Often, 18 U.S. Code, Section 1956 (a)(3) has been misapplied and abused to target individuals for a variety of misrepresented minor offenses which do not fall within the ambit of offenses for which the law was intended by Congress. As it was pointed out by Mr. Blau at the Commission's hearing, the only reason for passing the money laundering laws, was to get at professional money launderers, principally those associated with narcotics and organized crime. Furthermore, that the "sting" statute is too overboard and that the Department of Justice did not exercise some central control over its use. As a result, "ninety-four different interpretations of this statute exist presently throughout the country and each U.S. Attorney decides how this statute will be used or abused". Mr. Pauley, a Department of Justice official and ex-officio member of the Commission mentioned at the hearing that the Department of Justice is planning to decriminalize certain money laundering offenses, particularly for non-drug related minor offenses. However, the Department of Justice has not acted on these promises. Neither Congress nor the Department of Justice have provided guidelines for the statute's proper application. Guidelines for proper implementation are needed.

At the Commission's hearing, concerns were expressed of the need for changes of the money laundering laws, particularly of the "sting" statute. They warned that "the criminal justice process is being subverted and undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or with organized drug activity", as Congress intended. They questioned the existing sentencing guidelines and endorsed the need of correlating the money laundering offense level to that of the underlying conduct. Finally, they looked to the courts as the guardians of fairness and proportion in sentencing by stating that the Courts "will reach a position where they will not forever tolerate these charging abuses". Unfortunately the courts have been reluctant to deviate from the constraints of the present sentencing guidelines.

In conclusion, the U.S. Sentencing Commission's Charter mandates evaluation of the effects of the sentencing guidelines on the criminal justice system by providing advice to Congress regarding the modification or enactment of statutes relating to criminal law and sentencing matters. Furthermore, the sentencing guidelines proposed by the Commission are designed to further the purposes of just punishment, and provide fundamental fairness in meeting the purposes of sentencing by avoiding unwarranted disparities as related to the criminal justice process. I wish to reiterate that 18 U.S. Code, Section 1956 (a)(3) produces sentences so anomalous that it undermines the very uniformity that Congress sought to achieve when it adopted sentencing guidelines. The U.S. Sentencing Commission has the responsibility to call immediate Congressional attention to the urgent need for ratification of the proposed sentencing amendments (Amendment no 20 in particular) and for reevaluation of the money laundering laws, particularly of the "sting" money laundering statute (18 U.S. Code, Section 1956 (a)(3). This statute needs to be amended by appropriate Congressional Committees as its abuse has resulted in unwarranted convictions and in intolerable prosecutorial excesses and conduct. It has become an instrument of oppression. Most convictions have been obtained through abuse of this statute and through coercion in plea bargaining made possible by the threat of the guaranteed high and disproportionate sentencing.

Thank you for your consideration and action on these very important concerns.

Sincerely,

Carol Carayannis

Carol Carayannis
Association of Americans for Constitutional Laws and Justice (AACLJ)

cc:
Commissioner Michael S. Gelacak, U.S. Sentencing Commission
Judge A. David Mazzone,

Commissioner Wayne A. Budd, "
Judge Julie E. Carnes, "
Commissioner Michael Goldsmith, "
Judge Deanell R. Tacha, "
Commissioner Edward F. Reilly, Jr., "
Commissioner Jo Ann Harris "

Ms. Phyllis J. Newton, Staff Director, U.S. Sentencing Commission
Mr. Michael Courlander, Public Information Specialist, "

MONEY LAUNDERING WORKING GROUP OF U.S. SENTENCING COMMISSION
Win Swenson, Chair
Rusty Burress
Marguerite Cephas
Nolan Clark
Debora Dealy-Browning
Mary McDowell
Pam Rigby
Jackie Rubin

President Bill Clinton
Hon. Robert Dole
Hon. Newt Gingrich, Speaker of the House
Hon. Orrin Hatch,Chairman, Senate Judiciary Committee
Members of Senate Judiciary Committee
Hon. Alfonse D'Amato, Chairman, Senate Banking Committee
Members of Senate Banking Committee
Hon. Henry Hyde, Chairman, House Judiciary Committee
Members of House Judiciary Committee
Hon. Jim Leach, Chairman, House Banking Committee
Members of House Banking Committee

Hon. Dan Inouye. Senator, Hawaii
Hon. Dan Akaka, "
Hon. Neil Abercrombie, Rep., Hawaii
Hon. Patsy T. Mink, Rep. Hawaii

PARTICIPANTS WHO TESTIFIED on Money Laundering Sentencing Guidelines / Public hearing on proposed Guideline Amendments of the U.S.SENTENCING COMMISSION, (Monday March 22, 1993, Ceremonial Courtroom, Federal Courthouse, 2nd & Constitution Ave. N.W. Washington DC)

Mr. Charles W. Blau (former Associate Attorney General.Department of Justice)
Mr. Stephen R. LaCheen, Pennsylvania Association of Criminal Lawyers
Mr. James M. Becker, Criminal law Committee of the Federal Bar Association
Mr. Chuck Morley (EX Criminal Investigation Division of the IRS; EX Chief investigator of the U.S. Senate Subcommittee on Investigations)
Mr. David Stewart, Law firm of Ropes and Gray
Mr. Paul B. Bergman, New York Council of Defense Lawyers

American Civil Liberties Union
AHEPA
Mr. Jim McGee, The Washington Post
New York Times
Ms. Jill Smolowe, Time- Life Magazine
Ms Elaine Lafferty, "
Ms. Andrea Sachs, "

ASSOCIATION OF AMERICANS

FOR CONSTITUTIONAL LAWS AND JUSTICE (AACLJ)

(A Free Association of Americans seeking community, legislative, and judicial assistance and support in preserving and restoring constitutional laws and Justice in America.)

MANDATE: RESTORING CONSTITUTIONAL LAW AND JUSTICE IN AMERICA

PLAN OF ACTION

Unconstitutional laws, or laws used unconstitutionally, have no place in a great, free, and democratic country such as ours that advocates and supports human and civil rights. Our Constitution is still the supreme law of the land. Improperly used laws can undermine the legal process to become an instrument of repression. If we allow laws to be used unconstitutionally, without even protesting, it is only a question of time before our basic civil rights and liberties are forever lost. Loss of freedom can become an insidious progression.

