentenced him at level 22, to 50 months in prison. If the guidelines change to 100 grams per plant, Harold would be eligible to be resentenced to 15 months. Harold is 35 years old, married, and has a 7 month old baby. He attended college but did not graduate.

Dan Bolger plead guilty to growing 36 marijuana plants, but was convicted of growing 149 plants. On a motion from the government, the judge sentenced Dan at level 25, for 57 months in prison. If the guidelines change, Dan will be eligible for a reduction in sentence to 21 months. Dan is a 28 year old, first offender. Before his incarceration he taught music at the VA Hospital in Pennsylvania, was engaged, and had attended college for three years.

Donald Clark is serving a life sentence for a marijuana growing conspiracy involving 1 million plants. Of the 11 defendants charged in the case, he was the only one to take his case to trial. The others plead guilty and received between 3 and 11 years in prison. If the guideline ratio for marijuana plants changes, Donald will be eligible for a reduction in sentence to 24 years, at level 40. Donald is 52 years old. In 1985 he was arrested by the state of Florida for the same offense for which the federal government indicted him in 1990. He owned a watermelon farm in Myakka, Florida at the time of his arrest.

**Amendment 38: Changing the crack cocaine/powder cocaine ratio.**

Families Against Mandatory Minimums (FAMM) urges the Sentencing Commission to adopt a one to one ratio for crack and powder cocaine, retroactively. In the likely event that our first preference will not be adopted, FAMM proposes an alternative approach that accommodates the Commission's concerns that crack cocaine is more addictive than powder cocaine and causes greater community harm: **provide a two-level increase for defendants convicted of crack cocaine offenses.** This solution eliminates the need to choose an arbitrary ratio (or one impossible to accurately quantify,) between crack and powder cocaine, while it addresses the concerns raised by the Commission's crack report.

The Commission's Special Report to Congress, Cocaine and Federal Sentencing Policy, February 1995, makes it clear that the



current 100:1 ratio between crack and powder cocaine is unfounded and needs to be changed. The Commission wisely recognizes that the guidelines provide enhancements for most of the dangers associated with crack cocaine or any other drug, (firearms, bodily injury, etc.) and those harms do not need to be built into the ratio, as they are under the crack cocaine statute, causing double punishment.

Now the Commission is poised to recommend a fundamental change in the way that crack cocaine penalties relate to powder cocaine penalties. The challenge is to measure the harms perceived to be inherent in the drug and translate that into a quantitative justifiable measurement. No matter what ratio the Commission recommends is certain to elicit criticism from some corner. To avoid this inevitable confrontation, the Commission should adopt a two-level increase under the guidelines for crack cocaine convictions.

#### Racial disparity caused by application of 100 to 1 ratio

There is no doubt about the racial make-up of the defendants most often convicted of crack cocaine offenses. The Commission's crack report reveals that 52 percent of the people reporting crack use last year are white. Yet, 88.3 percent of those sentenced for crack cocaine are black. Of the hundreds of crack cases that FAMM has on file, only four defendants are white.

This racial make-up will not change if the crack/powder ratio changes, but the severity of the sentences will change dramatically, resulting in a closer balance between the sentences of defendants convicted of crack and powder cocaine. Although the Commissioners cannot correct the racial inequity of the statutory mandatory minimums for crack cocaine, they can avoid compounding the problem by alleviating the extreme disparity caused by the current 100:1 ratio of the sentencing guidelines. In balancing crack and powder sentences, the Commission accepts responsibility for restoring some critical racial equity to the sentencing process.

#### Crack Cases

**Miguel Rosario** is serving a 12 year 7 month sentence for conspiracy to distribute crack cocaine. At his sentencing he received a two-point departure for acceptance of responsibility. Miguel was approached by an undercover agent working for the DEA who wanted to purchase one kilogram of cocaine. When Miguel arrived with the kilo of cocaine powder, the informant did not accept it. He told Miguel that he wanted crack cocaine. Miguel told the informant he didn't know how to make crack cocaine, so the informant showed him how. Miguel cooked the powder into



crack cocaine and was immediately arrested. If Miguel had been arrested prior to cooking the cocaine into crack, he would have received a sentence of 5 years. His current sentence could be reduced to 10 years if the Commission adopts a retroactive change in the crack guidelines of 1:1 (level 26 without the statute.) Using FARM's alternative sentencing scheme, a retroactive change to 1:1 plus a two-level increase for crack, Miguel's sentence would still be 10 years (level 28 without the statute.) Miguel is 38 years old, a first offender, from the Dominican Republic and he has three children who are now on welfare.

**Donnie Strothers** is serving a life sentence for conspiracy to distribute and distribution of crack cocaine. He was 19 years old at the time of sentencing. Donnie began selling crack on the street at age 14. A controlled buy was made from him while he was still a juvenile, but no charges were brought. When he was arrested several years later, his co-defendant and partner, agreed to testify against him. Donnie's sentence was based on the aggregate amount of crack sold since he was age 14, according to his codefendant's memory. The judge determined that amount to be approximately 15 kilograms of crack, although the only drug transaction on record that Donnie was involved in was for 1/2 ounce of crack. A retroactive change in the crack penalty to 1:1 would give Donnie a 10 year sentence. Using the alternative approach, 1:1 with a two-level increase for crack, Donnie would serve a sentence of at least 151 months.

**Joseph Felton** is serving a 30 month sentence for distributing 1.2 grams of crack cocaine. Undercover agents purchased crack three times from Joseph before arresting him. If the guidelines for crack cocaine change retroactively to 1:1, Joseph will be eligible for a reduction in sentence to at least 10 months, at level 12. Under the alternative approach, 1:1 plus a two-point increase, Joseph's sentence would be at least 15 months. Joseph is 52 years old, a first offender, and has an 8th grade education.

**Derrick Curry** is serving a 19 1/2 year sentence for a conspiracy involving two kilos of crack cocaine. The FBI admitted that Derrick was a "flunky" in the operation that was run by his friend. At his sentencing, Derrick was given a two-point reduction for being a "minor" participant and a two-point increase for obstruction of justice (the government argued that he perjured himself on the stand when he denied any involvement in the offense.) Derrick was sentenced at level 38. If the crack cocaine guideline ratio changes, Derrick will be eligible for a reduction in sentence to 78 months, at level 28. However, because the mandatory minimum sentence trumps the guideline sentence,

Derrick's sentence cannot go below 10 years. A retroactive change in the crack penalty at 1:1 would reduce his sentence by 9 1/2 years. A change of 1:1 plus a two point increase, would result in a sentence of 151 months. Derrick is 20 years old, a first offender, and was in college when arrested.

#### **Amendment 29: Safety-valve**

FAMM urges the Commission to repromulgate Section 5C1.2 with at least one changes. The guideline should provide for a two-level reduction from the offense level if a defendant meets the criteria of the safety-valve. The two-level reduction fulfills the intention of Congress to create a safety-valve that would enable the defendant to receive a sentence as low as 24 months. Under the current guideline structure, it is impossible for a defendant who qualifies for the safety-valve to receive a sentence of 24 months without a substantial downward departure (with the exception of LSD defendants.)

The Commission should exercise the full extent of the discretion given it by the Congress. FAMM members worked tirelessly on the inclusion of a safety-valve in last year's crime bill. This small step away from mandatory minimum sentences restored a level of sentencing discretion to the federal judges and steered sentencing policy back to the U.S. Sentencing Commission. We strongly recommend that the Commission take advantage of this window of opportunity to further correct inequities of long sentences for defendants who qualify for the safety-valve while fulfilling congressional intent of a 24 month sentence, by adopting the language the Commission had under consideration when Section 5C1.2 was initially promulgated. !!

#### **Amendment 40: Drug Purity**

FAMM strongly supports the Commission's proposal to determine actual weight of the controlled substance on the drug's purity. The Commission answers it's own concerns about potential problems resulting from this amendment regarding litigation and cases in which there are no drugs seized. That the purity formula has been tried and tested by the U.S. Parole Commission makes a strong case for adoption by the U.S. Sentencing Commission.

#### **Amendment 42: Methamphetamine D, & L**

FAMM urges the Commission to oppose the fifth part of this amendment that calls for deleting the distinction between d- and l-methamphetamine and making both d-meth (the stronger of the two.) The Commission suggests that eliminating the distinction between the two drugs would "simplify" the guideline application. One could make the very same argument for eliminating the



distinction between crack and powder cocaine. But because the Commission has found some differences between powder and crack cocaine, different penalties will result. In the same vein, the Commission admits that there is a clear-cut difference between l-meth and d-meth, and therefore different penalties should be applied. To maintain the fairness and equity sought by the Commisison, FAMM urges the members to oppose consolidating l- and d-meth into d-methamphetamine.



## SENTENCING COMMENTARIES

### DRUG QUANTITY TABLE

<u>Controlled Substances and Quantity*</u>	<u>Base Offense Level</u>
10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marijuana, 100,000 Marijuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above)	Level 36
3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marijuana, 30,000-99,999 Marijuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil	Level 34
1-2.9 KG Heroin or equivalent Schedule I or II Opiates, 5-14.9 KG Cocaine or equivalent Schedule I or II Stimulants, 50-149 G Cocaine Base, 1-2.9 KG PCP or 100-299 G Pure PCP, 10-29 G LSD or equivalent Schedule I or II Hallucinogens, 4-1.1 KG Fentanyl or 100-299 G Fentanyl Analogue, 1000-2999 KG Marijuana, 10,000-29,999 Marijuana Plants, 200-599 KG Hashish, 20-59.9 KG Hashish Oil	Level 32**
700-999 G Heroin or equivalent Schedule I or II Opiates, 3.5-4.9 KG Cocaine or equivalent Schedule I or II Stimulants, 35-49 G Cocaine Base, 700-999 G PCP or 70-99 G Pure PCP, 7-9.9 G LSD or equivalent Schedule I or II Hallucinogens, 280-399 G Fentanyl or 70-99 G Fentanyl Analogue, 700-999 KG Marijuana, 7000-9999 Marijuana Plants, 140-199 KG Hashish, 14-19.9 KG Hashish Oil	Level 30
400-699 G Heroin or equivalent Schedule I or II Opiates, 2-3.4 KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9 G Cocaine Base, 400-699 G PCP or 40-69 G Pure PCP, 4-6.9 G LSD or equivalent Schedule I or II Hallucinogens, 160-279 G Fentanyl or 40-69 G Fentanyl Analogue, 400-699 KG Marijuana, 4000-6999 Marijuana Plants, 80-139 KG Hashish, 8.0-13.9 KG Hashish Oil	Level 28
100-399 G Heroin or equivalent Schedule I or II Opiates, 5-1.9 KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G Cocaine Base, 100-399 G PCP or 10-39 G Pure PCP, 1-3.9 G LSD or equivalent Schedule I or II Hallucinogens, 40-159 G Fentanyl or 10-39 G Fentanyl Analogue, 100-399 KG Marijuana, 1000-3999 Marijuana Plants, 20-79 KG Hashish, 2.0-7.9 KG Hashish Oil	Level 26**
80-99 G Heroin or equivalent Schedule I or II Opiates, 400-499 G Cocaine or equivalent Schedule I or II Stimulants, 4-4.9 G Cocaine Base, 80-99 G PCP or 8-9.9 G Pure PCP, 800-999 MG LSD or equivalent Schedule I or II Hallucinogens, 32-39 G Fentanyl or 8-9.9 G Fentanyl Analogue, 80-99 KG Marijuana, 800-999 Marijuana Plants, 16-19.9 KG Hashish, 1.6-1.9 KG Hashish Oil	Level 24
60-79 G Heroin or equivalent Schedule I or II Opiates, 300-399 G Cocaine or equivalent Schedule I or II Stimulants, 3-3.9 G Cocaine Base, 60-79 G PCP or 6-7.9 G Pure PCP, 600-799 MG LSD or equivalent Schedule I or II Hallucinogens, 24-31.9 G Fentanyl or 6-7.9 G Fentanyl Analogue, 60-79 KG Marijuana, 600-799 Marijuana Plants, 12-15.9 KG Hashish, 1.2-1.5 KG Hashish Oil	Level 22
40-59 G Heroin or equivalent Schedule I or II Opiates, 200-299 G Cocaine or equivalent Schedule I or II Stimulants, 2-2.9 G Cocaine Base, 40-59 G PCP or 4-5.9 G Pure PCP, 400-599 MG LSD or equivalent Schedule I or II Hallucinogens, 16-23.9 G Fentanyl or 4-5.9 G Fentanyl Analogue, 40-59 KG Marijuana, 400-599 Marijuana Plants, 8-11.9 KG Hashish, 8-1.1 KG Hashish Oil, 20 KG+ Schedule III or other Schedule I or II controlled substances	Level 20

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION

Professor David Yellen  
March 14, 1995

Thank you for this opportunity to testify before you.

