Chairman Wilkins and Members of the Commission:

My name is Alan J. Chaset and I am appearing on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization whose membership is comprised of more than 8,000 lawyers and 25,000 affiliate members who practice in every state and federal district. NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to insure justice and due process for all persons accused of crime, to foster the independence and expertise of the criminal defense bar and to preserve the adversary system in the criminal justice arena. NACDL's ongoing efforts to achieve those goals brings me here today to share our views about your set of proposed changes to the Sentencing Guidelines.

For the past six years, I have served as the Chair or Vice-Chair of the NACDL's Sentencing and Post-Conviction Committees and, in that capacity, have had the opportunity and pleasure of working with members of the commission and its staff on several related matters including the drafting of proposed amendments, the training of various actors in the federal criminal justice system, and the preparation of numerous articles on the guidelines. In that latter regard, this year saw the introduction of a bimonthly column in the Association's periodical *The Champion* devoted almost exclusively to Sentencing Guidelines issues; copies of the first three installments of "Grid and Bear It" are being made available under separate cover.

Before presenting our specific responses to the various proposals and requests for comments, I would like to address a number of more general issues regarding the commission and its guidelines. While much of what follows has been said before and while many of these same points will be raised anew by others, I believe that it remains both necessary and appropriate to rearticulate these matters. And, while the commission has so far not seen fit to adopt these basic suggestions, NACDL appreciates the fact that, at least in this forum, we are being given more than "three-strikes" at the system.

First, NACDL continues to believe that the commission should have crafted and should now reformulate the system to focus initial attention on whether or not the individual defendant warrants incarceration for his/her offense: the "in-out" decision. Only after it is determined that some period of incarceration is required would the guidelines come into play to assist in the calculation of the length of that period of imprisonment. As a closely related corollary, we support the fundamental principle of parsimony articulated in 18 U.S.C. § 3553(a): sentences ought to be no more severe than necessary to achieve the various purposes of sentencing.

Second, we continue to believe that the guideline calculations should be based solely on the precise conduct for which the defendant has been found, or to which the defendant has pled guilty. Thus, we are supportive of amendments that move away from the "real offense" concept and towards sanctioning based upon the offense of conviction. Next, while we find laudable the move toward assuring that similar offenders who commit similar offenses are treated similarly, we still do not feel that the current system affords sufficient opportunity to highlight and weigh legitimate differences and dissimilarities, especially as concerns offender characteristics. Too much emphasis remains on factors such as drug quantities and dollar amounts; too little attention is afforded to who the offender is and what function he/she may have played in the offense.

Fourth, NACDL continues to believe that trial judges should generally be provided with broader authority and greater discretion to depart from the calculated guideline range. That flaw in the current system is most blatant and the need for change most glaring in the area of substantial assistance and cooperation. We believe that each actor in the system should be able to initiate the consideration of a departure in this regard. And we believe that the commission should formulate provisions to eliminate some of the other restrictions/limitations on the implementation and application of § 5K1.1 that have been adopted in several districts. The resulting disparity here clearly merits remedial attention.

Additionally, we believe that there have been too many and too many inappropriate changes to the guidelines over the several years of their existence. While we remain advocates for some basic changes and while we will be voicing our support for some of the proposals provided in this round of amendments, NACDL believes that the need for any amendment to the system must be demonstrated and supported by empirical data and sound analysis and must be accompanied by an assessment of the potential impact that the change might have on the population of the Bureau of Prisons. Even as our representatives several blocks away debate the potential for assigning billions of dollars for new prison construction, it remains crucial for the commission to undertake its statutory obligation to insure that the guidelines minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.

Moreover, we believe that the commission's amendment task this year is complicated by the fact that there still is less than the full complement of commissioners and some significant questions exists as to whether some of the "holdovers" can appropriately vote to amend the system. In the face of those questions and in order to avoid unnecessary litigation, NACDL urges the commission to postpone its consideration

of all proposed amendments until it is at full strength.

In regard to those vacancies, NACDL would like to use this occasion to implore the administration to act swiftly on the appointment process. As we have stated in the past, there remains a distinct need to insure that representatives of the defense bar serve in some capacity on the commission. Whether more appropriately as a commissioner or in an *ex officio* capacity similar to the designee of the Attorney General and the Chair of the Parole Commission, it is time for such an individual to take his or her place at the table. We urge the commission to lend its full support to the effort to secure such a position.

Finally, we are acquainted with the efforts of our colleagues at the American Bar Association to craft a set of proposals concerning certain administrative rules and procedures to guide the commission in the conduct of its business. Without repeating those suggestions here, please permit me to both applaud that significant effort and to note NACDL's support for the general thrust of and the specific details contained therein. We urge the commission to fully explore those matters through the creation of a working group and we ask that a package of recommendations in this regard be included in the next round of amendments. While several of our members already participate within the responsible ABA committees, we pledge our continuing assistance in this endeavor.

Turning now to the amendments and requests for comments as proposed, NACDL offers the following responses:

AMENDMENT 1

NACDL opposes the amendments being proposed here for computer-related crimes as unnecessary and, in certain instances, overly broad. We share the views of (and adopt the comments provided by) the Practitioners' Advisory Group in this regard believing that there exists too little experience with these offenses to as yet craft appropriate guidelines.

AMENDMENT 2

As to 2(A), while favoring the elimination of the Specific Offense Characteristic in § 2C1.3, NACDL believes that the further consideration of the consolidation of this guideline and § 2C1.4 should be deferred pending review of the modification to 18 U.S.C. § 216. As to 2(B), while we have no specific objection to the consolidation of §§ 2C1.2 and 2C1.6, we continue to oppose level increases for more than one gratuity and remain concerned with the eight level increase for an official holding a "high-level decision-making or sensitive position; we believe that the value table and/or departure provisions can better address such matters. And, as to 2(C), NACDL opposes the consolidation of §§ 2C1.1 and 2C1.2. The differences between these two offenses are sufficiently substantial as to warrant separate guidelines.

AMENDMENT 3

NACDL would favor the modification of the base offense levels for Blackmail, Bribery Affecting Employee Benefit Plans, and Gratuities Affecting Employee Benefit Plans so that the sanctions for non-public corruption offenses are lower than those for public corruption cases and would oppose any other modification that would tend to equate the levels for those clearly different offenses. We oppose the proposed base offense level increases for §§ 2C1.1, 2C1.2 and 2C1.7 as we believe that non-incarcerative sentences should still be at least available as a potential for some of these offenses; and we favor lowering the offense level for corruption gratuity from seven to five.

AMENDMENT 4

In regard to the proposed changes to §§ 2C1.1 and 2C1.2, NACDL favors Option two which would eliminate the Specific Offense Characteristic addressing more than one incident of bribery/gratuity. With commission data reflecting the fact that the majority of cases receive this level increase, we believe that the continued use of this characteristic serves only to inappropriately increase the sentence for a factor that is already adequately addressed in the value table. Value or benefit of the payment is the better measure of offense severity. Because we favor Option 2, we see no need to comment on 4(B).

AMENDMENT 5

NACDL opposes the proposal in 5(A) to make cumulative the adjustments for the value of the payment and for high-level official in §§ 2C1.1, 2C1.2 and 2C1.7. The results that such a change would produce are clearly more severe than warranted. If, however, the commission were to adopt this proposal, we recommend that the adjustment for high-level official be reduced to two levels, permitting judges to depart in atypical, unusual cases. As to 5(B), while we favor the total elimination of any enhancement that depends upon the position of the bribee, we recommend that such an enhancement, if retained, should not exceed two levels. And, if the commission desires some sliding scale here, then we believe that the range should be from two to six levels with objective criteria developed (and clear examples provided) to guide in their application.

AMENDMENT 6

As to 6(A), NACDL does not object to the proposed clarifications in §§ 2C1.1 and 2C1.7 that the "payment" involved

in the offense need not be monetary. And, while opposing the size of the level increase, we favor the change to § 2C1.7 to clarify that private officials are not considered high-level officials for purposes of this enhancement. As to 6(B), while favoring the definition of "benefit received" as discussed in *United States v. Narvaez*, we remain uncomfortable with the commission's attempts to resolve potentially conflicting circuit interpretations and approaches to guideline issues and would allow the courts more time to address such matters. Finally, as to 6(C), NACDL opposes the proposal to add the potential for an upward departure under § 2C1.1 where the offense involves ongoing harm or a risk of ongoing harm to a government entity or program. Given the fact that the base offense level here (10) is already quite significant, any need to account for such risk can be addressed by the court's movement to a sanction in the higher part of the associated range.

AMENDMENT 7

NACDL does not share the conclusion that the holdings in the three cited cases and the requirements within 28 U.S.C. § 994(d) provide an example of a critical policy matter that warrants immediate commission attention. We believe that issues such as this should typically be allowed to additionally percolate throughout the federal court system before the commission attempts to resolve or bring cloture to them. For the present, we believe that the trial and appellate courts should be permitted to read both 28 U.S.C. § 994(d) and 18 U.S.C. § 3553(b) and then decide for themselves whatever tensions might exist between the two provisions and how to resolve same in the context of the facts and circumstances of the specific case. With the arguable exception of the "Crack" provisions, the commission has significantly and successfully performed its § 994(d) obligation and there exists no present need to revisit that effort for cultural matters in general or for public corruption cases in particular.

AMENDMENT 8

NACDL supports the proposed revisions in the Drug Quantity Table in § 2D1.1 as a step in the right direction. For many of the reasons that are discussed in our introductory remarks herein, we believe that 8(A)'s establishment of level 38 as the upper end of the scale and its keying of the mandatory minimums to the upper end of the guideline range will bring more fairness and rationality into the system as regards these offenses. Having said that, however, we remain convinced that more changes need to be made in order to address the consequences of these sanctions for these offenses as portrayed in the Department of Justice's recently released study of low-level, non-violent drug offenders. For similar reasons, we would support capping the offense level at 30 for defendants who qualify for a mitigating role adjustment as proposed in 8(C).