We, as Americans, cannot seat placidly by as our neighbors are wrongfully seized and their property is confiscated. We cannot simply capitulate to improperly used laws that dilute our right to be secure in our homes against unlawful searches and secure in the courts against nebulous, new unconstitutionally used laws and unlawfully fabricated evidence. Our sacred rights are not the"loopholes" by which our enemies, the murderers and rapists and thieves, and drug dealers, allegedly escape. Our juries can be responsible and trusted and should not be manipulated. Our legal system should protect us and uphold our civil rights . Finally, we cannot forget the lessons of history, that when the rights of our "enemies" have been wrestled from them, then our rights have been lost as well, for the same rights serve both citizen and "criminal".

All of our laws need to be adjudged constitutionally accurate in their intent and language so as to adhere strictly and hold true to the Rules and Principles of the Constitution of the United States of America and its Bill of Rights and subsequent Amendments. We, The People, and our Congressional representatives need to be vigilant of abuses and injustices of improperly applied laws. Only through civil responsibility, vigilance, and determination, we can restore a higher degree of fidelity to the American Criminal Justice System and to our country's Founding Principles.

AN ISSUE FOR IMMEDIATE ACTION

Title 18, U.S. Code, Section 1956 (a)(3), The Money Laundering "Sting" Statute is an unconstitutional law that needs to be amended or repealed.

Title 18, U.S. Code, Section 1956 (a)(3), the Money Laundering "sting" statute has been selected and targeted as the best example of a "new law" that has become an outmost instrument of oppression and repression in our country. It is an unconstitutional law that needs to be repealed or drastically amended.

The statute, when abused,as it has been inwell-documented in many cases around the country, "prearranges the "crime" and its evidence with guaranteed conviction and level of sentencing" Such abuse of the law is clearly unconstitutional and undermines the integrity of the judicial process. Our Congress needs to provide guidelines for the proper and ethical use of this money laundering law so that there can be some measure of balance and fundamental fairness in its intended restricted application against organized crime and drug traffickers.

Title18 U.S. Code, Section 1956 (a)(3), hereafter referred as the STING STATUTE, was enacted on November 18, 1988 as part of the Money Laundering Amendment Act and as a component of anti-drug legislation. However, the statute has been misinterpreted and applied frequently. selectively, improperly, prejudicially and unconstitutionally by federal prosecutors to target and convict individuals, through outrageous conduct, unethical deceptions, and abuse of the judicial process and of the federal criminal justice system. It has resulted in terrible waste of government resources and taxpayer's money. Furthermore, the statute has been grossly misapplied and abused to target and convict individuals for a variety of misrepresented hypothetical minor offenses which do not fall within the ambit of offenses for which the law was intended by Congress.

When improperly used, the STING STATUTE violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of our Constitution by permitting the orchestration of a "crime" and its evidence thus guaranteing conviction and a very high level of sentencing, obtained through a predetermined and unavoidable low threshold of proof. Abuses of the STING

STATUTE have been attested and documented by numerous sources, testimonies, newspaper and magazine articles, government records of public hearings, improper prosecutions documented by caselaw, and even by the U.S. Sentencing Commission's internal and independent finding; the latter suggesting that due process was not followed in the application of the STING STATUTE and that as many as 68% of the persons that have been convicted may be due to misrepresentations by law enforcement officials.

In brief, there has been unprecedented abuse of the STING STATUTE of the money laundering laws; the STING STATUTE does not provide the constitutional safeguards and it is a law which has become an instrument of oppression. Its continuing misapplication by federal prosecutors is subverting and undermining our Criminal Justice System.

Congress needs to repeal or amend drastically 18 U.S. Code, Section 1956 (a)(3), the STING STATUTE of the Money Laundering laws and to provide proper guidelines that guarantee Constitutional safeguards. Congress needs to review and adopt the amendments to the sentencing guidelines proposed by the U.S. Sentencing Commission for convictions obtained through the abuse of the STING STATUTE.

Criticism of the "Sting" Money Laundering Statute
(U.S. Sentencing Commission's Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993, Washington DC)

The U.S. Sentencing Commission generated an internal report proposing amendments to its own sentencing guidelines for money laundering offenses. Specifically for offenses prosecuted under the "sting" money laundering statute. the Commission's proposed amendments would tie the sentencing level to that of the underlying "sting" offense, when properly represented. There was an overwhelming support for these amendments by the Chairman of the U.S. Sentencing Commission, and all of the Commissioners and staff, as well as from those who testified at the public hearings. The judiciary committees of the 103rd Congress did not get around to reviewing or acting on the Commission's proposed sentencing amendments.

The following are a few examples of comments made at the Sentencing Commission's hearing (Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993) regarding abuses and inequities of the money laundering laws, particularly the "sting" statute. One of the people that testified at the public hearing in Washington D.C. was the principal author of the money laundering statutes, Mr. Charles W. Blau, (Transcripts of the hearing p.256-261). Commenting on the abuse of the money laundering "sting" statute, he stated: "*It is a bit like using a nuclear weapon against a single individual*". Mr. Charles W. Blau.is presently in private practice, but has worked for the Department of Justice in different capacities, including Chief of Narcotics, Associate Deputy Attorney General and Associate Attorney General. He played an active role in drafting the money laundering statutes and the memorandum of understanding between the various law enforcement agencies in using these statutes. He is now extremely critical of the abuse of the laws that he helped draft. At the hearing he stated:

> *"In looking at these statutes, I think basically the intent, or at least my intent, was to create a broad criminal statute which would reach every kind of sophisticated money laundering that was out there. In short, I thought, and I think basically the people that were in the process with me felt, that the real intent of this statute was to get at professional money launderers, principally those associated with narcotics and organized crime.*
>
> *In retrospect, I think there are probably two mistakes that we made....I think I would have liked to have limited this statute to instances where there was sophisticated criminal activity present, either with narcotics or with organized crime.*
>
> *Secondly, I think I would have required the Department (Justice) to have exercised some central control over the use of this statute much more so than we did. The Department, in my view, basically has failed to have what I would call a realistic or a centralized process dealing with the use of this statute. There are, in essence, 94 separate policies, and each U.S. Attorney, basically, in essence, decides how the statute is going to be abused or used, as the case may be.*
>
> *What we are seeing at least in my part of the country, which is Texas and the Southwest, is a continual threatening of the use of the money laundering statute in non-drug and non-organized crime cases."*