I am an associate professor at the Hofstra University School of Law. I have a long involvement with the Federal Sentencing Guidelines. During 1987-88 I was an attorney on the staff of the House Judiciary Committee's Criminal Justice Subcommittee, which held the only extensive set of hearings on the guidelines before they took effect. Since joining the Hofstra faculty in 1988 I have written and spoken about the guidelines on many occasions. ;

With a majority of its members being newly appointed, this is a time of great opportunity for the Sentencing Commission. A great deal has been learned in the seven years the guidelines have been in effect. This is an appropriate time for the Commission to step back and reconsider some aspects of the guidelines. In my view, some fairly modest changes could significantly improve the guidelines. What follows is an attempt to outline two initial steps that could start the Sentencing Commission on a sound path of reform.

These two proposals attempt to address four of the guidelines' problem areas. First, the guidelines are too inflexible, failing to give judges enough opportunity to respond to the unique circumstances of individual cases. Second, the guidelines are too complex. Undue complexity invites error and disparity, and distracts judges from considering issues related

to culpability. Third, the guidelines, and even more so the statutory mandatory minimum provisions, frequently result in overly harsh penalties being imposed on nonviolent offenders. And fourth, the guidelines rely too heavily on factors that have only a limited relationship to the defendant's culpability, while restricting the court's consideration of other, more relevant factors.

The first proposal is to authorize judges to increase or decrease the defendant's offense level by one or two levels if the offense level does not adequately reflect the offender's culpability, or if the purposes of punishment warrant a different sentence than that called for by the guidelines. The court's decision would be reviewable only for errors of law, such as impermissible consideration of race or gender, or failure to satisfy a statutory mandatory minimum. This proposal would authorize, in effect, a "mini-departure" subject only to limited appellate review, giving judges slightly more flexibility to individualize sentences. Mini-departures would allow judges to impose more appropriate sentences without increasing unwarranted disparity. Probation would become available for a larger number of offenders already at the lower ranges of the guideline's sentencing table.

Another virtue of these mini-departures would be to overcome some of the reluctance among sentencing judges to use full-fledged departures under 18 U.S.C. § 3553(b). Judges may depart from the guidelines if "there exists an aggravating or mitigating



circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence" other than that called for by the guidelines. District judges are among the most vocal guidelines critics, yet many have been remarkably parsimonious in departing. Other than when the government files a substantial assistance motion, judges have only infrequently departed. This seeming inconsistency is probably the result of appellate court decisions narrowly construing acceptable departure criteria,<sup>1</sup> combined with lower court judges' fear of reversal. This situation is unfortunate because Congress expected that departures would be a vigorous part of the sentencing dialogue under the guidelines, serving the dual purposes of doing justice in individual cases and identifying areas of needed guideline reform. "

There is already precedent in the guidelines for the approach suggested in the above proposal. Section 4A1.3 invites judges to consider departing if the defendant's criminal history score does not "adequately reflect" the defendant's criminal record. The proposal outlined here would extend the same principle to the offense level and would have an equalizing effect because while the § 4A1.3 departure is usually used for an upward departure, this mini-departure would probably be used more

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<sup>1</sup>This situation may be changing, as evidenced by the recent First Circuit decision in *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993), in which the court announced a more deferential approach to review of departures.

frequently to sentence somewhat below the current guideline range.

In addition to facilitating just sentences in more individual cases, mini-departures would provide a useful source of information for the Commission. Currently, many judges reluctantly impose sentences within the guidelines when they feel there are factors that warrant a somewhat different sentence, even if a departure under 18 U.S.C. § 3553(b) is not called for. Judges should be required, as they are with departures, to give a statement of reasons for applying the one or two level adjustment. The judge might disagree with something the Commission did, the judge might conclude that a number of factors in combination warrant a different sentence, or the judge might be responding to local conditions. Whatever the reason, judges would have somewhat more input in the sentencing process and the Sentencing Commission would have a useful source of additional information.

The second proposal concerns the area of the guidelines that is probably most in need of reform: the relevant conduct principle. I will not attempt in this short space to detail all of the shortcomings of this approach, which represents the Sentencing Commission's compromise between real and charge offense sentencing.<sup>2</sup> The Commission's starting point was a sound

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<sup>2</sup>I have attached a copy of my article, Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 201 (1993), which examines the relevant conduct principle in detail.

one: serious problems are associated with both charge and real offense sentencing systems. A system in which the sentence is determined by the offense of conviction fails adequately to distinguish among offenders of differing culpability who are convicted of violating the same statute. Charge offense sentencing also shifts enormous sentencing authority to prosecutors. In contrast, real offense sentencing, where the judge considers many factors beyond the offense of conviction, can become unwieldy and overly complex, and can result in manifest unfairness as offenders are punished for misconduct of which they have not been convicted.

Although confronted with a real dilemma, the Sentencing Commission's attempt at a resolution, embodied in the relevant conduct guideline, is plagued by illusion, illogic and injustice. To take only one, although probably the most notorious, manifestation of the Commission's compromise, defendants are often subjected to "alleged-related offense" sentencing. That is, many defendants are sentenced based not simply upon the offense or offenses for which they are convicted, but also upon other, unproven, charges that allegedly occurred in the same course of conduct. For example, if the judge believes that a defendant convicted of bank embezzlement committed several other similar offenses, the sentence must incorporate those other offenses, notwithstanding the government's decision not to bring such additional charges, the dismissal of the charges as part of a plea agreement, or even the defendant's acquittal of those



charges.

This policy, arguably unfair under any circumstances because it deprecates the role of the jury and the proof beyond a reasonable doubt standard, is even more indefensible because of the manner in which the Commission implemented it. The rule lacks a sound theoretical foundation, as the Commission failed adequately to explain why only some offenses are subject to alleged related offense sentencing. The rule produces anomalies even if applied as intended because alleged related offense have an inconsistent, often unpredictable effect on the sentence.

Further, alleged-related offense sentencing has failed to achieve the Commission's aims. Plea bargaining continues largely unabated, except that prosecutors now have more authority to influence or even determine the ultimate sentence. In particular, charging decisions and preindictment bargaining remain largely outside of the control of the guidelines. In addition, the enormous importance of substantial assistance motions under § 5K1.1 and 18 U.S.C. § 3553(e) has dramatically shifted the balance of sentencing authority towards prosecutors. Prosecutors can dangle the "carrot" of substantial assistance motions and plea agreements that limit the effect of real offense sentencing, backed up by the "stick" of relevant conduct and severe mandatory minimum penalties.

Thus, my second proposal is that the relevant conduct principle be overhauled. Most importantly, the guidelines should be amended to eliminate consideration of other, alleged offenses

of which the defendant has not been convicted. This is the position of every state sentencing guideline system now in effect, so it is by no means a radical proposal.

Alternatively, if the Commission is unwilling to take this step, relevant conduct should not count as much in guidelines calculations as does conduct from the offense of conviction. It is a peculiar and unexplained fact under the guidelines that conduct for which the defendant has never been convicted can influence the sentence more than additional current counts of conviction (which are accounted for by chapter 3, part D) and prior convictions (chapter 4). Should the Commission continue to rely on real offense sentencing, it should be done in a way that more closely approximates the sensitive, careful consideration judges in the pre-guidelines world gave to the whole range of possible information concerning the offender and the offense. Conduct for which the defendant has not been convicted should either count as a percentage (1/3 or 1/2, for example) of how it would be counted if the defendant were convicted, or judges could be given some discretion to assign a range of weights to this additional information depending upon factors related to the defendant's culpability, such as the defendant's role in the offense.

These two proposals are not the only steps that the Sentencing Commission should take to improve the guidelines. For example, the guidelines should also be amended to rely less upon amounts, such as the weight of drugs or the sum of money taken,

which often are only tangentially related to the offender's culpability or dangerousness, and more upon the types of factors that judges deem relevant in selecting an appropriate sanction. Still, the proposals outlined here could serve as a useful starting point.



# International Association of Residential & Community Alternatives

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## TESTIMONY CONCERNING PROPOSED U.S. SENTENCING COMMISSION GUIDELINE AMENDMENTS FOR PUBLIC COMMENT

March 7, 1995

Submitted by:

The International Association of  
Residential and Community Alternatives

Chairman Conaboy and Commissioners:

I am Mary Shilton, and I am pleased to be here today to testify on behalf of the International Association of Residential and Community Alternatives (IARCA). IARCA's mission is to promote and enhance community-based corrections services as well as to provide professional development for its members.

Founded in 1964, IARCA represents more than 250 private and public agencies operating over 1500 programs. Over 600 individual members are employed in community alternative and residential programs. They serve courts, departments of corrections, probation, the Federal Bureau of Prisons, counties, cities and states. Approximately 80% of the adult community-based corrections facilities in the United States are represented by IARCA and its members.

IARCA members are employed in a wide variety of correctional programs. Among them are:

- \* Community-based corrections centers
- \* Educational or vocational services
- \* Drug testing and treatment
- \* Tutoring services
- \* Day treatment
- \* Crisis intervention
- \* Family or individual counseling
- \* Victim services
- \* Community service supervision
- \* Bail supervision
- \* Home detention/ electronic monitoring
- \* Neighborhood outreach
- \* Aftercare

IARCA is pleased that the Commission has published a range of issues for public comment. Many propose to

eliminate inequities in the treatment of certain drug offenses under the guidelines. Others deal with the persistent problems resulting from passage of mandatory minimum sentences by Congress. A few address the most pressing issue on the minds of the public and politicians: that we have a skyrocketing, and potentially dangerous prison population placing increasing demands on our prison system, and that we simply cannot afford the cost of a purely punitive Federal system of sentencing. We must look to other principles of equity, public safety, restoration and habilitation to guide our punishment practices.

Today, I will focus on the pending proposals as they relate to the use and development of alternative punishments, particularly drug-involved offenders. To get to the point, the proposed Guidelines in their search for balance within a guideline system, fail to do what they should, and what many states are now doing--developing an intermediate punishment sentencing range. Such a range recognizes that there are a number of low level offenders who should not be sentenced to prison, and or should receive short split sentences with intensive community corrections treatment. The Commission should act now to recognize and provide for graduated incentives and sanctions, particularly for non-assaultive offenders.

It is important for the Guidelines to develop a range of community based sanctions for lower level offenders. With the steady and certain increase in drug related felons, there must be less costly alternatives to prison in order to preserve space for violent and dangerous offenders. The safety valve provision, Amendment 29 and the following amendments through Amendment 43 fail to substantially rectify this situation although some offer improvements.

IARCA applauds the Commission and Staff for documenting the impact of mandatory minimum sentences and continued growth of drug-related offenses in the Federal system.

We urge the Commission to continue to speak out about the influence of mandatory sentences on the Guidelines, particularly drug offenses. In so doing, the Commission should note that mandatory incarceration of drug offenders has almost no incapacitative effect because new couriers and drug dealers replace those who have been locked up.

Furthermore, the Commission must underscore that it



costs about seven times more to incarcerate drug offenders than to supervise, monitor and treat them in a community corrections program. Thus the costs of mandatory prison sentences for drug offenders are considerably more than mandatory community corrections treatment. Finally, with more and more such offenders taking up prison beds, there are numerous resulting tradeoffs that the Commission must document and make clear to Congress.

Although IARCA supports incarceration of high volume, career drug dealers, it does not support the preferred use of incarceration of most non-assaultive criminals. The Guidelines should take steps to treat non-assaultive offenders differently than violent, predatory offenders. Yet, the Guidelines and the Statutes fail to adequately address this issue. Only about one in six drug defendants had a weapons involvement in 1992-1993. Sixty-two percent of drug offenders had a Category 1 criminal history. This would indicate there is a substantial pool of drug offenders who could be safely supervised in community corrections facilities if only the Guidelines provided for such an assessment. One method that would help would be to develop guidelines for departures from mandatory sentences that tell courts how and when to use departures. We encourage the Commission to work more in this area to permit departures for more mandatory cases involving low level drug offenders.

The Guidelines should continue to be revised to eliminate the appearance of racial disparity.