As to 8(B), while recognizing that an increased enhancement for weapons and firearms might be used as a "trade-off" for the quantity decreases elsewhere being proposed, NACDL continues to oppose such a change.

AMENDMENT 9

Since the principal impact of this proposal would be to count undercover law enforcement officers as participants in jointly undertaken activity for aggravating role/§ 3B1.1 purposes, NACDL opposes this amendment. We believe that the main flaw in this guideline remains the words "or otherwise extensive," a phrase whose vagueness continues to foster disparate application.

AMENDMENT 10

NACDL welcomes and strongly supports the proposed revisions to the introductory commentary accompanying the Role in the Offense adjustment in Part B of Chapter Three. The clarifying language and examples provided should assist in securing a more consistent application of these adjustments.

As regards the proposed changes to the Application Notes accompanying § 3B1.2 *Mitigating Role*, we are generally supportive of just about all of these useful clarifications. We recommend the deletion of paragraph 4 as too inflexible; the decision as regards the role decrease for "mules" should be made in the context of the specific fact pattern involved. We also recommend against the adoption of either option in paragraph 5 because it inappropriately introduces a factor (use/possession of firearms) unrelated to the concept at hand and because it can be more adequately addressed in other sections of the guidelines (specific offense characteristic). We would also recommend the deletion of the phrase "i.e., value of $1000.00 or less, generally in the form of a flat fee" in paragraph 2(C); the concept to be addressed here should be "small in relationship to the size of the conspiracy" without any additional specificity.

AMENDMENT 11

In regard to money laundering, NACDL continues to believe that the sanctioning here needs to be revisited and the guideline consequences revised. We continue to agree with the commission's study group that the sentences provided for money laundering conduct should be the same as for the underlying offense where that conduct is essentially the same; we continue to be troubled by the government's attempts to ratchet up sanctions and to inappropriately influence plea bargaining through the use and/or threatened use of the money

laundering provisions. Also, while the proposal here represents the commission's recognition of these problems and a first step to remediate same, it does not go far enough.

AMENDMENTS 12 & 20

NACDL strongly supports the changes proposed in Amendment 12(A) that would result in the elimination of the term "more than minimal planning" as a specific offense characteristic in several guidelines and that would substitute in its stead the term "sophisticated planning." We believe that this change will improve the structure of the guidelines in two significant respects.

First, the continued recognition of planning and preparation as an important factor in assessing relative culpability is consistent with the analysis that the commission conducted on pre-guideline practices. However, it appears that the courts, in interpreting the existing language, have found "more than minimal planning" in virtually all the facts and circumstances that they face. As a result, the basic guideline heartland-type concept of differentiating base offense level cases from others through the use of specific offense characteristic adjustments has seemingly been lost: if all defendants receive the associated level increase for clearly dissimilar quantities/qualities of planning, then the specific offense characteristic serves no function other than to indirectly increase the base offense level. Therefore, adopting the proposed new definition and substituting it within the various guidelines would advance the original intent of the commission in this regard and would promote fairness by providing the courts with a better mechanism to rationally distinguish between offenders and their offenses.

As regards the proposal in 12(B) that seeks to raise the base offense level in § 2B1.1 to the same as that in § 2F1.1, NACDL opposes this change. We maintain that there exists sufficient differences between and amongst larceny and theft cases and fraud and deceit cases (particularly at the low end) as to warrant the current base level differential. We believe that prior practice correctly reflected those differences and that the change proposed would tend to increase disparity by treating dissimilar cases similarly. If, however, the commission were to continue to view the need for seeming consistency as an imperative, then we suggest the formation of a working group to further study the issue. If the results of such a study were to uncover both a real need to harmonize these two provisions and a limited potential for disparate results, then NACDL would support a reduction to the base offense level in § 2F1.1 rather than an increase in that level under § 2B1.1.

Finally, as to 12(C), the commission has sought comment on changing the increments in the loss tables of §§ 2B1.1, 2F1.1 and 2T4.1, offering two options in that regard. The stated reason for such a change relates to the non-uniform slope of the existing tables. NACDL strongly opposes any such change in the tables. While we do not view the rationale offered as a sufficient reason to undertake such a change, we also remain concerned about the guideline application confusion that such a change would engender. If the commission remains convinced that this type of tinkering is important, we recommend the formation of a working group to establish and demonstrate how the new amount thresholds better differentiate between offenses.

And as to the three items proposed in Amendment 20, we likewise suggest the formation of a working group to study the entire "loss" definition issue. While consistency between §§ 2B1.1 and 2F1.1 might be a legitimate goal, NACDL is not yet convinced that the need exists for the changes being recommended.

AMENDMENT 13

In regard to the various proposals to amend some of the career offender provisions in Chapter Four, NACDL opposes 13(A) with its recommended addition to the Commentary for § 4B1.1. We believe that an offender should not be placed in the career offender category based upon a conviction for a conspiracy to commit a substantive offense or for an attempt to commit a substantive offense.

NACDL does support, however, the remaining proposals: 13(B) would appropriately avoid unwarranted double-counting by defining the term "offense statutory maximum" as the statutory maximum prior to any enhancement based on prior criminal record; 13(C), Option 1 is the more favorable method of ensuring that this provision impacts the "true recidivist" by providing that the offenses that resulted in the two qualifying prior convictions must be separated by an intervening arrest for one of the offenses; 13(D) would correctly eliminate non-residential burglaries from consideration as crimes of violence for § 4B1.2 purposes; and 13(E) serves to appropriately narrow the definition of crimes of violence that "otherwise involve conduct that presents a serious risk of physical injury" to offenses that are similar to the offenses expressly listed.

AMENDMENT 14

NACDL strongly supports this proposal in general and the bracketed language "or combination of characteristics or circumstances" in particular as providing most useful and workable guidance and clarification for the application of the departure provisions of § 5K2.0.

AMENDMENT 15

While NACDL supports all efforts to simplify the opera-

tion of the guidelines, we remain uncomfortable with the long list of changes being proposed herein because we have seen no evidence/data that these particular guideline sections have been the source of confusion and misapplication nor have we been provided with information that these changes will adequately address those problems.

AMENDMENT 16

While believing that it is most appropriate to provide more flexibility throughout the entire system as regards older and infirmed and older, infirmed defendants, NACDL recognizes that this issue does not lend itself to simple, discrete suggestions. It is recommended, therefore, that the commission form a working group (made up of commission and Bureau of Prisons staff and others) to explore this topic and its guideline and statutory ramifications. The goal of such an effort would be, amongst other things, to develop a uniform set of criteria and definitions to inform the initial sentencing decision, to develop similar criteria and definitions for changes in circumstances during the period of confinement and supervision and to develop a mechanism for addressing those changed circumstances in a uniform, expeditious manner. Given the fact that the overall federal prison population is rapidly aging and considering the fact that current legislative initiatives may result in more individuals serving longer periods of time, the need to address this issue in a more systemic manner appears imperative.

AMENDMENT 17

As to the various miscellaneous substantive, clarifying and conforming amendments contained in this item, NACDL supports 17(A) as appropriately clarifying § 1B1.3 through the addition of helpful language in the Application Notes, 17(D) as adding useful definitions for hashish/hashish oil cases, 17(M) as simplifying the application of § 3D1.2, and 17(O) as appropriately clarifying § 5G1.1. As to 17(Q), we support Option 1, providing that a false statement made to a probation officer during supervision is to be treated as a Grade C violation. As to 17(I), since NACDL favors the position taken in *United States v. Concepcion*, we oppose the clarification of the application of subsection (c) of § 2K2.1. As to the remaining proposals herein, NACDL takes no position.

AMENDMENT 18

NACDL continues to strongly support proposals that would limit the use of acquitted conduct for guideline purposes. While we believe that such conduct should also not be used for departure purposes, we credit the proposal offered by the PAG as at least providing more fairness and flexibility than currently exists within the system.

AMENDMENTS 19 & 31

While remaining concerned with some of the *ex post facto* implications of this guideline in general, NACDL supports the proposed changes to § 1B1.10. The minor clarifying revisions and the deletion of subsection (c) should assist the courts and the parties in more easily applying the provisions of this guideline. Additionally, as regards the issue for comment raised within Amendment 31, we would support a further amendment to this section that would provide that, when considering a sentence reduction where the applicable range has been lowered, the amended guideline range is to be determined by using only those amendments that have been expressly designated for retroactive application in conjunction with the manual used at the defendant's original sentencing. The existing provisions here require the use of the current manual in its entirety, effectively (and inappropriately) granting retroactive status to all of the amendments issued subsequent to the original sentencing, both those that might help and those that might harm the defendant.

AMENDMENT 21

NACDL supports this proposal that would treat all attempted conduct similarly, regardless of the language in the title of the applicable statute.

AMENDMENT 22

NACDL strongly supports Option 1 in this proposal crafted to address the limited application of § 5K2.13 *Diminished Capacity* to non-violent offenses. We believe that the favored option provides a more rationale and reasoned approach to the issue and would argue that the second paragraph in the synopsis well captures and explicates our position.

AMENDMENT 23

NACDL opposes the proposed change to § 5G1.3. While the amendment is designed to resolve the difficulty in obtaining information about prior unexpired state and local offenses and the problems in accurately applying such information to the guidelines process, we believe that that difficulty and those problems are overstated and that, in any event, this amendment affords no clear solution. While recognizing that the commission has long struggled with this issue, we see no present need to make an additional change. Moreover, we remain concerned that, while the language appears to afford more flexibility for the imposition of concurrent or consecutive sentences, the other changes contained within will actually require defendants to serve unnecessarily longer and often more disparate periods of incarceration.