On page 259 of the Sentencing Commission's Hearing proceedings, Mr. Blau continues:

"My view, however, I think is that this statute is a very, very important powerful prosecution tool. I think that it has tremendous potential to be abused. I think in at least my area of the country, and particularly in the white collar non-drug area, we are seeing an abuse of the use of this statute. Plea negotiations, in short, have been replaced by threat negotiations, and using a very substantial and heavy-wielding club, the money laundering statute. This is a real threat. One may argue that it is either good plea bargaining on the part of the government or, alternatively, it is a little bit overzealous and coercive of the criminal justice process.

The question that I raise with the use of this statute, without any centralized controls, is whether the criminal justice process is being undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or with organized drug activity. And the question with these guidelines has been, should a person be subjected to severe criminal sanctions, when his conduct amounts to no more than the base underlying offense. It is a bit like using a nuclear weapon against a single individual.

I think these changes proposed by the Commission are essential in bringing a little reality back into the prosecution charging process. I would have preferred that the department basically would have taken this on itself, would have overseen basically the use of this statute and would have culled out the cases where it was clearly an abuse of process to bring such an enormous charge against underlying conduct which did not deserve it.

My view of these guidelines, until basically Congress gets around to amending the statute, is that the underlying offense should be relevant and important factor in determining what penalties for money laundering connected with those type of offenses are.

I do believe that the courts are going to I think reach a position where they will not forever tolerate these charging abuses, and a very valuable prosecution tool will be unnecessarily limited, or bad case law. So I support your amendments completely."

Mr. Stephen R. LaCheen, representing the Pennsylvania Association of Criminal Lawyers, in his endorsement of the Commission's guideline amendments commented (page 75):

"We also comment favorably on your money-laundering amendments, as well as the amendments regarding sting operations, and there both, again, informed out of the concern to avoid manipulation of the guidelines in the plea-bargaining process, which in vast majority of cases, as you know, are resolved in plea negotiations."

Mr. James M. Becker, representing the Criminal law Committee of the Federal Bar Association, commented as follows (p. 157):

".....Our group has identified several instances in the Eastern District of Pennsylvania, and we think they exist nationwide, where the mere addition of that money laundering charge, especially under 18 U.S.C. sections 1956 and 1957, artificially raises the guideline level beyond that of the underlying offense, when there is no real money laundering activity that somehow makes the person's conduct more culpable than if they were just charged with a fraud offense, so for that reason, we applaud the proposed Amendment No. 20, heartily endorse it."

Mr. Chuck Morley, an expert on the subject of money laundering and currency reporting laws under the Bank Secrecy Act, having served with the Criminal Investigation Division of the IRS and as Chief investigator of the U.S. Senate Subcommittee on Investigations, stated (p. 224):

".....I come here today to urge you to approve the money laundering and the structuring guidelines as proposed by the committee staff." "....the revised guidelines reflect greater sensitivity to such factors as sophistications of money laundering conduct." "....the staff (Sentencing Commission) found that, historically, prosecutors have been stretching these guidelines significantly,..."

"Offenses that technically qualify as money laundering are frequently simply incidental to or component parts of the underlying crime. This has given rise to extensive disproportionate sentencing.....The sentencing report indicated that 68 percent of the defendants convicted of structuring either didn't know or did not

believe the funds were illegal. .....Yet, these people could still get the same type of sentence as a major money launderer, somebody involved in a huge smurfing operation. So do the guidelines work? I don't think they work. unless what we are trying to do is fill the jails up....."' The Justice Department has said to me informally that we are trying to decriminalize money laundering or that we are trying to greatly lessen the offense of money laundering....." ".....To continue under the current guidelines is to ignore the realities of money laundering totally, while continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants."

Mr. David Stewart of the law firm of Ropes and Gray, commented:

The basic principle announced by the Commission, which I strongly endorse, is an attempt to tie the base offense levels for this offense (money laundering) more closely to the underlying conduct that was the source of the illegal proceeds.....in non-drug offenses you really do get an extraordinary increase in the penalty by including the money laundering charge. .....I would even report that prosecutors confirm that is why they add money laundering counts, because the guidelines are so powerful with them. It is a bigger hammer. One case I saw that was 27 months in prison versus 6 months in prison.....Finally, I would note my agreement with the observation to the American Bar Association on the subject of stings, again, the concept of the money laundering offense to the underlying offense seems to me very important in that context, as well. It is a little trickier, of course, because there is no true underlying offense, so it has to be the represented underlying offense, but, again, it seems to me the proper ways to approach the problem."

Mr. Paul B. Bergman, representing the New York Council of Defense Lawyers, had the following comments:

"I think that this proposed amendment on the guidelines for money laundering goes one way towards eliminating what we consider to be unfair leverage and sometimes abusively exercised leverage with money laundering."

What is interesting from the above statements and other criticism, and what the Sentencing Commission's own report suggests, is that the money "sting" laundering statute has been abused. Two of the people who testified at the Sentencing Commission hearings had been with the Justice Department and had been responsible for the drafting of the money laundering statutes. The same people now indicate that their real intent, was to get at professional money launderers, principally those associated with narcotics and organized crime. The principal author of the money laundering statutes, Mr. Blau, admits that the Department of Justice made two mistakes in making the "sting" statute too overboard and not limiting it to sophisticated criminal activity present, either with narcotics or with organized crime. Furthermore, that the Department of Justice did not exercise some central control over the use of this statute and that 94 separate policies exist, with each U.S. Attorney's Office, often misapplying and clearly abusing the statute.