According to the Commission's 1993 Annual Report, 58% of drug defendants were subject to a mandatory minimum penalty and black defendants were more likely to receive mandatory sentences than whites or Hispanics. The emphasis on type of drug, and departure for substantial assistance need to be more closely scrutinized for racially disparate impact. There must be delineation of how many of those who received mandatory sentences were violent or assaultive offenders.

The Guidelines should preserve and strengthen the use of probation, supervised released and split sentences to provide a range of more effective sanctions.

Most Federal offenders have not committed a violent offense yet most who go to prison are sentenced as if they were violent offenders. Most offenders are



classified at the lowest or second lowest security levels and are not ranked as dangerous. Despite this, many will serve similar sentences as violent offenders because of mandatory minimums operating within a Guidelines system. The Guidelines decision process as presently constructed, particularly for low level drug offenders does not adequately consider factors that a judge might in sentencing to community corrections such as age, infirmity, rehabilitation, culpability, and capacity for change. A study by Gerald W. Heaney, Senior Circuit Court Judge, United States Court of Appeals for the Eighth Circuit concluded that some Federal prisoners are serving twice as long as they did prior to sentencing guidelines and the number receiving probation dramatically declined.

It is suggested that the Commission develop initiatives that would encourage a number of strategies such as:

- \* Working with the Office of the Attorney General and the United States Attorneys offices to develop voluntary guidelines for the exercise of prosecutorial discretion. This would consider developing joint prosecutor and defender guidelines, enacting drug court diversion and treatment programs; and

- \* reserving Federal prosecution for major cases or cases where states are not able to prosecute.

The Guidelines must be revised to present a more balanced approach toward prison and to fully implement restitution and rehabilitation purposes of sentencing.

Because the statutory purposes of the Guidelines give equal weight to the enumerated goals of sentencing it is important that the Commission provide more balance toward restitution and rehabilitation. To provide for more rehabilitative options for large categories of offenders is practical, humane, less expensive, and consistent with a growing body of criminological research. The findings show that certain community correctional treatment can be safe, punitive and prevent relapse or subsequent criminal behavior.

The Guidelines should include a non-incarcerative option for all nonviolent first-time offenders who are not drug kingpins. The Alternatives to Imprisonment Project Report recommended in 1990 that such options include: residential incarceration, intensive

supervision, public service work, bootcamps and day reporting centers as a substitute for imprisonment. In addition, transitional release programs to halfway houses should be the norm for offenders up to 12 months prior to their release from prison.

Over half of all Federal offenders could be safely assigned to community based alternatives if the Guidelines were to provide Judges with the tools for departure and recognize the importance of using such options.

Community based programs should be the placement of choice for over half of all guideline offenders because they are safe and effective.

The evidence from evaluations in at least eight states shows that rehabilitation is more likely to occur with use of halfway houses and other alternatives in lieu of prison. If appropriate offenders receive drug treatment, literacy training, and job placement, they can become productive members of the community. This will enable them to support their families, pay taxes, build neighborhoods and stabilize their lives. Stable families with adequate economic support and opportunity for the future are the best anti-crime measures.

I thank the Commission for this opportunity to discuss the expansion and use of alternative sentencing within the guidelines. I commend the Commission for its willingness to listen to IARCA's suggestions. The Commission must change course to make room for more practical sentencing policies, particularly for drug offenders, before the problems in the future administration of such sentencing policies yield dangerous and unintended consequences.







TESTIMONY OF NANCY LORD, M.D., J.D.  
TO THE U.S. SENTENCING COMMISSION

Mr. Chairman, I appreciate the opportunity to testify before this Commission. I hope that my observations as a practicing attorney can help to correct the perilous course of today's law.

The Federal Sentencing Guidelines which we are considering today represent a radical and counterproductive departure from well-established legal principles and practices. Their existence and employment are undermining public confidence in our legal structure and thereby endangering our society.

Good law derives its authority from its adherence to Natural law. And by common assent, the preponderance of men obey good laws. For those tempted to violate them, the fear of shame and rejection usually compels obedience, because such laws enjoy the overwhelming support of the people. And when real crimes are committed, we impose sanctions which have long been tested and approved in the laboratory of human experience.

It is important to understand that fear of shame enforces laws that coercion cannot. This insight probably explains why large cities have historically exhibited higher crime rates than small towns. The big city provides an opportunity for anonymity and thereby permits shameful activities with less fear of shame and rejection.

Every government in history has manufactured certain laws and prescribed certain punishments in order to coerce an unwilling population to conform to arbitrary and transitory notions of right and wrong, legal and illegal.

## TESTIMONY OF NANCY LORD

These laws, in their mature forms always display one common characteristic: unconscionably harsh penalties for the infractions committed. The reason for that is that they possess no intrinsic moral authority with which to inspire the compliance of the citizens. And the sole agent of enforcement is the police power of the state. Individual citizens have no stake in and no commitment to the enforcement of such laws.

Do you recall the vigor and determination with which the U.S. Government prosecuted the crime of manufacturing alcohol during Prohibition? Those laws stand as a monument to the transitory nature of artificial and oppressive legislation. Writing in the August 1992 issue of *The Freeman*, the Rev. Edmund Opitz said,

The 18th Amendment was repealed by passage of the 21st Amendment in 1933. Shortly thereafter another prohibition law was passed, this one a prohibition against owning gold. Under the earlier dispensation you could walk down the street with a pocketful of gold coins without breaking the law; but if you were caught carrying a bottle of whiskey you might be arrested. Then the legal switcheroo occurred, and you could carry all the whiskey you wanted, but if you had any gold in your pocket you could be thrown in jail!

Oppressive laws attempt to coerce the obedience of the population to a standard which is foreign to their traditions and temperaments. Thus begins a destructive cycle in which ever more citizens disobey discredited laws, and ever greater sanctions are imposed by government. Eventually, either the laws or the government will be repealed.

Rebellions and coups are the active mechanisms by which the people try to rectify the errors. But they're seldom successful; one form of oppression is usually replaced by another. Castro's Cuba comes to mind.



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Using the passive mechanism, citizens bring down the government with indifference. In periods of tranquillity, governments do not need the support of the people, only their sufferance. But in periods of great stress, governments must have the active support of the population in order to survive.

The fall of Egypt to the Romans and the fall of Rome to the Vandals occurred because their citizens were unwilling to defend them. Each fell with an unanticipated ease. Should it occur as threatened, the fragmentation of the national government of Canada will allow us to observe another such example close at hand.

Today Congress keeps the sentencing function out of the hands of the jury, because jurors would very seldom apply the law's harsh punishments to a flesh-and-blood defendant.

But removing the jurors from the sentencing phase of the trial is not enough. It is also necessary to conceal from them the Draconian penalties to be imposed upon the convicted defendant. If they knew the consequences of a guilty verdict, the jurors would frequently acquit despite the law and evidence.

We frequently hear the claim that jurors are unschooled in the law, naive in dealing with criminals, and too easily swayed by emotional appeals from defense lawyers. Such matters should be left to professionals, we're told.

But the hideous magnitude of the punishments for some crimes has been too much even for many veteran judges to stomach. The penalties for drug law violations have become so severe and the requirements for conviction so lax that scores of Senior District Judges are now exercising their prerogative not to hear cases involving violations of the drug laws.

## TESTIMONY OF NANCY LORD

In order to ensure that its laws and penalties would be imposed, Congress found it necessary to deprive even the judges of their discretion in sentencing. Now we have the Federal Sentencing Guidelines and *Justice-by-Recipe*.

We just open the Felony Cookbook and search for a credible offense. We add a little time for this; deduct a little time for that. We extrapolate here and interpolate there. And -- with the impartial guidance of a calculator -- we arrive at a just sentence. Who ever would have imagined that justice could be so easy? Who indeed?

Mr. Chairman, justice is the most elusive of our declared ideals. And justice demands that each case be considered on its own particulars -- *ad hoc* -- not on some equation borrowed from the Federal formulary. The Federal Sentencing Guidelines, which purport to quantify intangibles, are a facile fraud and an abject failure in the quest for justice

In the campaign for the passage of the Federal Sentencing Guidelines, much was made of the great variability in Federal Sentencing. One of the causes of this evil -- we were told -- was the broad discretionary authority of the District judges.

Now that the Guidelines are in effect, we find that the evil of variability has survived the reforms. Much of the trial judge's discretionary authority now resides with the prosecutor. Today, it is primarily the prosecutor who controls the sentence by his characterization of the evidence; by his characterization of the defendant's degree of cooperation; by submitting or withholding recommendations for 5(k)(1) departures; by submitting at sentencing evidence which was inadmissible at trial; and by the vigor with which he presents his arguments in the sentencing hearing.

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Prosecutors have always wielded great power because of their discretion to prosecute or not. The additional discretionary authority granted by the Sentencing Guidelines has now concentrated a dangerous excess in the prosecutor's office.

Legal fictions have been an accepted part of the Common Law tradition for centuries. Corporations and Trusts are examples of fictions which have served benign ends. But today we have new and malignant fictions which are designed to evade the evidence requirements of the Sixth Amendment.

When the weight of a marijuana plant is determined by an *a priori* decree; when a tall, thriving plant weighs the same as a dead seedling; when people are convicted of growing plants which have never been seen and cannot be produced in court; and when the number of plants charged to a defendant is determined by extrapolating from conjecture, justice itself has become a fiction. And everything I have mentioned happened in the case of Joanne Tucker.

Under the Sentencing Guidelines, "acquittals" become "Relevant Conduct." The court then increases the length of the defendant's sentence based on charges which were rejected at trial. The additional length of the sentence is clearly an imprisonment for a crime of which the defendant was found not guilty. Why not simply adopt the legal dictum of the Queen of Hearts?: "*No! No! Sentence first -- verdict afterwards.*" When acquittals do not immunize a defendant from punishment, what does it matter which comes first?

For most defendants, the only practical way of escaping the blind wrath of the sentencing machine is to accuse someone else and testify against him. If the defendant-turned-witness was truly the dishonorable criminal that the government claimed when it sought his indictment, why would we now honor his bartered testimony? Why would we permit him to designate someone else to serve his prison sentence? Why would we beg him to perjure himself?



## TESTIMONY OF NANCY LORD

Witnesses under duress have an ignoble history in our law. We should have learned our lesson long ago when -- in one case -- the first person who was accused passed the blame to a second and she to a third. Before long, twenty people had been executed and scores more awaited trial. Of those executed, nearly all eventually confessed. But when reason returned to the people of Salem Village, the trials, convictions, and executions for witchcraft were halted forever. How is it that we have forgotten how treacherous witnesses can be when they themselves are under duress?

An attentive and vigilant people will not tolerate violations of liberty. So, taking a page from the magician's handbook, governments everywhere have mastered the art of diverting the onlooker's attention. !!

Once, Congress could pass oppressive laws without public scrutiny; we had a "Cold War" with which to distract the terrified population. And when a pressure group began screaming about some danger to society, Congress could pacify them by increasing the severity of the punishment under some law which had already proved itself ineffectual. This is similar to the motorist who finds he's headed in the wrong direction and tries to compensate for the error by increasing his speed.

Today there are no external threats. The attention of the Nation is turning inward; and the government itself is under scrutiny as never before. Peering at government through a microscope, the citizenry are beginning to recognize their own Government as a menace to Life, Liberty, and Property.

When government grows more oppressive and less responsive with each passing day; when Congress is blind to justice and deaf to petition; when the courts are but legal geldings; and

## TESTIMONY OF NANCY LORD

when libraries full of law books afford no remedy for flagrant wrongs, we have reached societal bankruptcy.

Each year we witness the creation of tens of thousands of new laws and regulations. If laws produced justice, America would be Paradise. But our eyes confirm what Tacitus told us nineteen-hundred years ago: "The more corrupt the state, the more numerous the laws."

Mr. Chairman, our citizens naturally fear felonies such as murder, rape, burglary, arson, and the like. And they support strict penalties for those crimes. But those matters, for the most part, are the proper subject of *state* law. The people are beginning to realize that the Federal government's severe punishments for fiat crimes are an error.

Mr. Chairman, in another forum I will ask Congress to restrict the scope of its legislation. But here, I would ask that this Commission report to Congress that impartiality and uniformity by themselves do not constitute justice -- "blind justice" *is* blind, but it's *not* justice; ask that this Commission candidly acknowledge the philosophical and practical failure of the Sentencing Guidelines by recommending that they not be modified in some particulars, but repealed in their entirety; and ask that you recommend that traditional discretions be returned to the trial judges.