AMENDMENT 24

NACDL strongly endorses the proposed change to Note 12 of § 2D1.1 that currently advises that the amount of drugs that was the subject of negotiations determines the offense level save where the defendant establishes that he did not intend *and* was not capable of delivering the negotiated amount. The amendment would change the word "and" to "or" so that either capacity *or* intent can reduce the amount negotiated. Not only would such an amendment speak to the general need to reduce the emphasis on drug amounts, but also such a change would more adequately address the fact that an offender who wants to deliver/buy more, but cannot and/or one who has the means, but does not want to be involved with more is less culpable. Additionally, it would lessen the opportunity for guideline manipulation by case agents and law enforcement officers.

AMENDMENT 25

NACDL supports the revision in Option 1 that would amend § 2P1.1 to conform the definition of non-secure custody in subsection (b)(3) to that used in subsection (b)(2).

AMENDMENT 26

While NACDL does not oppose the distinction being proposed between the base offense level in § 2H2.1 where the defendant corrupts the registration or votes of others and where the defendant corrupts only his own registration or ballot, we remain concerned with that base level remaining at 12 for obstruction of the right to vote by forgery, fraud, theft, bribery or deceit because it exceeds the base offense level of 10 for bribery (§ 2C1.1), a more serious offense.

AMENDMENT 27

NACDL continues to oppose any and all proposals that would attempt to add adjustments or other base offense level increases as a function of membership in or association with a gang, criminal or otherwise. For the present, we believe that the role adjustment in § 3B1.1 is sufficient to address this issue.

AMENDMENTS 28, 29 & 30

While offering no specific comments, NACDL sees no need to amend the guidelines to provide the enhancements or increases being proposed nor does it see the present need to add any additional distinctions or categories within Chapter Four or the Sentencing Table in Chapter Five. Although we have in the past supported the development of a Criminal History Category for those with totally clean records (no arrests and no convictions), we understand and appreciate the commission's position in this regard and do not ask that that decision be revisited.

AMENDMENT 32

While welcoming opportunities to expand the coverage of and the rewards to be received under the provisions of § 2E1.1 even for those defendants who proceed to trial, NACDL opposes this otherwise well intended proposal. The language as proposed is too vague and ambiguous and appears to suggest that those defendants who go to trial and vigorously contest the government's proof by objections, motions, etc., should be placed in a worse situation than those who do otherwise.

AMENDMENT 33

This amendment seeks comment as to the need to explore and then modify the provisions within § 2D1.1 as regards both the ratio between powder cocaine and crack cocaine and the equivalency between marijuana and marijuana plants. NACDL believes strongly that each of these issues merit commission attention and remedial action to eliminate what we perceive as amongst the most grossly unfair, illogical and racially biased provisions of the guidelines. While we recognize that the commission has already commenced a study of the crack cocaine issue, we believe that a similar effort should be undertaken as to marijuana. Additionally, we believe that the commission should likewise urge Congress to revisit these matters and, in the meanwhile, it should on its own at least reduce the sanctions here as regards those drug amounts above the mandatory minimum levels.

AMENDMENT 34

NACDL opposes the creation of a new adjustment within Chapter Three to address harm caused when there is more than one victim. There is no empirical basis available that demonstrates either the need for such an adjustment or the fact that existing provisions (including departures) are inadequate to address this factor. Similarly, we see no need for the creation of a generalized victim table. If data are developed that demonstrate such a need for particular offense categories, the proper way to address such would be the development of a specific offense characteristic for those offenses.

AMENDMENT 35

NACDL opposes the proposal to provide a minimum offense level of 14 for an organized scheme to steal mail. Aside from the ambiguity/vagueness in the proposed language and absent more data in this regard, current base offense levels, increases for the amounts of gain/loss and role adjustments appear sufficient to address this offense conduct. ■

Testimony of the Drug Policy Foundation
Kevin B. Zeese
Vice President and Counsel

On Amendments to the Sentencing Guidelines for 1994

Before The United States Sentencing Commission

March 25, 1994

The Drug Policy Foundation
4455 Connecticut Ave., NW
Suite B-500
Washington, D.C. 20005
202-537-5005

Testimony of the Drug Policy Foundation
Kevin B. Zeese
Vice President and Counsel
On Amendments to the Sentencing Guidelines for 1994

The Drug Policy Foundation is an organization made up of police officials, judges, doctors, academics, lawyers, business leaders and other citizens concerned about the lack of effectiveness of the current drug control strategy of the United States. The Foundation opposes extreme drug war measures but does not stand for legalization, decriminalization or other specific reforms. The Foundation is a forum for diverse views on alternatives to the war on drugs.

I. General Considerations

The Foundation supports reform in both the cocaine-crack ratio as well as the weight of marijuana plants. In this testimony I will primarily focus on the latter issue.

If the Commission decides to change either or both of these guidelines, such changes should be made retroactive. It is simply unjust to recognize that the guidelines were inappropriate or unjustified and to allow people to remain incarcerated based on those guidelines.

With regard to both issues there are some common themes. Both of these guidelines are inconsistent with two goals of the Sentencing Reform Act of 1984, Pub. Law No. 98-473, 98 Stat. 1937 (1984). One of the primary goals of the Act was to reduce sentencing disparity and thereby improve the quality of justice. As the Senate Report noted, "an unjustifiably wide range of sentences [has been imposed upon] offenders with similar histories, convicted of similar crimes, committed under similar circumstances." Senate Report No. 98-225, at 38 (1984). Both the crack-cocaine and

marijuana cultivation guidelines increase disparity, and result in people who have committed similar crimes being punished disproportionately.

Another problem with both of the current guidelines on these two issues is honesty in sentencing. The crack-cocaine disparity is simply dishonest. Both crack and cocaine are the same psychoactive substance, have similar effects and deserve to be treated equally. With regard to marijuana plants, the marijuana plant simply does not produce one kilogram of marijuana. There is no basis for this number in the literature on marijuana cultivation — whether produced by government or private agencies. The figure is dishonest and should not be the basis for determining length of incarceration.

Finally, both of the current guidelines result in inappropriately harsh sentences and therefore loss of respect for the law. In the case of the crack-cocaine guideline, sentencing disparity is particularly acute because treating crack offenders more harshly than powdered-cocaine offenders has significant racial overtones. As a number of courts have noted, African-Americans are being punished more often and more severely because crack is more common in their communities.

II. Appropriate Weight for Marijuana Plants

The Sentencing Commission should be commended for considering changes in the sentencing of people who cultivate marijuana. Marijuana is not as controversial a drug as crack, cocaine or heroin and, therefore, is often ignored. In fact, in 1992 there were 4,313 marijuana offenders in the federal system. Therefore, a significant number of people are affected by the marijuana sentencing guidelines. Thus, it is appropriate for the Commission to focus on the sentencing of marijuana offenders under the guidelines.

There are several problems with the current approach taken by the guidelines with regard to marijuana plants.

1. The current approach creates a cliff effect for people involved in cultivation of over 49 plants. The current guidelines treat 49 and fewer plants as having a standardized yield of 100 grams per plant, unless the plant actually produced a greater quantity. When a case involves more than 49 plants, the guidelines adopt a one kilogram-per-plant standard yield. Thus, there is a steep cliff at this level with a jump in the sentencing guideline from 10 months to 33 months.

2. The current approach creates disparity between people possessing or trafficking in harvested marijuana and those growing marijuana. The current guideline approach creates a ten-fold disparity between people committing similar offenses.

3. The current approach presents certain problems when plants are particularly young. People who grow marijuana begin with a large number of seedlings. However, when the plant matures and its sex becomes evident, approximately half the plants are destroyed because they are males. Thus, an individual arrested growing 50 seedlings will be disproportionately punished in comparison with the actual crime committed.

4. The one-kilogram-per-plant ratio is simply not justified by any scientific evidence. This was noted in U.S. v. Osburn, 756 F. Supp. 571 (N.D. Ga., 1991) where the court concluded: "There is no rational basis to support the Commission's 1000 gram-per-plant ratio for plants in groups of 50 or more . . . . The record clearly demonstrates that a 1000 gram equivalency cannot be empirically supported." The evidence considered in the case included research conducted by the legal marijuana grower for the University of Mississippi, Dr. Mahmoud A. ElSohly, who testified he had never seen a plant that produced one kilogram. Dr. ElSohly grows marijuana for

research and medical purposes. See also, U.S. v. Lee, 762 F. Supp. 306 at 307 (D. Kansas, 1991) where the court concluded that "100 plants can never produce 100 kilograms."

Therefore, the Foundation makes three recommendations:

1. Apply the 100 grams-per-plant equivalency currently used in cases involving 49 plants and under to all marijuana cultivation cases with regard to female plants. In Osburn, Dr. ElSohly testified that "a sentencing scheme based on 100 grams-per-plant would be reasonable. . . ." Osburn at 573. The 100-gram equivalency has been accepted by the courts. U.S. v. Streeter, 907 F.2d 781 (8th Cir., 1990); U.S. v. Bradley, 905 F.2d 359 (11th Cir., 1990).

2. Male plants produce marijuana with extremely low levels of it's psychoactive ingredient, THC, and are generally discarded by growers. Male plants should not be counted in determining sentences.

3. Only 50 percent of seedlings should be counted using the 100 grams per plant equivalency, because generally half of all plants are males, which will be destroyed.

III. The Cocaine-to-Crack Ratio

The 100-to-1 ratio between powdered cocaine and crack cocaine should be amended so that powdered cocaine and crack cocaine are treated equally. There is no scientific basis for treating one unit of crack as 100 units of powdered cocaine. This ratio has been described by a leading pharmacologist as "arbitrary, capricious and scientifically and medically wrong. It is doesn't reflect the reality of the molecule. It is not a different drug." Ronald Siegel, New England Journal of Medicine, as quoted in USA Today, May 26, 1993, at 1.