Concerns have been expressed by the Sentencing Commission members and the supporters of proposed sentencing guideline amendments and of the changes of the money laundering laws, that the criminal justice process is being undermined by the use of a very easily proven criminal statute which "is not connected in any way, shape or form with any organized crime activity or with organized drug activity", as Congress intended. They question the existing sentencing guidelines and they endorse the need of correlating the money laundering offense level to that of the underlying conduct. Finally, they look to the courts as the guardians of fairness and proportion in sentencing by stating that the Courts will "reach a position where they will not forever tolerate these charging abuses" (by federal prosecutors).

IMMEDIATE OBJECTIVES FOR ACTION:

The abuses of the "sting" statute of the money laundering laws should be stopped. They have resulted in the subversion of the criminal justice system, in unfair convictions, and in gross waste of taxpayer's money. Congress needs to review and revise, not only the sentencing guidelines on non-drug related money laundering offenses, but the statutes themselves. The Department of Justice should be required to exercise better control to prevent abuses of the "sting" statute by overzealous prosecutors. Congress has an obligation to change this unconstitutional law, or at least provide proper guidelines of due process, in its implementation. In its present form, this unfair, unconstitutional law is undermining our criminal justice system and is responsible for improper convictions and unprecedented prosecutorial misconduct that has no place in a democratic society.

AACLJ has identified two immediate objectives for community support and for Congressional action :

1. The money laundering "sting" statute (18 U.S. Code, Section 1956 (a)(3)), needs to be repealed or at least amended by Congress.

2. The U.S. Sentencing Commission's Proposed Amendments to the Sentencing Guidelines need to be adopted, particularly those pertaining to money laundering offenses and more specifically to non-drug related offenses prosecuted by the "sting" money laundering statute.

JUSTIFICATION OF OBJECTIVES:

THE STATUTE: Congress needs to reevaluate the language of the statute and provide proper guidelines for its use. " Ninety-four different interpretations of this statute exist presently throughout the country and each U.S. Attorney decides on his or her own how this statute will be used or abused". Neither Congress nor the Department of Justice have provided guidelines for the statute's proper application. The U.S. Sentencing Commission's internal report on the need for amendments related to mandatory sentencing guidelines suggests that 68% of those convicted under this statute did not really know or believe the proceeds to be from a "specified unlawful activity". This is because no clear representation was made and no due process of the law was followed. It means that perhaps as many as 68% of the people that have been convicted may be innocent; people serving long prison sentences through coercive plea bargaining and because of prosecutorial abuse of this "sting' statute of the money laundering laws. The statute has an extremely low threshold of proof, provides for a disproportionate sentencing level, and it has been grossly abused by overzealous prosecutors. It is unconstitutional, because it violates the Fourth, Fifth, Eighth, and Fourteenth Amendments. The statute's low threshold of proof, makes it easy for government prosecutors to engage in outrageous behavior, to fabricate crimes and evidence, and almost automatically obtain indictments and convictions.by prearranging a "crime", the evidence, conviction and extremely high level of sentencing.

The "sting" statute violates the Due Process and the equal protection provisions of the Fourteenth Amendment in that, more often than not, there is no clear representation by the undercover agent that the proceeds are indeed those of an "unlawful activity" , but of "some form of unlawful activity" without ever disclosing what is the activity . It violates the Fourteenth Amendment because of the low threshold of proof in the form of the key words "any representation". There are more nebulous definitions that are vague and subject to deliberate prosecutorial misinterpretations.

THE SENTENCING: Amendments proposed by the U.S. Sentencing Commission pertaing to money laundering offenses received overwhelming support at a public hearing. The U.S. Sentencing Commission's prepared its own favorable internal report recommending changes. Congressional committees failed to consider the proposed amendments in 1993 or in 1994. Congressional attention should be called to the need for ratification of these amendments.

The statute clearly violates the Eighth Amendment, because it imposes excessive bail, excessive fines, and cruel and unusual punishment totally out of proportion to the underlying offenses. For each count it provides for $250,000 in fines and up to 20 years imprisonment; the same as a major drug trafficking violation, even if the alleged, misrepresented, underlying offense of the "sting" is only a petty misdemeanor. Often the alleged unlawful activity does not fall within the predicate offenses of section (7) of the law to qualify as a money laundering offense. A circuitous statutory tracking is often required to bring the alleged offense within the ambit of money laundering offenses with considerable, unusual and cruel escalation of the offense level.

NEEDED ACTION AND SUPPORT

AACLJ asks Patriotic Americans and groups sharing the common goal of preserving and restoring constitutional laws and justice in America to assist and support this initial effort to have this most outrageous law, the Money Laundering "sting" statute, 18 U.S. Code, Section 1956 (a)(3) repealed or amended by writing to the chairmen and members of the Congressional Banking and Judiciary committees, to their elected representatives in Congress and to the U.S. Sentencing Commission. The statute needs to be repealed or drastically modified and amended.

Guidelines should be provided by Congress and the Department of Justice on how targets should be selected for deceptive government investigations using 18 U.S. Code, Section 1956 (a)(3); on how government confidential informants should be qualified, screened and monitored; on what is the effect of the Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers seeking convictions by any

means; on how outrageous government invasion of privacy can be rationalized, on what are appropriate sentencing levels when the underlying offense is nothing more than a petty misdemeanor; finally on what the due process requirement of "representation" should be.

Please sign and return the accompanying "Petition to Repeal" which clearly outlines the unconstitutionality of the "Sting" money laundering statute. Please circulate this notice, write and send copies of the attached petition to your elected officials in the 104th Congress bringing to their attention the abuse of this law and urging them to act on our common goals and objectives. BY SO DOING, YOU WILL BE UPHOLDING OUR CONSTITUTION, AND YOU WILL HELP PRESERVE OUR CIVIL RIGHTS, OUR BASIC CONSTITUTIONAL FREEDOMS, AND THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

PETITION TO REPEAL
18 U.S. Code, Section 1956 (a)(3)

"Issuing A Petition calling for the REPEAL of 18 U.S. Code, Section 1956 (a)(3), the "Sting" Money Laundering Statute which, in its present form, is an Unconstitutional Law;

CONSTITUTIONAL BASIS

WHEREAS, our Founding Fathers in 1787 adopted a Constitution at our First Congress and subsequent Congresses supplemented it with Constitutional Amendments or what is known as The Bill of Rights and the Reconstruction Amendments and, most importantly, the 14th Amendment with its due process and equal protection clauses; and