I would ask that the bartered testimony of desperate defendants be presumed to be tainted and that the courts and juries be made aware of all the circumstances and events which influenced that testimony.

Finally, I would ask you to recommend that we look to the jury as the final authority in sentencing. Of course, the jury would have the benefit of the court's experience and recommendations. A public presumption of justice usually attends a jury's verdict.

TESTIMONY OF NANCY LORD

Therefore, including the jury in the sentencing phase avails us of their "community conscience" function and inspires public confidence in the criminal justice system.

Thank you again for the opportunity to speak here today and for your consideration of my opinions and recommendations.



Lennice Werth  
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United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500 South Lobby  
Washington, DC 20002-8002

## *Testimony Concerning Marijuana Plant Weight*

To be given March 14th 1995

The medical use of marijuana is totally prohibited by the federal government. Even when doctors, family and patients agree that death or blindness may be unavoidable without marijuana, the law of the land is steadfastly against its use. Under these circumstances it is hardly surprising that some individuals break the law. Public opinion polls consistently show eighty percent public acceptance of legal medical access to the ancient herb. In fact, marijuana has a long documented history as a medicine that is effective and mild. Recently the Virginia Nurses Association voted to support it's use for a variety of purposes.

In my own little community of Nottoway, Virginia, many people use marijuana as medicine. Most of these people live in fear. They are afraid they will be arrested, jailed, and forced to suffer, even though our state law allows medical use. Two of them have asked me to mention them. Mr. Westly Holtalen is paralyzed from the mid chest down. He is able to live independently and care for his son. His doctors prescribe valium and surgery for his uncontrollable spasms but he feels he can survive with cannabis. "I've been cut on so many times already. I know I can get along just fine this way. I'm trying to avoid surgery." he says.

Sandy Hayer has a badly curved spine that her doctors tell her is inoperable. She is in a great deal of pain. The doctor prescribes pain medication that Sandy says doesn't work. "Just a little bit of marijuana in the evening and I can hold my job." she says.

As for myself, my family shells out \$560 for a thirty day supply of marinol (synthetic THC, one of the active ingredients of marijuana). It doesn't work as well and it costs more, but it is legal.

Many others in Nottoway county wonder how I can come to you and tell you my situation. They tell me that the narcotics police will watch me, Westly and Sandy very closely and try to arrest us. Maybe that is true. But, I feel this is my civic duty to tell because if any one of the three of us were to try and grow our own marijuana outside or in a closet it is very conceivable that we might have to start with fifty plants. This sentencing guideline could affect people like us, and you need to know this as you consider the marijuana amendment.

When you think about people who will be affected by this, you need to think about people in wheel-chairs, house wives, productive people who are not out to break the law, just to survive. We know the high price of marijuana is linked to the long jail terms.

Because marijuana is used as medicine by some and it's negative health effects are less than other drugs - or at least disputed - long prison sentences are inappropriate.

I realize that this commission can't do anything about the fact that some people will suffer, waste away, and even die because of federal marijuana policy. It is ~~not~~ your jurisdiction to judge this substance as a medicine. But, a 100 gram presumption is more realistic and factual, so that even if marijuana were not medicine these current rules are to harsh. As things are, the interests of medical patients and their families should be considered.

I respectfully request that you act in favor of the 100 gram per plant presumption for cases in excess of fifty plants.

Thank-you for your attention,

*Lennice Werth*

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March 6, 1995

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

FAX: 1-202-273-4529

Dear Sirs/Mesdames,

For the past two years I have testified here (copies enclosed) regarding the impact of the Sentencing Guidelines on their victims. I have discussed the unfairness of the Guidelines as a result of the arbitrary way in which weight is counted for marijuana plants. Thus, the Commission understands the impact of their policies.

In many other countries, the U.S. policies regarding marijuana are considered a violation of human rights. In recent cases, Holland has refused extradition of defendants in marijuana cases. In Holland there are thousands of United States expatriates who have fled the country because of these laws.

The "War on Drugs," in which you are active participants, has many victims. When officers in charge of war efforts voluntarily help in the commission of war crimes, they can be held internationally for their criminal actions. This "war" is considered a violation of human rights. As a result of your decisions forty million or more people in the United States consider you war criminals, and revile you and your actions.

Your cloak of respectability has been stripped since you are aware of the results of your actions.

In your work here you are centurions of a new police state. To stop this unconstitutional drift you must take personal responsibility and leave this job.

If you continue, you will be helping to destroy the Constitution. Your family names will be besmirched for even seven generations.

Sincerely,

Ed Rosenthal



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March 14, 1993

United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500 South Lobby  
Washington, D.C. 20001

Dear Sirs/Mesdames,

For the past five years I have served as an expert on the subject of marijuana cultivation, intent and yield in both federal and state courts. Before that, I studied the plant, cannabis, for over fifteen years. As a result of my study and research I have come to the conclusion that federal sentencing in marijuana cultivation cases is inappropriate and unjust. In addition it does not accomplish any of the purposes for which it has been promulgated. !:

The Guidelines were created to develop a more uniform method of sentencing for offenses of equal magnitude. The Guidelines, as they pertain to marijuana cultivation do not accomplish this goal. Instead, they create a system of arbitrary and capricious punishment, not justice.

In order to have a clear understanding of the effects of the sentencing regulations as they affect marijuana growers it is helpful to have an understanding of marijuana's botany as it relates to yield, cultivation techniques, patterns of personal use and sales and intent.

Botanically, marijuana is considered a short day or long light plant. That means that its flowering cycle is triggered when the plant receives between 8-12 hours of uninterrupted darkness each evening. Two plants of the same variety, one a seedling and one a large, older plant will both flower at the same time if given the same long night regimen. One implication of this is that plants grown outdoors will flower at a given time during the season no matter what size they are.

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TO: United States Sentencing Commission  
FROM: Ed Rosenthal

March 14, 1993

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The size and yield of the plant is dependent on several factors.

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Rather than trying to grow large plants, growers often use a method dubbed, "sea of green". Plants are started four or more per square foot and are never intended to grow out of that space. This garden may have plants growing at the density of four plants per square foot, a total of 144 plants. Each plant would have a maximum yield under ideal conditions with a high yielding variety of only about one half ounce. The maximum yield of the garden would be four and a half pounds. If the grower were reproducing plants using cuttings, a small tray of them, with a size of less than two square feet, could contain 36 plants.

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B.) Plant growth and yield is determined in part by the amount of water the plant receives. Less water results in smaller growth. This is especially important in gardens which receive no irrigation. In parts of the country, there is no water for long periods during the growing cycle. This results in very small plants. Indoors, plants are often over watered, resulting in poor growth.

C.) Plants receiving low light or too intense a light have lower yields than plants receiving optimum light. Because of the necessarily surreptitious nature of growing operations and the need for them to remain hidden, plants are often grown in less than ideal conditions. They are often hidden under the shade of trees or in other areas where they do not receive direct sunlight. Plants receiving these conditions will grow much smaller than plants receiving direct sunlight. In areas of the country where the sun is very intense, plants will be stunted from over-radiation. Indoors, growers often try to grow plants using inadequate lighting, resulting in very low yields.

D.) Outdoors, late planting results in smaller plants, because the plants of a single variety flower at the same time no matter the size. Surreptitious growers often plant late so that there is less time for the plants to be detected and so that stay small, making detection less likely. Indoors, growers using the "sea of green" force the plants to flower when they are only 18 inches high. At maturity, the plants are only two to three feet tall, with no branching and a yield of only one half ounce.

### 3.) Conditions

A.) Soil fertility and fertilizing regimen plays a part in growth of plants. Plants receiving inadequate nutrients have smaller yields than those obtaining adequate amounts. No two farmers use exactly the same techniques, so each will have different results.

B.) Temperatures which are too high or too low retard both growth and yield. This affects all outdoor crops. Indoors, gardeners often find it difficult to control temperatures because of the heat generated by high intensity of the lights needed for indoor cultivation.

C.) Very high or low humidity lowers the growth rate and yield of the plant by slowing photosynthesis. This leads to lower yields.

D.) Rain may destroy a crop if it occurs close to harvest time because the ripening buds are susceptible to mold under conditions of high humidity and moisture. Once attacked the bud can be destroyed by the spreading fungus overnight.



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E.) Insects such as aphids, whiteflies, mites and thrips attack marijuana gardens indoors and out. These insects suck away the plant's vigor, resulting in less growth and yield and even death of the plant.

F.) Animals such as field mice, rats, rabbits, deer and raccoons regularly attack marijuana grown outdoors. They can destroy an entire plant in a few minutes and can attack any time during the season.

All of these factors make it clear that plant counts are an unreasonable method of determining sentencing of people convicted of marijuana offenses. A plant normally yields from 10 grams to about 100 grams. It is inherently unfair to sentence them for yields that they were not expecting nor able to produce. As it stands now, a person with a small garden which has a potential yield of about two kilograms can be sentenced to 63 months or more, while an individual with a garden with many fewer, but much larger plants might receive only 10 months.

Rather than fixing an arbitrary weight to each plant, which is not based on a realistic assessment of the individual situation, the guidelines in the case of cultivators should be amended to reflect either the potential yield or the yield at seizure. In this way, the system will be more equitable. Although it would take more work by the courts, it would lead to a system of justice based on rational consideration.

The law has been particularly hard on indoor growers who use the "sea of green method" and fall under the mandatory minimum sentencing laws. Under these provision a minimum sentence of five years is required for the cultivation of 100 plants or more, and ten years for 1000 plants. The Sentencing Commission should recommend that the law be changed to reflect the actual yields of the plants in the same way that weight is considered for other marijuana offenses.

If the Sentencing Commission desires to allocate a specific weight to each plant, the weight of 100 grams per plant, which is applicable up to 49 plants at present in sentencing procedures should be extended to all plants, and the Sentencing Commission should recommend that the law should be changed to reflect this.

If a plant count is to be used, consideration should be made for plants not likely to be harvested. Clones and seedlings have a variable success rate and consideration should be made for clones not likely to grow to maturity. Perhaps the best way to do this would be to exclude all plants under six inches tall from the plant count.

Male plants are ordinarily removed from the garden, so that should be taken into account in figuring the plant count in gardens which have not been "sexed".



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March 14, 1993

Lowering Level 42 through 24 as proposed (Sec 2D1.1) is a step in the right direction. The offense levels for what is now Levels 22-26 should also be reduced. Even a 2 point reduction would make the sentencing more appropriate.

The Guidelines should also be amended so that the court can consider downward departures based on mitigating circumstances for marijuana crimes of Level 12 and under. Penalties other than incarceration should be considered for first time offenders in these cases. This would free the courts of many small and relatively minor cases as well as limiting the possibility of these offenders mingling with hardened criminals.

!!

Ed Rosenthal  
1635 East 22nd Street  
Oakland, CA 94606

Tel: (510) 533-0605  
Fax: (510) 535-0437

March 7, 1994

United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500 South Lobby  
Washington, D.C. 20001

Dear Sirs/Mesdames,

For the past six years I have served as an expert on the subject of marijuana cultivation, intent and yield in both federal and state courts. Before that I studied the plant, cannabis, for over fifteen years. As a result of my study and research I have come to the conclusion that federal sentencing in marijuana cultivation cases is inappropriate and unjust. In addition it does not accomplish any of the purposes for which it has been promulgated.

I will discuss several aspects of the sentencing laws. First I will address botanical aspects of marijuana and its cultivation. Secondly, I will briefly cover some of the effects of present policies. Third, I will propose a reasonable set of sentencing policy alternatives. The fourth section covers long-term prospects for the marijuana laws.

#### BOTANICAL ASPECTS OF MARIJUANA CULTIVATION AS THEY RELATE TO SENTENCING

The Guidelines were created to develop a more uniform method of sentencing for offenses of equal magnitude. The Guidelines, as they pertain to marijuana cultivation do not accomplish this goal. Instead, they create a system of arbitrary and capricious punishment, not justice.

In order to have a clear understanding of the effects of the sentencing regulations as they affect marijuana growers it is helpful to have an understanding of marijuana's botany as it relates to yield, cultivation techniques, patterns of personal use and sales and intent.

Botanically, marijuana is considered a short day or long light plant. That means that its flowering cycle is triggered when the plant receives between 8-12 hours of uninterrupted darkness each evening. Two plants of the same variety, one a seedling and one a large, older plant will both flower at the same time if given the same long night regimen. One implication of this is that plants grown outdoors will flower at a given time during the season no matter what size they are.