The initial justification for treating powdered cocaine and crack cocaine differently was based on the alleged violence caused by crack. Research conducted in recent years shows that crack is not a violence-inducing drug to any degree different from powdered cocaine. In a study of 414 drug-related homicides in New York City involving 490 perpetrators and 434 victims, the research found that only one homicide could be described as caused by crack intoxication. Paul Goldstein et al., "Most Drug-Related Murders Result from Crack Sales, Not Use," The Drug Policy Letter, March/April 1990, 6-9.

With the institution of the disparity in treatment of crack and powdered cocaine users, there has been a dramatic shift in the federal prison population with regard to race. African-American offenders grewfrom 10 percent of the mandatory minimum drug offenders in 1984 to 28 percent by 1990. The difference in the average sentence between whites and blacks was 11 percent in 1986, and, by 1990, the average sentence for black offenders was 49 percent higher than white offenders. There is also great disparity between whites, blacks and Hispanics when it comes to the likelihood of receiving a mandatory sentence. Federal Judicial Center, "The General Effect of Mandatory Minimum Prison Terms," 1992.

With regard to powder cocaine and crack laws, the racial disparity is striking. A U.S. Sentencing Commission report found that in FY 1992, of all of the defendants sentenced for crack violations 92.6 percent were black, as compared with 4.7 percent who were white. In addition, 45.2 percent of defendants sentenced for powdered cocaine were white, as compared with 20.7 percent of black defendants. Of particular note, all of the defendants sentenced for simple possession of crack were black. These figures are consistent with figures contained in the U.S. Department of Justice's Sourcebook of Criminal Justice Statistics table entitled "Defendants

Sentenced for Drug Trafficking Under U.S. Sentencing Commission Guidelines." According to the table, in 1992, 91.5 percent of those sentenced for crack were black, while 3 percent were white; and 30.9 percent of those sentenced for powdered cocaine were black compared with 32 percent who were white.

While federal courts have refused to find an equal protection violation due to this dispropotionate impact, courts have acknowledged that the racially disproportionate impact exists. Courts have merely said that showing a racially disproportionate impact is not enough. See, e.g. U.S. v. Galloway, 951 F.2d 64 (5th Cir., 1992); U.S. v. Simmons, __F.2d__(8th Cir., May 15, 1992) No. 91-1368.

Thus, in addition to making no pharmacological sense, the differentiation between crack and powdered cocaine sentences has a significant racially disproportionate effect. For these reasons, the Foundation recommends treating powdered cocaine and crack equally. As with the previous recommendation, the Foundation urges the Commission to make these changes retroactive.

Sentenced for Drug Trafficking Under U.S. Sentencing Commission Guidelines." According to the table, in 1992, 91.5 percent of those sentenced for crack were black, while 3 percent were white; and 30.9 percent of those sentenced for powdered cocaine were black compared with 32 percent who were white.

While federal courts have refused to find an equal protection violation due to this dispropotionate impact, courts have acknowledged that the racially disproportionate impact exists. Courts have merely said that showing a racially disproportionate impact is not enough. See, e.g. U.S. v. Galloway, 951 F.2d 64 (5th Cir., 1992); U.S. v. Simmons, F.2d (8th Cir., May 15, 1992) No. 91-1368.

Thus, in addition to making no pharmacological sense, the differentiation between crack and powdered cocaine sentences has a significant racially disproportionate effect. For these reasons, the Foundation recommends treating powdered cocaine and crack equally. As with the previous recommendation, the Foundation urges the Commission to make these changes retroactive.

TESTIMONY OF
PROFESSOR JONATHAN TURLEY
DIRECTOR, PROJECT FOR OLDER PRISONERS (POPS)
GEORGE WASHINGTON UNIVERSITY
BEFORE
THE UNITED STATES SENTENCING COMMISSION
MARCH 24, 1994

Washington, D.C.

Chairman Wilkins, on behalf of the Project for Older Prisoners, let me begin by thanking the United States Sentencing Commission for the opportunity to speak with you today. As you know, I have addressed this body on previous occasions on the subject of older prisoners in the federal system. I am happy to continue this dialogue today with the consideration of an amendment to the United States Sentencing Guidelines.

THE PROJECT FOR OLDER PRISONERS

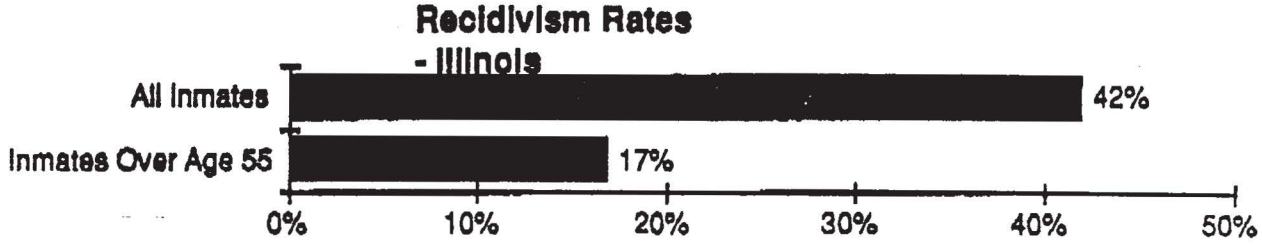
In 1989, I established the Project for Older Prisoners (POPS) to work on the problems associated with the growing population of older offenders. With offices in New Orleans and Washington, D.C., POPS has proven very successful in lowering overcrowding through the release of low-risk, high-cost offenders. We are currently working on individual cases in six states with new offices planned for Illinois and New York. Four other states have requested that POPS open offices to work with their older offender populations.

The first organization of its kind in the country, POPS was formed to study the national problem of an aging prison population. The number of prisoners over the 55 years old has doubled in the last four years and will continue to expand exponentially. According to one study, by the year 2000, there will be an estimated 125,000 older offenders in this country. While there remains little information on the actual number of older prisoners incarcerated nationally, many states are reporting older prisoners as their fastest growing population. With this

population expansion will come a steep increase in maintenance and medical costs. POPS works on both national and local aspects of this problem, and POPS continues to gather data on the special costs and necessities of this population.

POPS has roughly 200 law students working in Louisiana and 75 students in D.C.. These students work without compensation and the project does not charge for its services. POPS students interview prisoners over the age of 55 (and a number of younger chronically ill prisoners). Each prisoner is evaluated according to a long, comprehensive questionaire that explores the prisoner's legal, health, employment, and family background. Based partially on recidivism studies, this data serves as an indicator of whether a prisoner can safely be released into the general population. Among other things, students will interview families and outside groups to determine the availability of homes and jobs for prisoners who might be released. After roughly 60 releases, POPS has never had a prisoner commit a new offense.

POPS has recently completed two new state evaluations that reaffirm our previous studies on older prisoners. In both New York and Illinois, POPS found higher costs and lower recidivism rates among the older prisoner populations. In Illinois, older prisoners were over twice as likely to succeed on parole than younger prisoners.



It is important to note that this rate reflected older prisoners released without any POPS or alternative system of special review. Moreover, the rate of recidivism was even higher among younger inmates who, in some cases, had as high as a 90% likelihood of a new

offense within the established time period. Studies of this type will become critical for the period of reform and restructuring ahead. The federal and state systems must develop new approaches to a prison system that is changing and expanding at a startling pace.

As noted by Paul Davis, chairman of the Maryland Parole Commission, "[t]he graying of America has also become the graying of America's prison population." In the general population, the rate of chronic conditions and terminal illnesses increases with age. Prison populations reflect this societal trend. While the health needs of older and geriatric populations are always a concern, it presents a unique and more pressing problem when the population happens to be found in our nation's prisons. On the one hand, incarceration is an important component of crime control and deterrence. On the other hand, as Attorney General Janet Reno remarked, "[y]ou don't want to be running a geriatric ward . . . for people who are no longer dangerous."

AVAILABLE RESOURCES AND CAPACITY OF THE FEDERAL SYSTEM

On November 22, 1993, the Project for Older Prisoners submitted a series of suggested amendments and supporting data to the Commission for broader consideration of age in the sentencing of federal prisoners. The need for such consideration has grown with the size and institutional demands of our federal prison system. In 1986, the federal system housed 33,132 prisoners. By 1990, the number of inmates had gone to 59,123. By year 2000, this number is expected to reach 127,000. The system, therefore, is not only growing but growing at an accelerated pace.

With the increase in the federal prisoner population, there has been a corresponding increase in the population of older prisoners. In 1986, prisoners over 50 represented 11.3 percent of the federal prison population. That number reached 26 percent in 1989 and it is expected to reach 33 percent by 2010. It is important to keep in

mind that these figures represent chronological measurements of age. In reality, the number of physiologically older prisoners will be greater. Federal studies have shown that the average prisoner is seven years older physiologically than he or she is chronologically. Thus, a 45 year old prisoner will often show the physical deterioration and require the level of care of a person in his early to mid fifties.

The impact of the growing older prisoner population can be felt on the national, systemic and individual institutional levels. On the national level, older prisoners are occupying badly needed cells that could be utilized to house more dangerous younger prisoners. Each year, the expansion of the federal system has out paced the states. Last year, the federal system expanded by roughly 12 percent, twice the average of the state systems. The federal system is substantially over its rated capacity. Of the six federal penitentiaries, five are over their rated capacity by 40 to 100 percent.