WHEREAS, our Constitution, the Bill of Rights and subsequent amendments, are the Supreme Law of the Land, and all individual rights and liberties are guaranteed therein, within the Bill of Rights and by the 14th Amendment; and

WHEREAS, all laws must mesh both democratic values and the need for public order and integrity in government and, most importantly, honor the rights guaranteed citizens under the Constitution; and

WHEREAS, if a law is ratified by Congress in good faith but its enforcement and prosecution is intentionally misinterpreted, applied selectively, improperly, prejudicially and unconstitutionally, abolishing liberties guaranteed by the Bill of Rights and violating the Due Process of the Fourteenth Amendment and UPON THIS HAPPENING this law to be hereby declared to be in violation of the Constitution of the United States, and subject to Congressional review and REPEAL; and,

THE UNCONSTITUTIONAL "STING" STATUTE OF MONEY LAUNDERING LAWS - CONGRESSIONAL RECORD

WHEREAS, 18 U.S. Code, Section 1956 (a)(3), the "sting" money laundering statute hereafter referred as the STING STATUTE), enacted on November 18, 1988 as part of the Money Laundering Amendment Act, is such a law requiring review and repeal because, frequently, it is misinterpreted and applied selectively, improperly, and prejudicially by federal prosecutors to target and convict citizens, through outrageous government conduct, unethical deceptions, abuse of the judicial process, and violations of Constitutional rights and principles, and

WHEREAS, the record shows that this STING STATUTE has been consistently, systematically and improperly applied and implemented, in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of our Constitution by permitting the improper fabrication of evidence and orchestration of a "crime" with guaranteed conviction and level of sentencing, obtained through a prearranged, low threshold of proof, and

STING STATUTE'S VAGUE LANGUAGE and DEFINITIONS

WHEREAS, the STING STATUTE makes such improper prosecution possible through vague, confusing and generic language and definitions which do not meet the simple language requirement of the law or sufficiently and clearly informing targeted persons of the charges against them; and

WHEREAS, the definitions and due process requirements that hold true for other laws, are not applied in the implementation of this STING STATUTE by federal prosecutors guiding, directing and supervising "sting" operations against targeted individuals; and

WHEREAS, the vague language of the STING STATUTE downgrades the threshold of proof necessary for convictions with such definitions of terms as "represented" substituted with "any representation", and "specified unlawful activity" substituted with "some form of specified unlawful activity", further substituted and downgraded with "though not necessarily what form of specified unlawful activity"; and

WHEREAS, the "specified unlawful activity" or "some form of specified unlawful activity" , though not necessarily what form of specified unlawful activity, covers a wide range and an unimaginable variety of hypothetically committed offenses, including any of the offenses in section 1961 (1) (RICO violations) and sub-violations under this section, encompassing in turn a variety of other offenses, some of which may be even State misdemeanors, "represented" vaguely and circumstantially by undercover officers through "any representation" but only for definitional purposes in the structuring of a "sting" and thus making it possible to obtain a guaranteed guilty conviction through such confusing, circuitous, statutory tracking and by the vague language of the STING STATUTE; and

WHEREAS, these misrepresented "sting" subviolations used in the statutory tracking require a substantive rather than a hypothetical federal or State offense, prosecutors do not charge defendants with these offenses but use the vague "representation" or "any representation", including a circumstantial omission of further inquiry by a targeted person, to establish "willful neglect" or a "blind eye" as a substitute for their failure to follow the Due Process requirement of the law, and to claim hypothetical underlying offenses which are used for definitional purposes in structuring "stings" and only for the purpose of indicting and prosecuting for money laundering under the STING STATUTE, and independently of the nature or offense level of these hypothetical, underlying offense; and

LACK OF CONGRESSIONAL GUIDELINES IN THE APPLICATION OF THE STING STATUTE

WHEREAS, without proper Congressional or Department of Justice guidelines on the STING STATUTE's proper application, its vagueness has been often misinterpreted, exploited and abused by law enforcement agents and federal prosecutors to engage in outrageous conduct in order to obtain easy convictions of improperly targeted individuals by avoiding conformance to the due process requirements of the Fifth and Fourteenth Amendment of the Constitution; and

WHEREAS, no other Guidelines have been provided by Congress or the Department of Justice on how targets for such deceptive investigations should be selected; on how government confidential informants should be qualified, screened and monitored; on what is the effect of the Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers seeking convictions by any means; or on how outrageous government invasion of privacy can be rationalized, or what are appropriate sentencing levels when the underlying offense is nothing more than a petty misdemeanor artificially and enormously escalated to a money laundering offense level through abuse of the STING STATUTE; and

STING STATUTE'S MISAPPLICATION AND ABUSE

WHEREAS, no uniformity in the application of this law exists and Ninety-four different interpretations of this STING STATUTE exist presently throughout the country and each U.S. Attorney decides on his or her own how this STING STATUTE will be used or abused; and

WHEREAS, the STING STATUTE has been grossly misapplied and abused to target individuals for a variety of misrepresented minor offenses which do not fall within the ambit of offenses for which the law was intended by Congress; and.

WHEREAS, this misapplication of the STING STATUTE has resulted in unprecedented misconduct, abuse of power, abuse of the federal criminal justice system, waste of government resources, taxpayer's money and wrongful convictions; and

WHEREAS, the continuous abuse of the STING STATUTE for frivolous, unnecessary prosecutions diverts valuable government resources from fighting real crime; and

WHEREAS, the STING STATUTE has already been used to violate fundamental constitutional rights of United States citizens; and

STING STATUTE'S CRUEL AND UNUSUAL PENALTIES

WHEREAS, the STING STATUTE provides for severe, disproportionate and artificially escalated sentencing levels and penalties and seizures even when the underlying "represented unlawful activity" is minor; and

WHEREAS, most convictions are obtained through coercive plea bargaining effected by prosecutors through the use and threat of the high sentencing levels under this STING STATUTE; and

WHEREAS, the U.S. Sentencing Commission's internal report on the need for amendments related to mandatory sentencing guidelines suggests that 68% of those convicted under this STING STATUTE did not really know or believe the proceeds to be from a "specified unlawful activity", which is a frightening statistic, clearly suggestive of due process violations and possible wrongful convictions; and