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All of these factors make it clear that plant counts are an unreasonable method of determining sentencing of people convicted of marijuana offenses. A plant normally yields from 10 grams to about 100 grams.

Dr. Elsohely, at the University of Mississippi in Oxford conducted experiments on weight and spacing. Originally the Drug Enforcement Administration tried to keep the results confidential because they were so damaging to testimony given by DEA officers who testified in state trials that the plants produce between one and two pounds of buds. Dr. Elsohely's report clearly shows that spacing affects yield tremendously.

As enlightening as his experiment was, Dr Elsohely tested only one variety, growing for a single length of time and he has not tested for other environmental factors such as shading, water stress, weather, improper irrigation and nutrient problems. That is, the problems faced by all gardeners. The plants he grew were given ideal nutrients, plenty of sun and a uniform planting date. The goal of the experiment was to produce the largest plant possible.

#### EFFECTS OF PRESENT POLICIES

The effects of the present policies which result in severe penalties and high risk have been a disruptive source on cultivation and domestic supply. Over the years growers have become aware of the harsh penalties and have either stopped cultivating or downsized their operations so that they face lower sentences if caught. This has led to a shortage of domestic marijuana and the price has climbed. As a result many people who would prefer to use domestic have switched to lower price imports.



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For instance, in Portland, OR, a center of indoor cultivation, domestic buds sell for \$300 an ounce and Mexican buds, slightly less potent, retail for as little as \$125 an ounce. The situation is similar in other areas. Rather than unorganized cultivators a more organized criminal element is getting involved in supplying the market.

Since somebody will always be around to meet demand, no matter what risks they may face, making the laws or penalties harsher presents a niche for the more desperate and reckless person as the supply side is vacated by people who do not think possible gain is worth the risk. This is not a good trade-off.

#### SENTENCING POLICY ALTERNATIVES

It is inherently unfair to sentence a grower for yields that s/he was not expecting nor able to produce. As it stands now, a person with a small garden which has a potential yield of about two kilograms can be sentenced to 63 months or more, while an individual with a garden with many fewer, but much larger plants might receive only 10 months.

Rather than fixing an arbitrary weight to each plant, which is not based on a realistic assessment of the individual situation, the guidelines in the case of cultivators should be amended to reflect either the potential yield or the yield at seizure. In this way, the system will be more equitable. Although it would take more work by the courts, it would lead to a system of justice based on rational consideration.

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The Guidelines should also be amended so that the court can consider downward departures based on mitigating circumstances for marijuana crimes of level 24 and under. Penalties other than incarceration should be considered for first time offenders in these cases. This would free the courts of many small and relatively minor cases as well as limiting the possibility of these offenders mingling with hardened criminals.

It would be a step in the right direction if penalties for all marijuana offenses were lowered, especially considering that violent crimes and crimes against property are treated lighter in sentencing than some marijuana offenses. Certainly possessing, growing or selling marijuana is not as serious threat to society than a crime with a clear victim who complains.

Obviously, neither the people who are buying nor selling feel victimized. In order to apprehend these people police must employ snitches and invade privacy, two things considered un-American until a few years ago. The Constitution is bent by assaults by the prosecution on the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

#### LONG TERM PROSPECTS FOR THE MARIJUANA LAWS

the campaign to wipe out marijuana is doomed to failure for reasons which are not applicable to other drugs. Heroin, opiates and other drugs which induce a physical dependence seem to the user to limit free choice. They are dependent on the drug just as we need food, several times a day. Cocaine users over a period of time become dysfunctional. Marijuana however, does not induce a physical dependency and rarely induces a dysfunctional situation. Instead, most marijuana users enjoy its recreational use. They do not feel that it has caused them much harm except possibly for legal hassles.

If you asked most heroin or cocaine addicts whether they regret their use, most would answer affirmatively. The same is not true of marijuana. Most people who use it feel it has been a positive thing in their lives. You can lock a person up and throw away the key, but s/he will still tell you that your law is wrong and that the law should be changed.

No matter how harsh the laws are you cannot hide the truth that people enjoy using marijuana and will risk liberty to indulge in it. The current policy does the exact opposite of its intentions. By making marijuana hard to get through interdiction or destruction of plants, the price goes up because of reduced supply. This induces more people into the trade and at the same time causes a certain

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group of people who are experimenting with drugs to choose less expensive substances such as cocaine, crack or heroin. Certainly members of the committee would consider it more serious to the persons health and well being if a family member was using heroin or cocaine than if they lit up an occasional joint.

With the civil regulation of marijuana, use of hard drugs such as heroin and cocaine would plummet. This has been proven in Holland. Which has developed a successful hard drug-soft drug policy. Members of the committee who say we cannot take the risk should look at the dismal failure of the current regulatory system, which has been in effect since 1937, 57 years, most of our lives.

In 1937 there were estimated to be 50,000 marijuana users. Now estimates for regular users run between 25,000,000 - 50,000,000 people. That is an increase of 50,000 - 100,000%. Criminal regulation of marijuana, no matter how harsh or inappropriate the penalties will not work because a large minority of our citizenry know that marijuana use is not very risky to health and is very enjoyable.

I hope you will take the information I have provided into account during your consideration of the Sentencing Guidelines. I look forward to answering any questions you may have when I speak before you later in March.

Sincerely,

Ed Rosenthal

**POSITION PAPER OF THE LEGAL COMMITTEE**

**OF THE**

**NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS**

**Submitted by:**

**MARVIN D. MILLER**  
**Attorney at Law**

**to**

**THE UNITED STATES SENTENCING COMMISSION**

**for**

**HEARINGS OF 14 MARCH 1995**

*The Law Offices of*

**MARVIN D. MILLER**

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**I. Introduction: 2D1.1 Should Be Amended**

The National Organization for the Reform of Marijuana Laws (N.O.R.M.L.) has been dedicated for many years to a practical and reasoned approach to the marijuana laws. Marijuana is not addictive like heroin, crack cocaine, or PCP and, unlike those drugs and other drugs such as alcohol, it is not possible to take a toxic overdose which could prove fatal. This plant is also recognized by many doctors and physicians as beneficial in the treatment of patients with glaucoma and AIDS. It is also beneficial for the treatment of patients undergoing chemotherapy. Nearly two-thirds of the states recognize its medical use. A Drug Enforcement law judge ruled in a suit in which N.O.R.M.L. was a party litigant that marijuana has less toxic potential for harm than ordinary aspirin when used as a medicine. Finally, through N.O.R.M.L.'s efforts, many state legislatures have come to recognize the truth of the fact that marijuana, even as a recreational drug, has less potential for harm and is less dangerous for the user than such drugs as crack cocaine, heroin and PCP. This Commission ought to amend the Guidelines to include the same recognition, i.e., marijuana is less harmful.

**II. Weight Alone Should Not Be The Controlling Guideline Factor in 2D1.1**

Under the current Federal Sentencing Guideline structure, weight alone is the key factor in determining the sentence in drug cases. This creates inherently unfair results in countless cases. As our prison population passes the one million mark, many involved in the criminal law process, including judges, prosecutors, law enforcement, and defense attorneys, decry the fact that the small player is often the only one who receives a large sentence. A one time courier, for example, may not know how much of the drugs he or she is carrying. They may be unable to identify the intended recipient and may know little about the individual who hired them for their first time

effort as a courier. Thus, with what might be a large amount of weight and no one to turn in, they face a huge sentence. The successful dealer, on the other hand, can always buy himself out of a large sentence by cooperating and turning in those who work for him or her and by turning over assets which the prosecution may not be able to discover. The more a successful dealer has to turn in, the lower the sentence they are going to receive. All too often the little people are the only ones to end up with the big sentence.

Federal judges are aware of these unfair disparities, yet their hands are tied by the Guidelines. They are relegated to totaling up guideline numbers rather than handing out justice. Weight alone is not always a measure of culpability. Anyone who has been involved in the prosecution of drug cases certainly knows that. That is not to say that it is not a factor or that it is never a controlling factor; rather, it is not the invariably accurate yardstick by which all drug sentences should be judged. !!

It should be noted, for example, that a courier who is arrested in such a circumstance that he or she cannot be charged in a conspiracy is not, in many jurisdictions, eligible for a reduction as a minor or minimal participant because there is no one against whom to judge their conduct. This Commission has recognized, in the past, that the Guidelines need periodic adjustment in order to accomplish justice. Our criminal law process is not intended to be unfair. Just as the Guidelines computation regarding the carrier medium for LSD needed to be changed in order to achieve justice, the inflexible and rigid application of weight as the chief criteria for determining drug sentences also needs to be modified to more accurately reflect the reality of the cases coming through the courts.

### III. Section 2D1.1 of the *Guidelines* Relating to Marijuana Plants Is Clearly Erroneous

In Section 2D1.1 of the *Guidelines*, more than fifty marijuana plants require that each plant be treated as the equivalent of one kilogram of marijuana. That is clearly erroneous. Even the head of the United States Agricultural Testing Station in Mississippi which has grown marijuana for federal government scientific and experimental purposes has indicated in no uncertain terms, that it is not possible to get one kilogram of marijuana per growing plant. This is true even under ideal perfect lab conditions. If sentencing is supposed to be conducted with a ring of truth and honesty, then this computation has to be changed. There is simply no basis in the real world for this computation.

If sentencing is supposed to reflect that which the accused actually did, then the sentencing computations ought to have some basis in truth. This computation has no basis in truth. In fact, it completely misses the mark when it comes to growing marijuana. An individual who plants fifty marijuana plants will more likely than not lose as much as one-third because the plants simply will not survive and grow to full maturity. Of those that do survive, approximately one half will be male plants which have absolutely no use whatsoever as consumable marijuana. This sort of computation has been accepted by various courts and even by prosecution experts in a variety of cases because it is true. The consequence of this computation is that an individual growing sixty marijuana plants may only end up with a yield of twenty. The timing of when they might be raided is going to affect their sentence rather than the yield they are going to get from what they are growing.

Even if one were to get a successful yield of fifth usable female plants (only the female plants are of any use), that still is not an indicator of how much marijuana will be harvested. Most of the time in these days an individual harvests only the buds from the plants. That is the most







## Testimony Regarding Various Proposed Amendments to the Federal Sentencing Guidelines

submitted March 7, 1995

### Overarching Principle

The Marijuana Policy Project (MPP) is working to implement realistic, utilitarian marijuana-related policies and regulations with the intent to minimize the harm associated with marijuana consumption and the prohibition thereof.

The MPP's comments on the following proposed amendments to the sentencing guidelines have been made with this principle in mind.

### Proposed Amendment #11

The Marijuana Policy Project recommends that the Commission not further increase the penalties for drug offenses occurring near protected locations. "

As the penalty enhancement currently reads, individuals who are convicted of growing a few marijuana plants ("drug trafficking") within 1,000 feet of a school, university, or playground are assigned a minimum base offense level of 13, which nets 12-18 months in prison.

Most areas in a city fall within such "drug-free zones." Why should an adult who lives three blocks away from the edge of a university be subject to 12-18 months in prison because he or she sold an ounce of marijuana to another adult—or even grew a few marijuana plants in his or her basement for personal use—while another adult who committed a similar offense in the suburbs receives a lesser offense?

Because the guidelines already provide the required "appropriate enhancement" for drug offenses near protected locations, the Marijuana Policy Project recommends that the Commission not further increase the penalties for such offenses.

### Proposed Amendment #42, part 11

The Marijuana Policy Project supports the proposed amendment that would allow for a departure in instances when drug trafficking offenses were committed in such protected locations, but where the defendant's conduct did not create any increased risk for those whom the statute was intended to protect. This amendment would help correct the problem discussed above.

### Proposed Amendment #29

The Marijuana Policy Project supports re-promulgating the "safety valve" provision so as to "permanently" incorporate it into the guidelines.

***"Minimize the harm associated with marijuana."***



### **Proposed Amendment #33 (Approach 1)**

The Marijuana Policy Project agrees with the stated intent of Approach 1, that is, to "compress the Drug Quantity Table; limit its impact on lower-level defendants; somewhat increase the weight given to weapons, serious bodily injury, and leadership role; and address anomalies in the offense levels assigned to ... marijuana-plant offenses compared to other drugs."

Furthermore, the Marijuana Policy Project agrees with the reasoning of both Option A and Option B, and supports modifying the Drug Quantity Table to reflect both of these changes, i.e., the Marijuana Policy Project supports Option C.