Penitentiaries	Rated Capacity	Actual Population
Atlanta	983	1793
Leavenworth	1153	1677
Lewisburg	868	1474
Lompoc	1099	1725
Terra Haute	792	1491

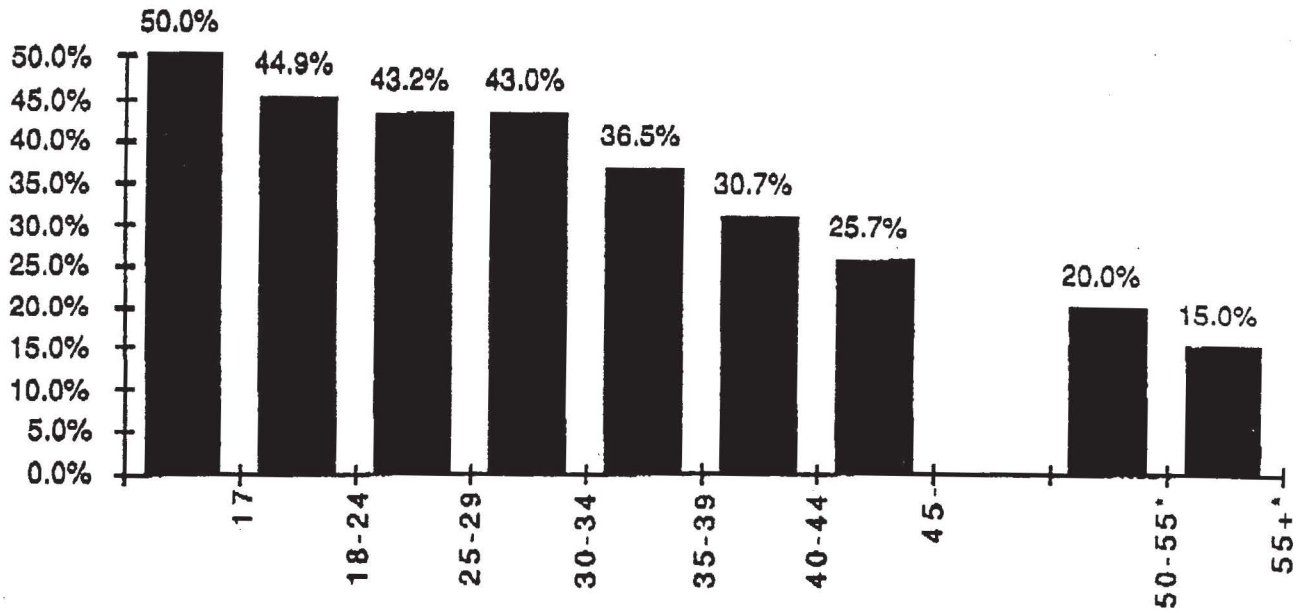
The only penitentiary under capacity is Marion, which can house only 440 inmates and is under continued locked-down status. Of the 36 federal correctional institutions, all 36 are over rated capacity. Some of these institutions are 150 to 200 percent over capacity. It is important to keep in mind that these figures are "rated" and not "design" capacity levels. Most of these institutions are two to three times the population level stipulated as "design" capacity. If there is no reduction in the rate of increase in population numbers, the

majority of federal prisons will reach ceiling capacity within ten years. Once a prison surpasses ceiling capacity levels, mandatory court releases are often mandated by courts.

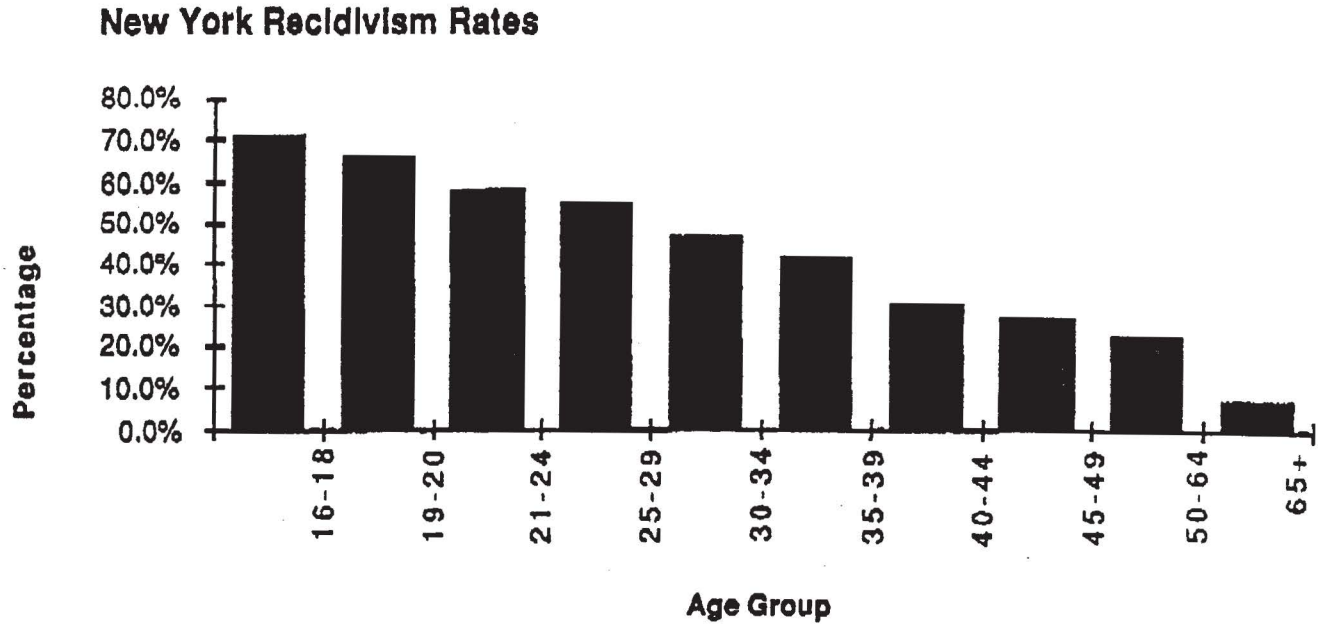
While prison construction is needed and advisable in the federal system, it is highly unlikely that the federal system can "build its way out of this crisis." While the federal government has spent enormous amounts of funds to build new prisons, prison construction has failed to keep pace with population growth. At roughly $100,000 per cell, unlimited prison construction is simply unrealistic in today's economic environment. At current rates of growth, the federal system would have to increase its cell capacity by 36 percent in the next three years simply to meet the number of incoming prisoners. Although this figure will be slightly reduced by releases, new legislation proposed in Congress is expected to cause the number of annually released prisoners to fall.

Most importantly, recidivist studies show that older prisoners are not the prisoners who need to be incarcerated in conventional prisons. Many older prisoners are statistically low-risk in comparison to younger prisoners and their conventional incarceration offers little for public safety. Ironically, as inmates age, and their institutional cost skyrockets, the risk of releasing them decreases. Numerous studies show that age is one of the most reliable predictors of recidivism. Federal statistics reflect the difference of age in recidivism that POPS has found on the state level. Older federal prisoners are half as likely to commit new offenses as younger prisoners and the difference is even greater with younger prisoners in their late teens and early twenties.

Federal Study of Recidivism Rates by Age



As with previous studies, the POPS study of the New York system found a similar age-recidivism correlation. This is borne out in New York where the recidivism rate for all inmates is 48% while the recidivism rate for inmates over age 50 and under age 65 is 22.1% and the rate for inmates over age 65 is only 7.4%. The graph on the following page illustrates the notable and predictable decline in the recidivism of the New York population that mirrors the results of other studies.



New York, therefore, has found almost identical recidivism rates for older offenders as national studies. Both New York and the federal studies show a gradual and predictable fall in recidivism with age. While the most recent federal study consolidates all offenders over age 45, a projection of the existing federal figures shows a close correlation to the New York data. The figures show a clear and steady drop in recidivism with age, falling to approximately 25% for inmates over age 45 in comparison to 50% for the youngest prisoners.

On a systemic level, the medical and maintenance costs associated with older prisoners are crippling. Many states have reported that the average cost of older prisoners is two to three times the cost of younger prisoners. To put this into concrete terms, the average cost of a prisoner remains around $20,000 per year. In 1986, the average cost of maintaining an older prisoner was $39,486. This average cost is even higher in some states.

On an individual institutional level, the increasing size of the older prisoner population presents difficult problems for both maintenance and security. Roughly fifty percent of a prison's operating costs are dedicated to officer salaries and benefits. Efforts to extend prison resources and control costs, therefore, have centered on the officer to inmate ratio. Older prisoners often frustrate such efforts by requiring special care and attention within the system. In addition to difficulties in mobility and interaction, older prisoners are often the targets of abuse by younger prisoners. Older prisoners make ideal targets for theft, extortion and even sexual assault. It is quite common to find POPS prisoners in hospitals or special wards after such attacks. These cases of victimization and the inevitable gerontological problems of the population demand a high level of attention from both officers and medical personnel.

SUGGESTED AMENDMENTS TO THE SENTENCING GUIDELINES

The suggested changes to the United States sentencing guidelines reflect the federal mandate to incorporate developing information and expertise into the federal sentencing system. There has been considerable research showing that age is the most reliable factor for predicting recidivism. The rates of recidivism for older prisoners are less than half the rate for younger prisoners in their late teens and early twenties. The House Judiciary committee recently acknowledged this correlation when it amended the federal crime bill to allow for the release of older prisoners.

The Introductory Commentary to part A of Chapter Four of the Federal Sentencing Guidelines already reflects the Commission's awareness of the correlation between age and the likelihood of recidivism. More specifically, section 5H1.1 allows a downward departure from the guidelines in the sentencing of "elderly and infirm" offenders "where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration." In addition, section 5H1.4 allows a downward

departure from the guidelines where "an extraordinary physical impairment" suggests that "home detention may be as efficient as, and less costly than, imprisonment."

These sections manifest the Commission's awareness of the cost-effectiveness and low-risk potential of alternative forms of incarceration for older prisoners. POPS recommends that the Commission amend sections 5H1.1 and 5H1.4 to allow reconsideration of sentences for inmates who are elderly or infirm, with the possibility of granting a request for relocation to a prison nursing home or home confinement.

Two direct amendments could be made to sections 5H1.1 and 5H1.4, as follows:

§5H1.1 Age (Policy Statement)
Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age is addressed at § 5H1.4 (physical Condition, Including Drug or Alcohol Dependence or Abuse).