STING STATUTE'S VIOLATIONS OF THE BILL OF RIGHTS AND OF THE 14TH CONSTITUTIONAL AMENDMENT

WHEREAS, the STING STATUTE violates the Fourth Amendment's guarantee of the right of the people to be secure in their persons against unreasonable searches and although secret videotaping of persons in public places may be permitted, clandestine sound recording of private conversations is a form of unreasonable search protected by the Fourth Amendment; and

WHEREAS, the STING STATUTE violates the Fifth Amendment and due process against self-incrimination in that no warning is given to the targeted person and no Miranda rights are read that any statements made, or not made (labeled as wiiful neglect), will be used against this person for money laundering or any other type of collateral prosecution; and

WHEREAS, the STING STATUTE violates further the Fifth Amendment of Due Process and encourages outrageous government conduct in obtaining convictions; and

WHEREAS, the STING STATUTE violates the Sixth Amendment because its language is ambiguous and vague and in most "sting" money laundering cases an indicted person is not informed clearly in the indictment of the nature and cause of the accusation which often is not clear and does not correspond with an underlying offense which was properly represented; and

WHEREAS, the statutory tracking of the accusation in the STING STATUTE is often circuitous, nebulous, semantically vague and therefore not understood as it involves the targeted individual's alleged guilt for an extreme money laundering offense based, not on an actual violation of an underlying federal or state offense (often a misdemeanor), but for his alleged "intent" or "state of mind" in that he "believes" to participate or commit the misrepresented, hypothetical underlying offense which is used for definitional purposes only in the structuring of the money laundering "sting", and that the target's "intent" or "state of mind" (and therefore guilt for money laundering) can be circumstantially and subjectively established by the undercover officer's "representation" or "any representation" of "some form of unlawful activity, although not necessarily which form unlawful activity"; and

WHEREAS, alleged ongoing investigation of defendants for "other crimes" allegedly revealed to the undercover agent earlier during the "sting" and subsequent piecemeal or a series of superseding indictments are used often by prosecutors as the excuse to violate further a defendant's sixth Amendment right to speedy trial; and

WHEREAS, the STING STATUTE clearly violates the Eighth Amendment, because it imposes excessive bail, excessive fines, and cruel and unusual punishment totally out of proportion to the underlying offense which often may be minor; and

WHEREAS, the STING STATUTE provides for $500,000 in fines and up to 20 years imprisonment, same as a major drug trafficking violation, even if the alleged, misrepresented, underlying offense of the "sting" is only a petty misdemeanor punishable ordinarily with a small fine if indeed it was committed; and

WHEREAS, prosecutors use the severity of the STING STATUTE's punishment or "other crimes" revealed during the "sting" to coerce and force most defendants to plead guilty to one or more counts of money laundering rather than risk longer imprisonment through the guaranteed conviction process made possible by the improper prosecutorial use of the STING STATUTE and its intentionally low threshold of proof: and

WHEREAS, if the alleged and misrepresented "unlawful activity" does not fall within the predicate offenses of section (7) of the STING STATUTE to qualify as a money laundering offense (i.e. drug related), the circuitous statutory tracking mentioned earlier is used to bring the alleged hypothetical offense of the "sting" within the ambit of money laundering offenses by charging a defendant not guilty of the misrepresented minor offense but guilty of his "intent" and of a circumstantially derived "state of mind" (guaranteed through the design of the scenario of the "sting"), in allegedly intending to commit the hypothetical lesser offense, with considerable, unusual and cruel escalation to the money laundering offense level in further violation of the Eighth Amendment; and

WHEREAS, the STING STATUTE violates the Due Process and the Equal Protection provisions of the Fourteenth Amendment in that, often, there is no clear representation by the undercover agent that the proceeds are indeed those of an "unlawful activity" , but of "some form of unlawful activity" often without even remotely disclosing the nature of this "unlawful activity"; and

WHEREAS, the STING STATUTE violates further the Fourteenth Amendment because of the low threshold of proof in the form of the key words and phrases downgrading the term "represented" to "any representation", and the term "unlawful activity" downgraded to "some form of unlawful activity", which is further downgraded by the phrase "though necessarily which form of unlawful activity", and the terms "proceeds", "property" "concealing" "disguising", "promoting", "interstate commerce" to have a plethora of incomprehensible definitions and interpretations; and

WHEREAS, the financial transaction of a simple deposit in a financial institution such as a bank from "some form, though not necessarily which form of unlawful activity" of intentionally misrepresented "property" or "proceeds" (often of insignificant value) becomes the automatic and low threshold criterion and element of the money laundering "crime" thus guaranteing conviction, through the abuse of the STING STATUTE, to an artificially escalated money laundering offense, in further violation of the Due Process requirement of the Fourteenth Amendment: and

WHEREAS, the STING STATUTE has an extremely low threshold of proof which makes it easy for government prosecutors to engage in outrageous behavior, to fabricate crimes and evidence, entrap individuals, mislead Grand Juries, and almost automatically obtain indictments and convictions of targeted citizens by nullifying their valid entrapment defense through the design of the "sting" scenario; and

STING STATUTE'S ABUSE VIOLATES CONGRESSIONAL INTENT

WHEREAS, Congress and its authors in the Department of Justice intended the STING STATUTE to be used against organized crime and criminals involved in money laundering activities and drug trafficking but the STING STATUTE has been used and abused by federal prosecutors to prosecute (i.e tax protestors, ethnic minorities, the politically incorrect) and primarily for purposes and in ways other than those intended by Congress.