Not only is the intent of both Options A and B sound, but the effect of implementing both options (implementing Option C) yields reasonable results as applied to marijuana cultivation offenses. See enclosed Table I, which shows that the sentences for marijuana cultivation offenses even for the best-case proposed scenario—the grams/plant ratio is changed to 100 grams/plant, and Option C is adopted—are still very long and comparable to sentences for violent offenses with victims.

The Marijuana Policy Project urges the Commission to adopt Option C of Approach 1 (amendment #33).

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### **Proposed Amendment #34**

The Marijuana Policy Project supports limiting the impact of drug quantity in the case of defendants with minimal or minor roles.

Indeed, the MPP recommends that the base offense level for such offenders not exceed level 22, as opposed to the suggested level 28. For defendants who acted in the capacity of deckhands or offloaders, a prison sentence of 78 - 97 months (6.5 - 8 years) for the suggested level 28 is exceedingly harsh.

The MPP strongly opposes the additional issue for comment, i.e., assigning a higher maximum base offense level for marijuana, crack, cocaine, and heroin, while assigning a lower maximum base offense level for other drugs. The MPP fails to see the logic of including marijuana in the same category with crack and heroin.

Offenders with minimal roles in an operation involving only marijuana should be assigned a maximum base offense level of 22, which is 41 - 51 months in prison.

### **Proposed Amendment #36**

Individuals who are cultivating marijuana for personal use and who exercise their American right to own weapons, whether bows and arrows or firearms, should not be sentenced more harshly just because the "dangerous weapon is found in the same location as the controlled substance," as the proposed amendment is worded.



Presumably, increased penalties for the possession of dangerous weapons is intended to be applied in those instances where the weapon in question either was used or was intended to be used in relation to the offense in question. Mere ownership or possession of a weapon at the time of a violation, without more, ought not to be a criterion for a penalty enhancement.

The MPP opposes the current wording of the amendment, i.e., "if a dangerous weapon is found in the same location as the controlled substance, there shall be a rebuttable presumption that the offense involved the possession of the weapon."

The MPP suggests that the wording be changed so as to require the government to prove beyond a reasonable doubt that the weapon was used or intended to be used in relation to the offense in question.

#### **Proposed Amendment #42, part 6**

Again, the MPP opposes the suggested wording of this amendment, i.e., "if a weapon was present during the offense, there shall be a rebuttable presumption that it was possessed in connection with the offense." The MPP urges that the burden of proof should lie with the government.

#### **Proposed Amendment #37**

The MPP strongly urges the Commission to adopt this amendment so as to change the grams/plant ratio to 100 grams/marijuana plant for all cases. This ratio more accurately reflects the actual average yield of mature, female plants, and would rectify the current sentencing disparity found at the 49 plant vs. 50 plant level.

#### **Proposed Amendment #42, parts 2, 3, and 10**

The MPP supports the second part of this amendment, i.e., discounting the wet weight of marijuana for sentencing purposes.

The MPP does not oppose the third part of this amendment, i.e., defining what constitutes a marijuana plant. The proposed definition is consistent with the MPP's understanding of what is normally considered to be a marijuana plant.

In regard to the tenth part of this amendment, the MPP urges the Commission the modify the definition of "trafficking" or "manufacturing" to exclude growing marijuana for personal use.

Cultivating 20 or 30 marijuana plants currently falls under guideline 2D1.1 of the guidelines, "Unlawful manufacturing, importing, exporting, trafficking (including possession with intent to commit these offenses); attempt or conspiracy." This heading—and the sentences contained in the section following this heading—does not accurately represent the scenario of an adult who is convicted of growing marijuana for his or her personal use.

If an individual were assigned the maximum level of 26, minus 3 points for acceptance of responsibility, the individual would receive 23 total points, which nets a sentence of 46-57 months if the criminal history category were 1.

Approach 2 has the effect of increasing the penalties for many low-level cases, which is the exact opposite of the stated intent. This is evidenced by the examples of applying Approach 2 which was prepared for the Commission on November 1, 1994. In case #136739, where under the current system a man with no prior criminal record who was convicted of selling 1.705 kilograms of marijuana to a confidential informant was assigned a final offense level of 8 (0 - 6 months), under the proposed Approach 2 this man would be assigned a final offense level of 17, which would net him 24 - 30 months or even 37-46 months in prison.

The MPP opposes Approach 2.



Many individuals who are not distributors or dealers grow marijuana for personal use to avoid having to purchase marijuana from the underground drug market. These individuals oftentimes may plant 50 or so seeds, with the hope that 20 or so will survive and produce smokeable material.

There is no provision in current federal law for those individuals who engage in cultivation for personal use and who are not commercial dealers. Many states recognize that there is a distinction between the individual who grows his or her supply for the better part of a year and someone who grows for the purposes of resale and profit. The federal guidelines should recognize and accommodate this distinction. The scenario of cultivation for personal use results in perhaps the greatest injustice in the realm of marijuana sentencing: Personal users are wrongly being sentenced as commercial dealers or "traffickers."

The MPP proposes that the Commission change guideline 2D2.1, "Unlawful possession; attempt or conspiracy," to include the cultivation of marijuana for personal use.

An alternative way of effecting such a change in the guidelines would be to allow for a significant downward departure so that penalties other than incarceration can be considered when applying guideline 2D1.1 to cases where the defendant is growing marijuana for personal use.

#### **Proposed Amendment #43 (Approach 2)**

Approach 2 is flawed on a number of counts. The MPP is bewildered as to why marijuana is classified in the second base offense level category, along with PCP, LSD, and methamphetamine. This does not follow from reason, as there is no comparison between the harmfulness potential of marijuana and the harmfulness potential of such drugs as PCP and methamphetamine, both as applied to the psychopharmacological effects of the drugs, as well as to the crime associated with using and/or trafficking in the drugs.

If Approach 2 were to be adopted, marijuana should be placed in the third category (base offense level of 10 - 18), and even then the base offense level would be too high. (If marijuana were placed in the third category instead, growing a few marijuana plants would be assigned a base offense level of 10 - 18. The minimum sentence (for level 10) would be 6 - 12 months in prison, while the maximum sentence (for level 18) would be 27 - 33 months in prison.

As Approach 2 now reads, individuals who grow 60, 30, or even 15 marijuana plants would be assigned a base offense level of 18-26.

If an individual were assigned the minimum level of 18, and the individual received a 3-point deduction for acceptable of responsibility, the individual would still receive 15 points. For a criminal history category of 1, this individual would be sentenced to 18-24 months in prison for growing a personal possession amount of marijuana.







**Table 1**  
**Kilograms of marijuana and numbers of marijuana plants for various offense levels for Approach 1**

<b>Off. Lev.</b>	<b>Current Ratio</b>	<b>Proposed Ratio</b>	<b>Proposed Ratio + A</b>	<b>Proposed Ratio + B</b>	<b>Proposed Ratio + C</b>	<b>Penalty (in months)</b>
38	30,000 kg	30,000 +	300,000 +			235 - 293
36	10,000 kg	10,000 - 29,999	100,000 - 299,999	300,000 +		188 - 235
34	3,000 kg	3,000 - 9,999	30,000 - 99,999	300,000 +		151 - 188
32	1,000 kg	1,000 - 2,999	10,000 - 29,999	100,000 - 299,999	300,000 +	121 - 151
30	700 kg	700 - 999	7,000 - 9,999	30,000 - 99,999	100,000 - 299,999	97 - 121
28	400 kg	400 - 699	4,000 - 6,999	10,000 - 29,999	30,000 - 99,999	78 - 97
26	100 kg	100 - 399	1,000 - 3,999	3,000 - 9,999	10,000 - 29,999	63 - 78
24	80 kg	80 - 99	800 - 999	1,000 - 2,999	3,000 - 9,999	51 - 63
22	60 kg	60 - 79	600 - 799	600 - 999	1,000 - 2,999	41 - 51
<b>20</b>	<b>50 kg</b>	<b>50 - 59</b>	<b>500 - 599</b>	<b>500 - 599</b>	<b>500 - 999</b>	<b>33 - 41</b>
<b>20</b>	<b>40 kg</b>	-----	<b>400 - 499</b>	<b>400 - 499</b>	<b>400 - 499</b>	<b>33 - 41</b>
18	20 kg	-----	200 - 399	200 - 399	200 - 399	27 - 33
16	10 kg	-----	100 - 199	100 - 199	100 - 199	21 - 27
14	5 kg	-----	50 - 99	50 - 99	50 - 99	15 - 21
12	2.5 kg	25 - 49	25 - 49	25 - 49	25 - 49	10 - 16
10	1 kg	10 - 24	10 - 24	10 - 24	10 - 24	6 - 12
8	250 g	3 - 9	3 - 9	3 - 9	3 - 9	0 - 6
6	< 250 g	0 - 2	0 - 2	0 - 2	0 - 2	0 - 6

**Current Ratio column:** Number of marijuana plants for various offense levels with the grams/plant ratios currently in use.

**Proposed Ratio column:** Number of marijuana plants for various offense levels using only the 100 grams/plant ratio.

**Proposed Ratio + A, B, and C columns:** Number of marijuana plants for various offense levels using 100 grams/plant and each of the three options of Approach 1.



Members of the Sentencing Commission:

My name is Peggy Edmundson. I currently live in rural southwest Missouri but most of my life in northwest Arkansas. My husband, Eric, and I own 40 acres with an older home on which we have done extensive remodeling on, doing most of the work ourselves. For the past 15 years we have worked diligently to establish a secure home and surround ourselves with the things we enjoy doing the most. This has earned us the respect of our friends and neighbors, all of whom know they can call on us anytime they need help. This can be anything from pulling a calf at 3:00 AM to keeping watch on their home while they are away.

My husband, Eric, was a respected electronics design engineer with Clarke Industries in Springdale, Arkansas, earning \$45,000 per year. He designed from the ground up some of Clarke's most profitable floor polishing machine, along with Clarke's line of marble refinishing and polishing machines. Being frugal by nature, Eric devoted all his time and money into our future and our farm. Eric grew up in Boy Scouts and received the high rank of Life Scout. He has always maintained high morals. Honesty, helpfulness, and kindness are second nature to him.

In the summer of 1993, it seemed everything was going our way. Eric was going to China to help set up machine tooling for some of the machines he designed. I was able to stay home and care for the farm, working our garden, orchard, and care for our honey bees. I was also helping my mother care for my father who six years ago was disabled by a stroke which left him unable to speak or care for himself, and past away March 17, 1994.

On the afternoon of August 18, 1993, our world was turned upside down. A confidential informant, for reasons we will never understand or know, gave information to local authorities that we were growing marijuana. After 4 months of investigation with no results, the DEA was called in with their thermal imaging technology. Because we had an exhaust pipe in our shop that was warmer than normal a search warrant was granted.

Local and State police, DEA agents, and National Guard, including helicopters, did an intensive search of our property. They discovered in our wine cellar an area the size of a small bathroom, in which 47 marijuana plants in various stages of growth allegedly were taken. They also allegedly found 4 marijuana plants growing somewhere in the woods on the property, for a total of 51 marijuana plants. Why our case was selected for Federal prosecution was a question our attorney asked often, and has yet to be answered. Despite repeated requests, the U.S. Attorney declined to permit Eric and our attorney the chance to examine the evidence. We would have liked to have known the actual weight since most of the plants had only 6 to 8 leaves.

Eric grew only for himself and never sold any to anyone else. He had a very demanding and high stress job, and chose marijuana over alcohol and tobacco or going to doctors for legal drugs such as tranquilizers. He drinks very little and has never smoked a tobacco cigarette.



Current Federal Sentencing Guidelines call for the infliction of a minimum two year prison term for cultivation of 50 plants or more. Cultivation of 49 or fewer results in eligibility for probation or a shorter prison term. In Eric's case, two small plants were responsible for Eric receiving a sentence of 24 months in the Federal Prison Camp in Leavenworth, Kansas, rather than getting probation. Two less plants he could have been sentenced to 10 months or less. Those two plants made a fourteen month difference in my husband's sentence. The guidelines should be changed so that all plants are weighted at 100 grams and this unfair cliff would be eliminated. Eric's sentence would have been no more than ten months, if all plants were weighted a 100 grams.

I understand that the reasoning behind this "cliff" at 50 plants is that growing that many plants couldn't be for just personal use. If those were 50 large mature, female plants that may be true. But it is also true that just scattering a handful of seeds may cause even 500 or more plants to sprout. Wild animals, nature, or thieves will kill almost all of those and one half of the rest will be males, and therefore unusable. Yet the way the law is enforced and interpreted, each of those little sprouts is equal to over two pounds of processed marijuana already bagged up and ready to sell, and that is the sentence the grower will get. It is neither fair nor just, nor is it even closely tied to reality.