Suggested amendment (to insert after "less costly than incarceration" in §5H1.1)
A sentence may be considered, on motion by an offender, for downward departure from the guidelines, or for relocation to home confinement, a prison nursing facility, or another form of

punishment. An offender must show that his age and infirmity have reduced his likelihood of recidivism to the point where the alternative confinement would likely have been ordered had he been sentenced as of the date of the motion for reconsideration.

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence or Abuse (Policy Statement)

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Suggested Amendment (to insert after "less costly than incarceration" in § 5H1.1)

A sentence may be reconsidered, on motion by an offender, for downward departure from the guidelines, or for relocation to home confinement, a prison nursing facility, or another form of punishment. An offender must show that his age, infirmity or physical impairment has reduced his likelihood of recidivism to the point where alternative confinement would have been ordered had he been sentenced as of the date of the motion for reconsideration.

CONCLUSION

These two suggested amendments are quite modest but they would further adapt the guidelines to the new realities in the federal prison system. While these amendments should also be considered by Congress, POPS believes that these types of sentencing changes can be made in either this form or possible variations without new legislation. POPS is also willing to work with Commission staff to explore alternative methods for dealing with this problem. It is clear that the use of current release provisions by the Bureau of Prisons has resulted in only a small number of releases each year, generally inmates who are close to death. While these releases are commendable, the roughly dozen releases last year in the federal system do not represent a significant programmatic response by the Bureau of Federal Prisons. With a population now approaching 100,000, the federal system must develop new ways of addressing this problem at both the sentencing and post-sentencing stages.

Our prison system is graying and this trend will necessarily present new challenges to and demands on our federal prison system. As in the past, POPS stands ready to assist the Commission in exploring alternative approaches to this special needs population. By using the available data on recidivism, we can develop risk-based systems that respond to these new challenges while guaranteeing the Commission's objectives of proportionality in sentencing, public safety and cost-effectiveness.

With those remarks, I would like to end my formal testimony and to answer any questions that you may have on our proposal or underlying research.

THE LAW OFFICES OF
MARVIN D. MILLER
1203 DUKE STREET
ALEXANDRIA, VIRGINIA 22314

MAILING ADDRESS:
P.O. BOX 663
ALEXANDRIA, VIRGINIA 22313

TELEPHONE:
(703) 548-5000
FAX (703) 739-0179

24 March 1994

UNITED STATES SENTENCING COMMISSION
1 Columbus Circle, N.E.
Suite 2-500
Washington, D. C. 20002-8002

Dear Commissioners:

On behalf of the National Organization for the Reform of Marijuana Laws (NORML) and its Legal Committee, I appreciate this opportunity to bring some of our concerns to your attention. I have been involved in the representation of individuals accused of growing marijuana for more than twenty (20) years. I am also a board member of the Virginia College of Criminal Defense Attorneys.

I wish to invite you to look at the manner by which the weight of marijuana plants is calculated under the current Guidelines. The method currently employed is not accurate. It creates false sentencing disparities.

Our experiences have shown us that the total number of plants an individual has planted is not normally indicative of the actual yield. Many horticultural experts who work in commercial plant nurseries have indicated in discussions and in testimony that it is not uncommon to lose up to twenty (20) percent of the plants when one is growing seedlings. More importantly, most marijuana experts agree that when growing plants, it is possible for as many as fifty (50) percent of the plants to be male plants. Using conservative numbers derived from these facts, eighty (80) seedlings could easily yield no more than forty (40) actual usable plants. Certainly, they would not yield eighty plants at 100 grams each or eighty (80) plants at 1000 grams each.

All experts, including those from law enforcement recognize that only the female plant produces intoxication. The male plant is undeniably of no value to the marijuana smoker. This is one issue where gender is a critical fact.

Another fact to consider is that most marijuana users these days use only the buds of the plant. The leaves are generally discarded. The stalks themselves have no value at all.

Under Section 2D1.1 of the Guidelines, the whole plant, including unusable stalks and roots can apparently be included in

the weight. Using such a weight creates an invalid computation which bears no relationship to the individual defendant's actual intent or ability insofar as growing usable marijuana is concerned. For example, if more than fifty (50) plants are involved, even seedlings that cannot be determined to be nonusable male or usable female, then the result is an arbitrary tenfold increase from 100 grams per plant to 1,000 grams (one kilogram) per plant. Such a quantum leap is simply unrealistic. It certainly bears no honest relationship to what is intended or the realistic end result.

Applicable Note 1 in the Commentary to Guideline Section 2D1.1 ought to make it clear that the only portion of the plant to be considered when computing weight is the female plant's buds and perhaps the leaves. Roots, stalks and male plants clearly ought to be excluded. Making such an amendment to the commentaries would create a more honest system of computation.

Given the Commission's desire for practical sentencing considerations dealing with practical situations, it is not reasonable to ascribe one hundred (100) grams for each and every plant seized from someone who is growing marijuana. Mature plants are easily distinguishable between male and female. The automatic ten (10) fold increase which comes into play in cases involving over fifty (50) plants also ought to be amended to be more in keeping with practical situations.

Many individuals who are not distributors but who merely grow for personal use, including medical use, may have fifty (50) plants, hoping that twenty (20) or so will survive and be female with an actual yield of a high quality personal supply of flower buds. Those plants that fail, the male plants and all but the buds of the female are discarded. There is no provision in the current federal law for this situation. The result is disparity in sentencing whereby personal users are wrongly treated as commercial dealers. Courts used to be able to make those distinctions but they are no longer real participants in sentencing. (Courts can almost always depart up and be affirmed but downward departures are nearly always overruled on appeal).

Since the Guidelines tie judges hands, they should permit courts to make honest distinctions that they are not currently allowed to make. This can be achieved by giving consideration to the purpose for which the plants are being grown as well as to the actual or reasonably foreseeable yield of usable plant material.

You are urged to reconsider the manner of determination and the weight the Guidelines ascribe so that it can be brought in line with the practical realities of what is actually occurring in these situations. By making this charge, the Commission will be taking a step towards real truth in sentencing.

Lastly, it should be known that the Commission's opposition to mandatory minimums is appreciated by both law enforcement and the defense. Many prosecutors and law enforcement agents recognize that these minimums create unreasonably harsh sentencing disparities. This is particularly so for the low level defendant who has no one to turn in. The big guy gets a reduction and low sentence while the little guy gets the big time. Elimination of mandatory minimums would help end this unfair difference in sentencing.

Sincerely,

D. Miller

MARVIN D. MILLER

I would like to thank the United States Sentencing Commission for giving me the opportunity to testify in regard to proposed Amendment #18, which provides that acquitted conduct be used only as a basis for upward departure, after a preponderance of evidence hearing. As I understand this amendment, it would preclude the use of acquitted conduct to increase a defendant's sentence as was done in the case of my husband, Gerald Winters.

My husband was convicted of Rico conspiracy in December of 1990. All of his accused co-conspirators were acquitted; yet at his sentencing in March of 1991, the sentencing court used the acquitted conduct to find that the conspiracy continued beyond November 1, 1987, the effective date of the guidelines. The Rico substantive offenses were sentenced under the Old Law; they were all found to occur before November of 1987.

The court sentenced my husband as follows: a guidelines sentence of 235 months for the Rico conspiracy and an Old Law sentence of 15 years for the Rico substantive offenses, to run

consecutively to the guidelines sentence.

If acquitted conduct had not been considered at his sentencing, my husband would have been sentenced exclusively under the Old Law. Receiving the harshest Old Law sentence possible, he would have been eligible for parole in 10 years. He must now serve 17 years under his guidelines sentence and an additional 5 years for his Old Law sentence, for a total of 22 years. I can't see this any differently than the imposition of a 10 year sentence on convictions and an additional 12 years he must serve for acquittals.

I'm not a lawyer and I don't pretend to understand all the intricacies of the guidelines sentencing system. But I have always held the belief that our system of justice was based on a democratic system of government for the people, by the people. I own my own business and I come into contact with many people from all walks of life. Without exception, these people are shocked

and disbelieving that our federal criminal justice system permits a court to sentence on acquitted conduct.

My husband does not serve this sentence alone. My two daughters and I suffer this injustice along with him. Other family members and friends also suffer the pain of this separation.

And we all want to believe in our system of law and a fair system of justice. I ask you to please recommend to Congress in May of this year that proposed Amendment #18 be passed. I also ask that this amendment be made retroactive to alleviate the injustice that a few federal defendants received when sentencing courts sentenced them using acquitted conduct.

Thank you for your time and consideration in permitting me to speak at this hearing.

Maureen Winters

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

August 31, 1994

JQB BR 50000 pdf

MEMORANDUM

TO: Commissioners
Senior Staff

FROM: Judy Mercer

SUBJECT: Additional Commission Meeting Materials

Attached are three additional items for the meeting on September 1, 1994:

- Modification to Part I of the Safety Valve Implementation Amendments (Revised Version) from Judge Wilkins
- Judicial Conference Committee on Criminal Law Responding to "Safety Valve" Provisions from Judge Kazen
- Practitioners' Advisory Group Response to "Safety Valve" Provisions from Fred Bennett

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

August 31, 1994

MEMORANDUM

TO: All Commissioners

FROM: Billy Wilkins BW

SUBJECT: Modification to Part I of the Safety Valve Implementation Amendments (Revised Version)

When the Commission considers the "safety valve" implementation amendments tomorrow, I intend to propose that we consider the "Revised Version" as circulated by John Steer on August 30.

I also suggest two additional minor changes in the third line of proposed §5C1.2, as follows:

(1) delete "at sentencing";

(2) insert "verbatim" after the words "set forth".

The words "at sentencing" are superfluous and inconsistent with other guideline phraseology. Application note 1 ensures that the criminal history determination will be made as of the date of sentencing.