PETITION TO REPEAL THE STING STATUTE OF THE MONEY LAUNDERING LAWS

IN CONCLUSION IT IS NOTED that the above abuses of the STING STATUTE have been attested and documented by numerous sources, testimonies, government records of public hearings (U.S. Sentencing Commission Hearings, March 22, 1993), improper prosecutions documented by caselaw, and by the U.S. Sentencing Commission's internal and independent finding suggesting that due process was not followed in the application of the STING STATUTE and that as many as 68% of the persons that have been convicted may be innocent people serving long prison sentences because of prosecutorial abuse of this STING STATUTE in the misrepresentation of the hypothetical "unlawful activity";

BE IT FURTHER NOTED that the STING STATUTE of the money laundering laws does not provide the constitutional safeguards and it is a law which has become an instrument of oppression and abuse because of the lack of proper guidelines in its application;

BE IT FURTHER NOTED that the continuing misapplication of the STING STATUTE by federal prosecutors is subverting and undermining our judicial system by the very same people who are supposed to protect it;

WE CONCLUDE that prosecutions under 18 U.S. Code, Section 1956 (a)(3),the money laundering STING STATUTE, have not been to the best interest of the citizenry of the United States of America and have been the source of abuse and prosecutorial misconduct and subversion of our Criminal Justice System;

WE ARE EXTREMELY CONCERNED THAT our judicial system is being subverted and undermined through unlawful prosecutions and abuse of this particular law but, also, WE ARE EXTREMELY CONCERNED that other greater issues and philosophies emerge that basic constitutional freedoms and guarantees are threatened in our country and that our democracy can rapidly degenerate into tyranny if such unconstitutional and unfair laws, as 18 U.S. Code, Section 1956 (a)(3), the money laundering STING STATUTE are allowed to stay in effect and be further abused;

WE FURTHER RESOLVE, that all laws, including 18 U.S. Code, Section 1956 (a)(3), the STING STATUTE, need to be adjudged constitutionally accurate in their intent and language so as to adhere strictly and hold true to the Rules and Principles of the Constitution of the United States of America and its Bill of Rights and subsequent Amendments;

THEREFORE, WE PETITION Congress to REPEAL 18 U.S. Code, Section 1956 (a)(3)), the money laundering STING STATUTE, as being a law which is unconstitutional, to review and amend all other money laundering laws and assigned sentencing guidelines, to ratify the amendments to the mandatory sentencing guidelines proposed by the U.S. sentencing Commission; and to be vigilant of further abuses and injustices of improperly applied laws, and for the additional benefit of engendering a higher degree of fidelity to the American Criminal Justice System and a re-awakening awareness to our country's Founding Principles.

RESPECTFULLY SUBMITTED

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE

020 - 95

Mr. James E. McClinton
11831 So. Orchard Ave
Los Angeles, CA 90044

February 24, 1995

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002 - 8002

Re: Written testimony for hearing (March 14, 1995) on Proposed Amendments to the Federal Sentencing Guidelines.

Dear Committee Members:

Numerous courts have come to acknowledge the flagrant injustices that have been and continue's to exist in America. Scores of blacks and minorities right's are trampled on each day as the courts impose the Guidelines established by the sentencing commission. " I simply do not see how Congress can be satisfied with the results of Mandatory Mimimums for possesion of crack cocaine " [1]. While the majority of these courts blatantly disagree with the guidelines and would much rather render a punishment, fitting of the crime and the respective circumstances that reflect the individuals cupulability in his offense, and a sentence that would afford the interest of justice and yet still reflect the seriousness of the offense.

Our Government has for so long, claimed that the balance of justice is perceived as color blind. One could argue to the contrary and put up fact's to substantiate this statement, that so many perceive as allegations. One only has to look at the gross disparity in the numbers (statistics). The courts have expressed, no doubt that the burden of the penalty scheme, which equated one gram of cocaine base to 100 grams of powder cocaine, falls disproportionally upon blacks. As sure as there is day and night, these number's do not lie, but they do quite profusely indicate that something is defitnitely wrong here.

---

[1] Justice Anthony Kennedy, New York Times March 10, 1995.

Panic based on media reports which incited racial fears has been Historically in this country as the catalyst for generating racially baised legislation. Our lawmakers in a frenzy and over reaction to overflow of fear from sensationlistic headlines, over zealous media, supposingly in the interest of justice broke there own rule's in implementing, formulating the infamous Crack Law, Abandoning hearings and the procedural steps that we now take in concidering these proposed amendments. Time and time again the courts at the district and appellate level have concluded that no one has yet to prove that Congress enactment of the crack law was racially motivated. " District court judge Cahill, J. to cite one of many has substantated beyond a doubt that although Congress did not intentionally discriminate. That unconscious racism was at work here. " [2]

It appears that lawmakers are more concerned with appeasing there constituents and tearing down the family unit by locking many, many non-violent, low level drug offenders up for unjustly lengthy sentences. Not to mention that the guidelines have again reintroduced racial disparities and variances, the very kind that the guidelines were disigned to reduce.

It has been almost 10 years since implementation of the infamous "crack law ". This has afforded the government time to gather data for and against the crack law. Senior Circuit Judge Bright writes, " note the racial injustice flowing from this policy." [3] Numerous studies by both sides continue to point out the fact that crack cocaine and powered cocaine are in fact synonymous, one and the same. There has not been a Drug/Narcotic that at some point was not deemed detrimental to society, be it Heroin, Cocaine, P.C.P., LSD, Marijuana and Alcohol. " The Criminal justice system response to the emergence of crack was out of proportion to the actual problem. However the response has had a substantial impact on the imprisonment rate of inner city minorities. " [4]

---

[2] District Court Judge Cahill, J. (Clary v. U.S., 846 F.Supp 768)

[3] Senior Circuit Court Judge Bright (Williams v. U.S. 982 F2d. 1268)