I, personally, chose not to smoke marijuana or use any other drugs, which was proven though repeated drug tests. However, I plead guilty to a misdemeanor charge of possession in a plea agreement, because it was in my home. I, too, could have been sent to prison if I had not plea bargained for probation. I am now forced to live without Eric for 24 months, along with the financial burden of paying back a \$10,000 loan we had to borrow to clear the criminal forfeiture which was brought against our property. Unfortunately, the cost of upkeep, utilities, insurance, and taxes, did not go down along with our income. My closest neighbor is a quarter mile down a winding dirt road and I am left feeling alone and cheated by our judicial system.

Who has benefited from this? Society has lost a productive, intelligent, hard working individual and our overcrowded prison system has gained a non-violent marijuana grower, who grew for personal use only. The DEA and it's "war on drugs", along with local and state authorities used 4 months of investigative time and thousands of dollars to prosecute one non-violent, personal use marijuana grower. Please consider the lives of real productive people, like Eric and myself, that your decisions affect. Please help restore some sanity to these sentencing guidelines. Please explain me why two small plants would make a 14 month difference in a sentence?

Thank You for your time and consideration.

Written testimony of Jeff Stewart  
for U.S. Sentencing Commission hearing  
March 14, 1995

RE: Amendment 37

It is encouraging to know that the Commission is reviewing the present sentencing guidelines for the manufacture of marijuana. While there is every reason to understand society's need and desire for a safe and law abiding community it is apparent that for justice and equity to prevail the punishment must fit the crime.

The sentencing guidelines for the manufacture of marijuana, as they are presently written, create an undue and unwarranted disparity in sentencing in one specific aspect. The arbitrary distinction between 49 and 50 plants--whereby 49 plants and fewer are calculated for sentencing purposes to weigh 100 grams each while 50 plants or more are calculated to weigh 1 kilogram each--has no basis in fact or logic.

How is it that if a given plant can be one thing it can (must in this context) also be something else? No plant capriciously changes itself simply because it is found in the company of 49 of its fellow species. !!

If the original intent of this guideline was to more severely sentence individuals apprehended with larger numbers of plants, doesn't the simple expedient of a longer sentence for a larger number of plants serve this purpose? Why is it necessary to multiply by a factor of ten?

As many of you know I myself have been on the receiving end of the sentences for the manufacture of marijuana. I was sentenced to a mandatory minimum sentence of five years. And, though with the exception of supervised release my sentence is completed, it is with an interest in basic fairness and justice that I communicate with you today.

In 1972, I remember seeing a living marijuana plant for the first time. In the years that followed, prior to my arrest in 1990, it happened that I encountered marijuana in many stages of cultivation in many parts of the world.

In Morrocco it is grown in terraced fields several acres at a time. Such techniques produce plants of an inferior quality which vary in height from approximately three feet to about four feet. In Pakistan and Nepal marijuana grows wild without the assistance of cultivation. In the capital city of Islamabad many vacant lots and unused open areas of the city support clusters of this undomesticated form. It is regarded, if at all, as a plant for which there is not much use. In the mountains, even the shepherd's usually voracious goats won't eat it.



This Himalayan variety of cannabis, however, is taller than its African counterpart ranging anywhere from five to more than eight feet in height. India, too, has known cannabis for centuries both domesticated and untended. Generally, the Indian variety in the northern part of that country is indistinguishable from the Nepali and Pakistani forms. In the southern part of India cultivated cannabis can be encountered. Though different from the northern forms this plant too only seldom exceeds six feet in height.

Here in the U.S. marijuana also exists in a natural, uncultivated state. This "ditch weed" is of little if any commercial value. It can, of course, be used in a court of law for sentencing purposes. The cannabis cultivated here is almost always a strain of the Asian or African varieties. Like most plants, it responds to careful attention. With optimum conditions, the right amount of expensive fertilizer, and water the American forms generally are healthier and larger than their foreign counterparts.

Much has been made of the strength or potency of this American plant. In my experience, to the extent that the potency has been raised there is commensurate reduction in consumption. After all, with something that is expensive there is a built-in incentive to economize.

More to the point of the Commission's inquiry is the fact that at no time, in no place on earth have I encountered a plant that would approximate a one kilogram yield. This statement can be corroborated. Dr. El Sohly, Mr. Rosenthal and many others have made clear that such a supposition cannot be supported by objective fact.

In closing I would like to urge the Commission to rescind the current guideline which does nothing to further the interest of justice and serves to create unneeded disparity in sentencing. Please reject the one kilogram per plant language and replace it with the more reasonable standard of 100 grams per plant, regardless of the number of plants involved.

Thank you.

TESTIMONY REGARDING AMEND. 37  
FOR: U.S. SENTENCING COMMISSION HEARING  
MARCH 14, 1995

MARIJUANA GROWER'S SURVEY

Of those who responded to our survey fully 39% fell into the 100 to 399 plant category. Of this grouping 22% are serving sentences longer than the minimum of their sentencing guideline range.

The next largest grouping was the 1,000 to 2,999 plant category, comprising 16% of the total respondents. Of this group 20% are serving sentences longer than the minimum of their sentencing guideline range.

The third largest group of respondents fell into the 400 to 699 plant category, comprising 14% of the total. Of these, 19% are serving sentences longer than the minimum of their sentencing guideline range.

Of those who responded 16% were in the category 50 to 99 plants. We received no responses from individuals sentenced for 1 to 49 plants.

The fifth largest grouping was comprised of those convicted of manufacturing between 700 and 999 plants. This group amounted to 7% of the total. Only one respondent is serving a sentence greater than the minimum of the sentencing guideline range.

The smallest grouping was comprised of those individuals convicted of manufacturing 3,000 or more plants. They were 5% of the total, although 21% of this group are serving sentences longer than the minimum of their sentencing guideline range.

This information must be viewed in the context of the fact that we still do not have an accurate idea of what percentage of all marijuana convictions growers comprise. The Dept. of Justice, Bureau of Statistics, to date, has not been able to identify this sub-category. Our survey would be even more useful could this related information be obtained.

Analysis of these data gives rise to several interpretations. The large percentage of convictions in the 100 to 399 plants category might indicate several things. Firstly, that many growers are unaware of the statutory 5 year minimum. Or that a crop of this size is conveniently manageable given most grower's limited time, space, and resources. This information might also suggest that prosecutors are bringing charges in such a way as to trigger the statutory 5 year minimum. For example, prosecutors sometimes combine the crops of more than one grower to obtain an aggregate total of 100 plants or more.



Additionally, those individuals convicted of manufacturing 1,000 plants or more (the 1,000 to 2,999 grouping added together with the 3,000 or more grouping) comprise 21% of the total. Does this indicate a distinction between those individuals who were moderately sophisticated and aggressive in their operations (the 100 to 399 plant grouping) and those who were truly serious and large-scale? (Note the "gap" created by the relatively small number convicted for 700 to 999 plants)

It bears mention that should the Commission adopt the proposed change in plant weights from 1 kilogram per plant to 100 grams per plant, for all plants regardless of the number involved, that individuals sentenced for 100 to 999 plants would remain subject to the statutory five year minimum. As those convicted of manufacture of 1,000 plants or more would remain subject to the statutory ten year minimum.

Statistical grouping of respondents by guideline category.

Sentenced above guideline minimum.

1 to 49 plants:	no respondents	n/m
50 to 100 plants:	16%	n/m
100 to 399 plants:	39%	22%
400 to 699 plants:	14%	19%
700 to 999 plants:	7%	n/m
1,000 to 2,999 plants:	16%	20%
3,000 or more plants:	5%	21%

(the total does not equal 100% due to rounding)

n/m = not meaningful

the data indicating a sentence greater than the guideline minimum were controlled for prior offenses, i.e., those with prior offenses were not included



AP 1 1995 09:59 FROM CATO INSTITUTE TO 4/18/95

Testimony of  
David Boaz  
Executive Vice President  
Cato Institute  
before the  
U.S. Sentencing Commission  
March 14, 1995

As with any public policy, there are both costs and benefits to current policies with respect to drugs such as marijuana, cocaine, heroin, LSD, and PCP. Benefits are presumed to include a reduction in the use of such drugs, with such concomitant benefits as improved health of U.S. citizens, more productive work, and less crime, though the last claim is particularly controversial. Costs include a loss of individual liberty, public expenditures for enforcement and incarceration, lost work effort by those incarcerated, and an increase in crime because of black-market activities.

Weighing most of these costs and benefits is not within the scope of the Commission's authority. That task is the responsibility of Congress and the state legislatures, who would do well to consider the wisdom of spending \$15 billion a year to enforce a policy that arguably increases both property crime and violent crime. But the Commission can consider the direct costs of incarceration as a result of its sentencing guidelines.

In 1987 the Commission substantially increased the penalties for marijuana possession, with little investigation of what past practice had been or what the results in terms of drug prices and crime might be. It seems clear that rising penalties, while they may deter some drug use, also increase the price of illegal drugs, thus leading to more black-market crime. It would be

valuable for the Commission to analyze the relationship between drug prices and murder rates in our major cities. Such an analysis might lead the Commission to question the benefits of increased penalties and stepped-up enforcement.

However, the question before the Commission today is a narrow one: Should the marijuana sentencing guidelines be changed to treat each marijuana plant as the equivalent of 100 grams of marijuana rather than 1000 grams, thus reducing the sentencing range for those convicted of offenses involving 100 or more marijuana plants?

I would suggest first that 100 grams is in fact a much better estimate of the yield of a marijuana plant than 1000 grams, so the proposed change simply makes sense.

Second, I would suggest that there are definite benefits for American taxpayers in making this change. It costs \$20,804 to keep a prisoner in jail for a year. (That figure does not include construction costs.) By my calculations there were approximately 784 people convicted of marijuana offenses in 1992 for whom the minimum of the guideline range was higher than the applicable mandatory minimum. The cost of keeping those 784 people in prison for one year was \$16,310,000. If we estimate that they would average four additional years in prison based on the current guidelines, the taxpayers would be paying more than \$65 million in additional costs for those prisoners.

There are other costs to consider. Each prisoner displaces another potential prisoner. Would we be better served by keeping violent criminals in prison longer by freeing up beds now used by

marijuana offenders? The average violent criminal commits 40 robberies, 7 assaults, 110 burglaries, and 25 auto thefts in a year. If we had space to keep 784 more violent criminals in prison for a year, we could avoid 31,000 robberies, 5,000 assaults, 19,600 auto thefts, and 86,000 burglaries.

Another cost is the productive work not done by people in prison. Not only does it cost society \$20,804 to keep each offender in prison, GNP is reduced by the amount that he would have earned in that year. Let's assume that the average marijuana offender would earn not the median income but only 75 percent of the median income of American men. That means our GNP is reduced by \$12.1 million for each additional year that 784 offenders are incarcerated.

The change proposed here is small, and the benefits are small compared with the \$15 billion a year that America spends to enforce its drug laws. But \$28 million a year in incarceration costs plus lost output is still a cost worth considering, and I urge you to determine that it clearly exceeds whatever benefits the additional prison time may be supposed to produce. Thank you.



**TESTIMONY BY:** REVEREND ANDREW L. GUNN  
President, Clergy for Enlighten Drug Policy  
Pastor, St. Luke's UMC, Washington, D.C.

**DATE:** 3/14/95

**TO:** U.S. SENTENCING COMMISSION

Members of the Commission, we know that in order to have peace and tranquility in our land, we have to have good laws. Laws that are based on common sense and fairness and justice. Our democracy has elected officials to make those laws. When these elected officials create laws out of fear or anger, or vindictiveness, then we no longer have good and just laws.

I am here this morning to witness to the growing number of clergy and citizens who have become more and more disenchanted with the criminal justice system and the law and the way it is being enforced. There is growing anger towards mandatory sentences. Particularly against those who are non-violent offenders. There is growing hostility, resentment and disrespect for the injustices of our mandatory sentences and the legal manipulation of the law by legal professionals, and by the seizure laws and the drug laws that often are counter-productive and are doing more harm than good.