Insertion of the word "verbatim" will make crystal clear that the language in subdivisions (1)-(5), some of which may not be the most artfully drafted, originated with Congress and not with the Commission.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States Post Office & Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Honorable Joseph Anderson
Honorable Richard J. Arcara
Honorable Richard H. Battey
Honorable Charles R. Butler, Jr.
Honorable Stanley S. Harris
Honorable George P. Kazen
Honorable Charles P. Kocoras
Honorable Richard P. Matsch
Honorable David A. Nelson
Honorable David D. Noce
Honorable Stephen V. Wilson
Honorable Mark L. Wolf

(201) 645-2133

FACSIMILE

(201) 645-6628

Honorable Maryanne Trump Barry
Chair

August 31, 1994

Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

On behalf of the Judicial Conference Committee on Criminal Law, I want to thank the Commission for providing the opportunity to respond to the proposed amendments regarding the "safety valve" provisions of the Crime Bill.

The full Committee has not had time to consider these materials subsequent to our receiving them on August 30, 1994. Therefore, I write at this time only on behalf of myself and Judge Maryanne Trump Barry, our Chair, to express our preliminary concerns and to advise you that we hope to present a formal response on behalf of the Commission or its appropriate Subcommittee by September 8, 1994. We hope that the Commission will be able to consider that response prior to official ratification of a decision on the proposed amendments.

The implementing amendments in Part I appear fine, but we have some concerns about the proposed 2-level reduction of sentences for those defendants who otherwise qualify for the "safety valve" exemption from the mandatory penalties. First, many of the defendants who qualify for the legislative exemption from the mandatory penalties will often not qualify for a minor or minimal role. On the contrary, they will be defendants who were actively involved in significant narcotics violations but who have no documented criminal record and used no firearm nor caused injury. It is questionable why such defendants should merit an additional reduction to their sentences.

Perhaps it would be more appropriate to make any further reduction in sentences applicable only to defendants who qualify for minor or minimal role under the guidelines (but if this is done, we would again encourage the Commission to further define and sharpen the role guidelines).

Second, the added reduction will increase the gap between the sentence of this group of defendants and that of other defendants, many of whom may have only narrowly missed qualifying for the "safety valve" (for example, by having 2 criminal history points rather than 1), thereby decreasing proportionality of sentencing among all defendants.

Further, since departure is still available for these defendants, courts will be able to further reduce the sentences of any unusually sympathetic defendants when the situation warrants.

Finally, and perhaps most importantly, in the interest of consistency and proportionality, it seems more prudent to await the outcome of the Commission's current study of a possible overhaul of the entire approach to sentencing drug cases rather than to hastily apply an ad hoc reduction to one limited group of defendants.

We appreciate the Commission's consideration of these preliminary concerns, but repeat the Commission would appreciate the opportunity to present a formal response by September 8, 1994, which we hope that the Commission will also be able to consider prior to taking final action.

Sincerely,

George P. Kazen

CUA

THE CATHOLIC UNIVERSITY OF AMERICA

Columbus School of Law
Office of the Faculty
Washington, D.C. 20064
(202) 319-5140

August 30, 1994

The Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
On Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002

Re: Implementation of "Safety Valve" Provisions of Crime Bill

Dear Chairman Wilkins:

As Chairman of the Practitioners' Advisory Group to the United States Sentencing Commission, I write on this occasion to strongly urge the Commission, at its scheduled September 1, 1994 meeting, to implement the "safety valve" provisions of the recently enacted crime bill.

I have been provided with John Steer's memorandum to you dated August 29, 1994 along with the proposed amendment language contained in Parts One and Two of Mr. Steer's attachment. I have reviewed the materials Mr. Steer submitted to the Commissioners and the Practitioners' Advisory Group fully concurs with the amendment options drafted by Sentencing Commission staff members.

In short, the Practitioners' Advisory Group respectfully urges the Commission to act favorably on the "safety valve" provisions of the Crime Bill at its September 1, 1994 meeting by approving the proposed amendment language drafted by your own staff. We urge approval of both Parts One and Two of the proposed amendments. This will have the effect of providing, prospectively, modest relief (a two level reduction in the offense level) to non-violent drug offenders who have little, if any, criminal records and who are not found to have had an aggravating role in the offense/offenses of conviction.

Sincerely,

Fred Warren Bennett

cc: All Commissioners

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

August 30, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners

FROM: John R. Steer
General Counsel

SUBJECT: Revised Version of Safety Valve Implementation Amendments

Based on suggestions from various persons, I have prepared a revised version of the proposed safety valve implementation amendments.

Part I (informational and definitional provisions) has been revised to simplify the introductory sentence of proposed §5C1.2 and indicate that the subsequently stated criteria are taken verbatim from the statute. Also, a new note 8 has been added to provide notice of the requirement in 18 U.S.C. § 3553(f) regarding opportunity for the government to be heard (an apparently superfluous requirement in view of Rule 32(a)(1)). Finally, the background commentary to §5C1.2 has been rewritten to make it more clear and complete.

Part II (substantive change in §2D1.1) has been revised to address several nuances, as follows: (1) ensure that the proposed two-level reduction would apply to a defendant who meets the safety valve criteria and whose offense level was 26 or greater because of the total quantity of drugs involved under relevant conduct but who was not subject to a mandatory minimum because no single count involved a sufficient quantity to trigger a mandatory minimum; (2) ensure that the two-level reduction would not apply to a defendant convicted of any of the "special purpose" drug trafficking offenses--sales to minors, etc., sales in protected locations, CCE; (3) ensure that the floor offense level of 26 for use of an aircraft in drug importation is not affected by the two-level decrease.

Attachment

PROPOSED AMENDMENT (Revised Version)

PART 1 – adopted 9/1/94 4-0 ratified 9/14/94 4-0 via telephone conference

§5C1.2. Limitation on Applicability of Statutory Minimums in Certain Cases

In the case of an offense under 21 U.S.C. § 841, 844, 846, 960, or 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Commentary

Application Notes:

1. *"More than 1 criminal history point, as determined under the sentencing guidelines," as used in subdivision (1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category).*

2. *"Dangerous weapon" and "firearm," as used in subdivision (2), and "serious bodily injury," as used in subdivision (3), are defined in the Commentary to §1B1.1 (Application Instructions).*

3. *"Offense," as used in subdivisions (2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in subdivision (5), mean the offense of conviction and all relevant conduct.*

4. *Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

5. *"Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subdivision (4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).*

6. *"Engaged in a continuing criminal enterprise," as used in subdivision (4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subdivision (4) because (i) this*

section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be a "leader, organizer, manager, or supervisor of others in the offense."

7. Information disclosed by the defendant with respect to subdivision (5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subdivision (5) does not provide an independent basis for restricting the use of information disclosed by the defendant.

8. Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Rule 32(a)(1), Fed. R. Crim. P.

Background: This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). See also H. Rep. No. 103-460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

* * *

7. Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimums in Certain Cases).

* * *

§2D2.1. Unlawful Possession; Attempt or Conspiracy

* * *

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimums in Certain Cases).

PART 2

1 - 3W, C, C
Mar 3

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

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

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If (A) the base offense level from the Drug Quantity Table is level 26 or greater, and (B) the defendant meets the criteria set forth in subdivisions (1)-(5) of §5C1.2 (Limitation on Applicability of Mandatory Minimums in Certain Cases), decrease by 2 levels. *Provided*, that this decrease shall not apply if the offense level is determined pursuant to §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) or §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy).

Compare - Sched. I. Check opposed to this part

(~~2~~3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

* * *

Commentary

* * *

Background:

* * *

[TO BE INSERTED AS THE SIXTH PARAGRAPH]

Subsection (b)(3) implements section 80001(b)(1)(i) of the Violent Crime Control and Law Enforcement Act of 1994 by providing a 2-level reduction for certain defendants who meet the criteria set forth in 18 U.S.C. § 3553(f).

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

August 26, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis J. Newton pjn
Staff Director

SUBJECT: Agenda — September 1, 1994, Commission Meeting

After consultation with the Chairman, the following agenda is proposed for the **Thursday, September 1, 1994**, Commission meeting that will begin at **10:00 a.m.** in the Commissioners' conference room:

1. Minutes

2. Safety Valve Implementation

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

August 29, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners

FROM: John R. Steer
General Counsel

SUBJECT: Implementation of "Safety Valve" Provisions of Crime Bill

Imminent enactment of the Crime bill presents the Commission with a narrow window of opportunity in which it is authorized to make amendments to the Guidelines Manual to implement the so-called "safety valve" for low level, nonviolent drug defendants. This memorandum describes important features of the provision and sets forth amendment options.

Eligibility Criteria. The text of the provision (Section 80001 of the Act) is attached, along with a copy of the explanatory House Judiciary Committee Report. In brief, a drug defendant can qualify for sentencing in accordance with applicable guidelines without regard to an otherwise applicable mandatory minimum if the defendant (1) had no more than one criminal history point, (2) did not use violence, a credible threat of violence, or possess a firearm or dangerous weapon, (3) the offense did not result in death or serious bodily injury, (4) the defendant did not have an aggravating role, and (5) the court finds that the defendant fully cooperated with the prosecution (no government motion required). Sec. 80001(a), to be codified as 18 U.S.C. § 3553(f).

Effective date. The provision applies to sentences imposed beginning ten days after the date of enactment. Sec. 80001(c).

Commission Authority and Direction to Act. (1) **In General.** The provision states that the Commission "shall promulgate guidelines, or amendments to guidelines, to carry out" the provision. The Commission is also authorized to issue policy statements to assist courts in applying the safety valve provision. Sec. 80001(b)(1). This authorization thus would seem to empower the Commission to provide procedural and definitional guidance to

courts to assist in the provision's interpretation and implementation. Commission policy statements that reasonably interpret the provision and that are consistent with its apparent purpose of achieving a greater degree of compatibility between statutory penalties and the guidelines for drug trafficking offenses presumably would be binding on the courts under the authorities of Mistretta v. United States, 488 U.S. 361 (1989); Williams v. United States, 112 S. Ct. 1112 (1992); and Stinson v. United States, 113 S. Ct. 1913 (1993).

(2) **Emergency Amendment Authority.** The provision resurrects temporary, emergency amendment authority that the Commission was granted under the Sentencing Act of 1987, thereby empowering the Commission to immediately promulgate and put into effect implementing guideline and policy statement amendments "[i]f the Commission determines that it is necessary to do so in order that the amendments . . . take effect on the effective date of the [statutory] amendment . . . ." Sec. 80001(b)(2). This conditional clause (which we had recommended be deleted but obviously was not) could be argued to limit the timing and duration of the emergency amendment authority to the ten-day period between enactment and the taking effect of the safety valve.

Under emergency amendment authority, any promulgated amendments take effect on the date specified by the Commission without any intervening review by Congress. However, the Sentencing Act of 1987 also provides that amendments so promulgated have a limited "lifespan." Unless repromulgated in the next regular amendment cycle, emergency amendments expire when the next group of amendments promulgated through the usual process (including 180 days' review by Congress) take effect. Thus, should the Commission invoke its newly granted emergency amendment authority, any amendments so issued would need to be repromulgated in the next amendment cycle or they will expire November 1, 1995.

(3) **Safety Valve Floor.** In directing the Commission to promulgate implementing amendments, Congress also established a new floor of at least 24 months as the minimally required sentence in any revised guideline range applicable to the least culpable group of qualified defendants who formerly would have been subject to a five-year mandatory minimum. Section 80001(b)(1)(B). The provision did not establish revised guideposts for eligible defendants otherwise subject to higher mandatory minimums presumably because Congress expected that the Commission would maintain a guideline structure under which guideline ranges would "increase progressively, in proportion to indicia of increased culpability or seriousness . . ." H. Rep. No. 103-460, 103d Cong., 2d Sess. 5 (1994).

The current guidelines comply with the newly established floor, providing a minimum guideline sentence for a defendant otherwise subject to the five-year mandatory minimum of 30 months (range of 30-37 months). Such a range currently would apply to a defendant convicted under 21 U.S.C. § 841(a) whose offense involved 500 g-1.99 kg of cocaine powder (five-year mandatory minimum) and who had a minimal role in the offense (four-level

reduction), fully accepted responsibility (three-level reduction), was in Criminal History Category I (0 or 1 point), and had no aggravating factors under the guidelines. Had the same defendant been involved with at least 5 kg of cocaine powder, the guideline range, but for the ten-year statutory mandatory minimum, would be 57-71 months.

Taken as a whole, the legislation sends a less than clear message to the Commission regarding whether any reduction of guideline ranges for safety valve (and perhaps other drug defendants) is contemplated. As indicated, the legislation on its face authorizes but does not require a modest reduction of guideline ranges for safety valve defendants. The accompanying House Judiciary Committee Report, while not resolving the ambiguity, contains the following relevant language:

> To ensure an actual sentence reduction for those convicted of offenses covered by the legislation, H.R. 3979 also includes a specific directive to the Sentencing Commission to amend the Sentencing Guidelines. The Committee recognizes that among defendants who will be eligible for consideration under proposed section 3553(f) and who are now subject to a five-year minimum there may be some modest differences in culpability or seriousness that may warrant slightly different guideline ranges. The Committee intends that the Commission implement its directive so that the guideline range applicable to the least culpable defendants eligible under subsection (f) goes no lower than two years.
>
> For example, under the present guideline structure, defendants involved with drug quantities that would trigger a mandatory five-year minimum, who played a "minimal" role in the offense, and who warranted the maximum credit for acceptance of responsibility would fall within this least culpable subcategory. Guideline ranges for other offenders would be expected to increase progressively, in proportion to indicia of increased culpability or seriousness, from the floor of the two-year guideline range.

During the course of the legislative deliberations, a number of congressional staff indicated on behalf of their principals (safety valve proponents) that a reduction in guideline ranges by the Commission was desired or expected as part of any safety valve implementation. Indeed, some Members apparently formed the impression that the provision actually requires such a reduction. For example, on August 3, 1994, Congressman Schiff stated on the House floor in regard to the safety valve that "[t]he sponsors decided the sentencing guidelines were too stiff and directed they be reduced." This statement appears erroneous insofar as it describes any congressional mandate in the statute, although it may or may not reflect majority congressional intent. In any event, the provision presents the Commission with a clear policy choice of whether or not to implement the safety valve with some reduction in guideline ranges for affected defendants.

Proposed Amendments. The attached amendments to implement the safety valve are recommended. These amendments can be subdivided into two parts. First, the text of the safety valve is incorporated into the Guidelines Manual as proposed guideline §5C1.2. Application notes to this guideline are designed principally to ensure the closest possible fit between guideline terms and determinations and the new statutory provision. In addition, background commentary to §2D1.1 and §2D2.1 (the offense guidelines potentially applicable to safety valve-eligible defendants) is added to reference courts and other users of the Manual to the new statutory exception to mandatory minimums. It is recommended that the Commission promulgate these amendments whether or not it desires to reduce the drug guidelines for safety valve defendants.

Secondly, if the Commission desires to implement the safety valve by reducing guideline ranges, the amendments in Part II are recommended. These amendments effect a reduction of two offense levels for defendants who meet the safety valve criteria and whose offense involves a drug quantity subject to the five-year statutory minimum. Consequently, under this part of the amendment, a defendant whose offense involved 500 grams of cocaine powder and who had a minimal role, fully accepted responsibility, and had no aggravating factors under the guidelines would be subject to a revised guideline range of 24-30 months--exactly matching the legislated safety valve floor. Guideline ranges for safety valve defendants involved with larger drug quantities similarly would be reduced by two levels.

Number of Affected Defendants. Based on FY 1993 sentencing data, the prospective estimated impact of the safety valve, with and without the proposed two-level reduction, is described in Table I and Figures A and B attached.

Attachments

PROPOSED AMENDMENT

PART 1

§5C1.2. Limitation on Applicability of Statutory Minimums in Certain Cases

Notwithstanding any other provision of law, in the case of an offense under 21 U.S.C. § 841, 844, 846, 960, or 963, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under 28 U.S.C. § 994 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that --

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Commentary

Application Notes:

1. *"More than 1 criminal history point, as determined under the sentencing guidelines," as used in subdivision (1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category).*

2. *"Dangerous weapon" and "firearm," as used in subdivision (2), and "serious bodily injury," as used in subdivision (3), are defined in the Commentary to §1B1.1 (Application Instructions).*

3. *"Offense," as used in subdivisions (2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in subdivision (5), mean the offense of conviction and all relevant conduct.*

4. *Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

5. *"Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subdivision (4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).*

6. "Engaged in a continuing criminal enterprise," as used in subdivision (4), is defined in 21 U.S.C. § 848(c). As a practical matter, it will not be necessary to apply this prong of subdivision (4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be a "leader, organizer, manager, or supervisor of others in the offense."

7. Information disclosed by the defendant with respect to subdivision (5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subdivision (5) does not provide an independent basis for restricting the use of information disclosed by the defendant.

Background: This section sets forth the provisions of 18 U.S.C. § 3553(f), which limit the applicability of statutory minimum sentences in certain cases. The Commission, under the authority of section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). See also H. Rep. No. 103-460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

* * *

7. Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimums in Certain Cases).

* * *

§2D2.1. Unlawful Possession; Attempt or Conspiracy

* * *

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimums in Certain Cases).

PART 2

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

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

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(3) If (A) the base offense level from the Drug Quantity Table is level 26 or greater; and (B) the defendant meets the criteria set forth in §5C1.2 (Limitation on Applicability of Mandatory Minimums in Certain Cases), decrease by 2 levels.

* * *

Commentary

* * *

Background:

* * *

[TO BE INSERTED AS THE SIXTH PARAGRAPH]

Subsection (b)(3) implements section 80001(b)(1)(i) of the Violent Crime Control and Law Enforcement Act of 1994 by providing a 2-level reduction for certain defendants who meet the criteria set forth in 18 U.S.C. § 3553(f).

Table I

IMPACT OF "SAFETY VALVE" FOR FISCAL YEAR 1993 DRUG DEFENDANTS*
(October 1, 1992, through September 30, 1993)

- convicted under a mandatory minimum drug statute
- in Criminal History Category I (0 or 1 criminal history point)
- no dangerous weapon
- no aggravating role in the offense
- no death or serious injury
- received acceptance of responsibility adjustment

	Based on Current Drug Guidelines					Based on 2-level decrease				
	Number of Cases (less Substantial Assistance departure cases)	n	%	Mean Red. (mths)	Med. Red. (mths)	Number of Cases (less Substantial Assistance departure cases)	n	%	Mean Red. (mths)	Med. Red. (mths)
ALL CASES (N=3,647)										
Definitely Affected	1,360 (-733)	627	31.0%	22.9	14.0	2,559 (-1,144)	1,415	69.9%	27.9	23.0
Possibly Affected	1,199 (-411)	788	38.9%	9.4	9.0	580 (-228)	352	17.4%	11.1	9.0
"Not Affected"	1,088 (-478)	610	30.1%	--	--	508 (-250)	258	12.7%	--	--

*Cases selected based on recommendations in the Presentence Report for the 20 percent of cases for which complete information from the sentencing court was unavailable. "Definitely Affected" refers to cases in which the statutory minimum was higher than the guideline range. "Possibly Affected" refers to cases in which the statutory minimum fell within the guideline range. "Not Affected" refers to cases in which the statutory minimum was lower than the guideline range. The amount of available reduction is based on the difference between the statutory minimum and the guideline range minimum.

SOURCE: U.S. Sentencing Commission, 1993 Data File, MONFY93.