We citizens are spending 23 billion dollars on prisons and law enforcement with little positive results. The "Draconian" mandatory sentences are unfair and unjust, and they lack, in many cases, common sense. They do far more harm than good in the long run. They destroy families and individuals. We have demonized drug offenders and the whole drug problem. During the time of Christ, those who had leprosy were demonized; but Jesus did not demonize them, instead he healed them and helped them. I am the

President of Clergy for Enlighten Drug Policy and we receive letters from all over the country. Here is one from Columbia County Jail, Bloomsburg, PA. This woman is in jail for two and a half years. She is a widow with three children. She writes, "Where I live the courts prove over and over that violent crimes are the thing to do. A drunken woman serves eleven and a half months for vehicle homicide. A man kills an infant and gets three years. It really makes a person wonder what is wrong with the system. It is obvious that any alcohol related crime or crimes against innocent children will get you a slap on the wrist. Yet a drug offender who hurts no one gets a very stiff mandatory sentence".

As a citizen and as a clergy man, I am against alcohol, nicotine, marijuana, cocaine and all the other hard drugs. But on the other hand we recognize that alcohol, if appropriately used on social occasions, is acceptable. And that marijuana and cocaine can and should be used for medical reasons. In my judgement, we need to rethink our failed drug policies. They have become an excuse for police violence and corruption. In sentencing, the sentencing guidelines must be based on accurate facts. I am told that one thousand grams per marijuana plant is totally unreasonable and way off the mark. It should be one hundred grams per plant. Thus on this matter the guidelines should be changed and made retroactive. I've seen a chart where there is a cliff between certain numbers of plants of marijuana plants. I hope the Commission will consider rectifying this so that there are not these steep cliffs. I thank the Commission for this opportunity to appear before them and bring to you my testimony. Thank you very much.

A PROPOSAL TO HAVE FEDERAL SENTENCING GUIDELINES ADJUSTED  
BY LOWERING BASE OFFENSE LEVELS  
(THIS PROPOSAL IS TARGETED AT AMENDMENT #44)

SUBMITTED TO :  
UNITED STATES SENTENCING COMMISSION

SUBMITTED BY:  
THEODORA GARZA  
CONCERNED AMERICAN and  
STUDENT AT THE UNIVERSITY OF TEXAS  
IN SAN ANTONIO, TEXAS  
FEB.15th,1995



## SUMMARY

The present existence of mandatory minimum sentences imposed by Congress in 1987 for even the smallest federal drug violations has failed to reduce crime during its practice in federal courts. These mandatory sentences have kept non-violent offenders in prison for more time than violent criminals convicted of other offenses. Federal Judges are no longer allowed to use their discretion when passing sentences on to convicted offenders, and these minimums group all of the accused into one group where individual circumstances are not allowed to be taken into consideration. It is unjust for legitimate business people, such as car dealers or realtors to sell a car or a home to a person who unbeknownst to them is a drug dealer, and for the car dealer or realtor to later be prosecuted for money laundering, and consequently stand convicted on a drug offense. The American Business Sector are not trained D.E.A. agents. They are Americans who tried to follow in the path of the American Dream, and tried to run their business to the best of their knowledge. It is extremely unconstitutional to force such people to serve lengthy jail terms. It is a waste of taxpayer's money, and a waste of these people's lives. Additionally, the law has been poorly drafted, and while these mandatory minimum sentences are excellent political tools, they are **unconstitutional** and have failed to reduce drug crimes.

The United States Sentencing Commission should work to bring about changes in a failed system. The Commission should make recommendations to Congress for necessary revisions on federal sentencing guidelines to restore judicial discretion as well as fairness and sanity. The nation needs a more rational, pragmatic approach. It is simply not right for all accused persons to be thrown into one single category, where they must all face the same harsh sentences. Distinctions have to be made between non-violent offenders who were not directly involved in the drug business in any way, and offenders who have a history of violence. Base offense levels need to be lowered in order to avoid the imposition of an automatic lengthy jail term where individual circumstances were not taken into consideration. !!

## PROBLEMS WITH THE CURRENT SENTENCING GUIDELINES

There are several factors that cause the current sentences to be **unfair, unconstitutional, race biased, expensive, and a failure in general.** Prisons have become **grossly overcrowded** and violent criminals are being released in order to make room for those labeled as drug offenders.

1. The present mandatory sentences don't make distinctions for non-violent drug offenders. Small time offenders (**gofers and mules**), and **offenders such as money launderers**, some of whom have **never even seen drugs in their lives**, must face the same **harsh sentencing** as big ringleaders, and sometimes harsher sentences. Many of the people who stand convicted of money laundering were not involved in the selling of drugs in any way. They had no culpable intent. They simply sold an item to a person who later on was convicted of being a drug dealer. Many times these drug dealers are facing long sentences, and in turn decide to produce a "story" for prosecutors whereupon they inform the prosecutor of a business person who was willing to sell them an item without exposing them as being involved in illegal activity. The **true criminals are granted reduced sentences**, and legitimate, hard working business people's lives are ripped apart, and they must face the horrible reality of their inhumane sentences. **Prosecutors are cutting deals with high-level traffickers**, even those that are **animalistic thugs**. These violent thugs are used to testify against the "ignorant" car-dealers, or realtors, or accountants, and on and on. The word ignorant is used here to again emphasize that these business people were unaware that they were selling an item or providing a service to a drug dealer. Until these people stand convicted of such a



crime, it is not public knowledge that they are indeed drug dealers, and again, **business people are not trained Drug Enforcement Agents**. Surely it was never the intention of Congress to allow for such things to go on in the American Judicial System.

2. Prisons are extremely overcrowded ( with the wrong people ).

Federal prisons are **full of first time, non-violent drug offenders**. The federal inmate population has risen from 24,000 in 1980 to 76,815 today. Without changes it will top 116,000 in 1999. Some states, under court orders to ease prison overcrowding, are **routinely releasing violent criminals early to make room for drug offenders**. There is no statutory requirement that murderers and rapists be kept in prison, but there is a requirement that drug offenders, (money launderers, etc. ), be kept in. **Violent, threat imposing criminals are released into our streets to make room for non-violent minor league drug offenders**. Perhaps that is why the newspapers reek of stories such as the one involving Polly Klaas, **a child who was murdered by a violent offender who had been released. Was he released in order to make room for a money launderer?** The very idea of such things going on in my beloved country are scary indeed! **These mandatory minimums have created a lousy legal system that should not exist in America!**

3. The cost of maintaining prisoners is overwhelming.

American taxpayers pay **\$4.5 million a day to incarcerate federal prisoners**, and according to the Justice Department's estimates, **another \$100 million a week will be needed to build enough prisons just to hold mandatory minimum inmates**. Americans are tired of having to pay so much in taxes. Obviously, the maintaining and building of prisons to **house non-violent inmates is a great contributor to the tax burden**. Perhaps if the whole country were to become well informed !! with these circumstances, and be allowed to vote on this issue, they would vote to **release those non-violent people** who have had **draconian sentences** imposed upon them. Would an American Citizen be content with the fact that he or she was paying such a vast amount in taxes to **incarcerate someone such as a non-violent, clean record female realtor? Or a non-violent, clean record car dealer who sold a suburban to someone who he had no idea was a drug dealer?** And the examples go on and on and on. Is it right for taxpayers to be so unnecessarily burdened financially? And is it right for undeserving Americans to be denied the right to life, liberty, and the pursuit of happiness with the imposing of such **harsh, draconian sentences?**

4. Mandatory minimum sentences have packed prisons, but have not brought about any reduction in crime

Many of the nation's federal judges and members of the American Bar Association have concluded that the **mandatory minimums have been a failure**. Mandatory minimums have to be adjusted. **Distinctions must be made! Base offense levels should start out differently for different individuals**. Each accused person's history should be examined and taken into account. **A first time offender should not have to automatically start out with a five or ten year sentence**. The imposing of such a sentence is extremely harsh, to say the least. **What a waste of life!** Many of the people facing such sentences and currently serving such sentences are kind, giving intelligent people who have contributed much to society. **Why must they be torn from their families for such a lengthy period of time? Why can't they be allowed to contribute to society through community service?** Allow for them to contribute to society and not detract from it through all the taxes Americans must pay due to their incarceration. Each case that comes before a federal judge should be examined **individually**, with all existing circumstances being allowed to be taken into consideration.

## PROPOSAL

The United States Sentencing Commission should request that Congress immediately adjust federal sentencing guidelines. **Base offense levels need to be adjusted** : they **need to be lowered**. Again, they need to start out differently for different individuals. This **amendment must be retro-active** so that those who needlessly suffer with their imposed **draconian sentences** may again grasp some sort of hope that their nightmare of an ordeal might soon come to an end, and so that families can be united.

## JUSTIFICATION

As American Citizens, we are promised **life, liberty** and the **pursuit of happiness**. Certain laws that have existed in our country have removed some of these promises. For instance, we should remember that we had laws that agreed with slavery. **Slavery was accepted and condoned because recorded laws stated that it was legal. The law was wrong then, and it is wrong now with the imposition of mandatory minimum sentences.** Government and law are supposed to exist for the people, for the betterment of society, and not for the purpose of being unconstitutional. **It is time for this injustice to end.** Too many good, decent human beings are being ripped from their families, and **every family member painfully suffers needlessly**. Injustice is not what America is about. Incarcerating non-violent fathers, mothers, sisters and brothers for long, pain staking sentences is not bettering society. Children of all ages need their mothers and fathers. Having a father or mother figure in a young person's life is detrimental.

The evidence shows that the mandatory laws have drastically failed. All that these laws have created are situations in which prisons have surpassed their holding capacities, and taxpayers have unnecessarily spent millions.

I personally witnessed the **rape of justice** when dealing with federal sentences through the conviction of my father and brother. They were both accused of money laundering. A violent drug dealer was arrested, and was facing twenty to twenty five years in jail for various crimes. Through his high priced attorney, he decided to plead guilty and realized that he could have his sentence drastically reduced if he produced a "story" for the prosecutors. The drug dealer had bought several vehicles from my father's dealership, and my brother was the salesman in the transactions. At the time of his purchases, **it was not a known fact that he was in fact a drug dealer.** His brother was the County Clerk in my father's town, and had served on the school board for many years. They both represented to the townspeople that they had a legitimate horse racing business from which they derived a substantial income. They raced their horses at various racetracks, and had a business account at the local bank. (**Our attorneys, more interested in their fees than in their clients,** did not bother to mention this important fact to the jurors.) This drug dealer told the prosecutors that my family knew he was a drug dealer, and that they were very accommodating to him when selling him the vehicles. Our attorneys also failed to mention to the jury that each time a vehicle was sold to this person, a check for the cost of the vehicle had to immediately be written out to GMAC since all of the vehicles on the lot were simply lent to the dealership on a consignment basis. There is not much profit in the sale of new vehicles. My father's dealership made about two or three hundred dollars (or less) each time a vehicle was sold to this person. The jury was kept under the impression that each time a vehicle was bought by this person, the full amount went



straight into my father's and brother's pockets. **No amount of money in the world could compensate for this nightmare that we all now currently live in.**

The outcome of the trial was that the **violent drug dealer**, a cold-blooded thug, (as we learned through the trial as his crimes were exposed), **got his sentence reduced to a measly three years**, due to his "honesty and cooperation", and my father and brother were damned with almost seven.

My **brother** is a hard working **non-violent young man** who simply did his job and sold cars for a commission. He never even handled any of the money at the dealership, yet he stands convicted of being a money launderer. The commissions he earned will never add up to the cost of many years of his life and freedom.

My **father** is probably **one of the last living altruists**. He was a **Volunteer Fireman** in his community, as well as a **Boy Scout Troop leader to many fine men**. He has **never** been involved with drugs, and would probably not even know what they look like, yet he stands convicted on a drug offense. This fifty-three year old man who continuously served his community throughout his life, must now waste it in a prison. The prosecutor, a woman who asks for leniency where thugs are concerned, stared at him throughout the trial as if he were a mass murderer. **It broke my heart, but not quite my hope. I still possess some sort of hope that justice can come into our lives, and the lives of others like us, who needlessly suffer.**

**That is the purpose of this letter: to try and make my hopes a reality.**

## CONCLUSION

By adjusting federal sentencing laws, and **lowering base offense levels**, constitutional rights can be restored, and accused Americans won't have to face **inhumane, barbaric** sentences where they are incarcerated for **inanely mandated periods of time**. Improved laws will make for a better society. Human compassion must come into focus, and non-violent human beings who made a mistake, or who were found guilty by an uncaring, uninformed jury, should have their lengthy sentences reduced so that they can bring to an end their unbearable nightmares.