[4] Steven Belenko, Deputy Director of New York Criminal Justice Agency

But more important and noteworthy is the fact that the threat that these drugs posed was not acknowledged until they were being used frequently by blacks and other minorities. " District Court Judge Cahill, J. held that the 100 - 1 ratio of cocaine to cocaine base provided by penalty provisions of the crack statute and the sentencing guidelines deprive blacks of equal protection." [5] The much unwarranted 100 to 1 ratio between cocaine base (crack) and powered cocaine for the purposes of the sentencing guidelines should be changed to reflect a ratio of 1 to 1 in that they cocaine base (crack) and powered cocaine are one and the same. Members of the committee indulge with me briefly in a mere analogy. When we go out to eat, say for instance breakfast. We decide to have eggs as part of our breakfast dish. Our waitress inquires as to how we would like our eggs (i.e. scrambled, fried overeasy, sunny side up etc...), with this in mind when we are not charged more or less for our eggs just because we individually choose to injest them in a different form. We are simply charged the price of the egg! Irregardless of the way prepared an egg is an egg, whether scrambled or fried, they are one and the same. Similarly, cocaine/cocaine base (crack) are one and the same. Individuals should be charged at a ratio of 1 to 1 for crack as they are for powder cocaine, just as eggs are eggs. My grandfather just as your's I'm quite sure had a saying " If it walks like a duck, quacks like a duck, looks like a duck, then it must be a duck. " I could cite numerous district and appellate court Judges, Lawmakers, and Authorities whom acknowledge that cocaine/cocaine base (crack) are one and the same. The [o]nly difference in the two are, the people who use it. Regardless of Congress wanting to put emphasis on cocaine base (crack) this ratio of 100 - 1 is the most gross, flagrant, injustice since separate water drinking fountains for blacks and whites. Lawmakers have subtly wiped out all the progress that was made during the civil rights movement at every opportunity. By the means of " Unconscious Racism ", that does exist and is very much alive, but never acknowledged openly simply because it is percieved as not fashionable even among similarly minded

---

[5] District Court Judge Cahill, J. (Clary v. U.S. 846 F.Supp 769)

constitutents. In Arlington, the Supreme Court listed circumstantial evidentiary sources for judicial review of legislative or executive motivation to determine whether a racially disriminatory purpose exist. Arlington decided that departures from normal procedures are relevant in determining the existence of invidious influences. Evidence presented that this was significant departures from prior substantive and procedural sequences, which point tward invidious discriminatory purpose.

Although moderate strides have been taken, we cannot fool ourselves into believing that our decisions are free from the influences of this country's legacy of racial subordination and discrimination. If we deny the influences of the vistiges of racism we will remain imprisoned by the past. Thus the root of racism has been implanted in our collective unconscious and has baised the ideas that Americans accept about the significance of race. The root of unconscious racism can be found in the latent psyches of white Americans that were inundated for centuries with myths and fallacies of the superiority over the black race. So deeply enbedded are these ideas that their acceptance and socialization from generation to generation have become mere routine. The illustration of unconscious racism is patently evident in the crack cocaine statues. Had the same type of law been applied to powder cocaine it would have sentenced droves of young whites to prison for extended terms. Before enactment of such a law it would have been much more carefully and de liberately considered and scrutinized.

With regard to §2D1.1 (c) (1), cocaine does not increase in purity as quantity increases. In the case of cocaine base (crack) purity is [s]ubstantially lower. Thusly, It should be reflected in a significantly lower offense level. By utilizing a rebuttable presumption that the actual weight of the controlled substance was 50% of the weight of the misture containing the controlled substance . This would best reflect what is actually taking place and is consistent with the majority of cocaine base (crack) mixture being sold in our streets. To apply a set of rebuttable presumptions, with to many other interpretations would allow for the law to be manipulated as to give the same effect as never being amended. The only stipulation that should be allowable to the

rebuttable presumption of 50% purity is, if a defendent or government can establish a purity by chemical analysis (DEA form 7). Then this established figure should be used in determination of purity, regardless whether it is higher or lower then the presumption of 50% purity. In short a person should be charged only for the amount of cocaine in the mixture. For example, Our laws do not take into consideration that 5 kilo's (5,000 grams) of cocaine base is not 5 kilo's of cocaine base (crack). To have 5 kilo's of " pure " cocaine base (crack) is unheard of. On top of the fact that most of the cocaine we get in the United States is not 100% pure. This adds considerably to the quality of the cocaine base (crack). No consideration is given to the fact that legal over the counter products are used to obtain cocaine (crack), (i.e. Baking Soda, Vitamin B Blend, Procaine-Synthetic cocaine etc...). Case in point the average drug dealer wants to maximize his profits and cut cost. What better way to achieve this then by stretching your product. In lay mans terms watering it down. For example if a individual wanted to sell 5 kilo's (5,000 grams) of cocaine base (crack) to someone all he or she does is purchase 2.5 kilo's (2,500 grams) of powered cocaine. They could then buy 3 to 4 lbs of baking soda, 2 to 3 lbs of Procaine, then mix the 2.5 kilo's of powdered cocaine with 1,500 grams of Procaine and 1,200 grams of baking soda. A individual now has 5 kilo's (approx. 5,000 - 5,200 grams) of cocaine base (crack), with a purity of between 30% to 50%. The end result is how can lawmakers justify punishing a individual with a law that say's cocaine base (crack) is XX% purity or stronger? When in fact it has the same effect or less then it does in powdered form. How can you charge a person for weight that is not consistent with the drug iself, not to mention that it is quite legal (the additives) and purchased legally and openly?

Inconclusion there should be some law to the extent, where a individual will be charged for the cocaine only and not for the medium added to it. Section §2D1.1 (c) (1) falls short of reality. Cocaine that is in the form of base (crack) is rebricked before sale as a kilo. Therefore that means that half of that kilo is mixture already. For this reason 50% as in (A) (2) is more in line with reality. As

pertaining to section two of the Domestic Chemical Diversion Act of 1993 the amendment under §2D1.11 points out that in order to avoid any unwarranted disparity in determing the level of offense, those substances which are additives to the drug that is at issue as being illegal in some manner are not be considered in establishing the offense level. Only the weight of the drug in its pure state and not the mixture is to be used in determining the offense level for the violation. Surely all will agree that the intent and spirit of this statement should cover all drugs.

With regard to proposed amendment #43 AND 38, OPTION 2: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including possession with Intent to Commit these offenses); Attempt or Conspiracy applying also the drug quanitity table for offenses involving cocaine base (crack). The equivalent for this should without dispute be 1 to 1 to reflect accurately that powder cocaine and cocaine base (crack) are one and the same.

The proposed Amendment #34 to Section §2D1.1 (a) (3) makes a lot of sense in that it takes into consideration,, that a person whom qualifies for a adjustment under §3B1.2 (Mitigating Role). In short it takes the brunt of responsibility off of the low level defendant. The drug quantity should not play [as] much in the determination of offense level, with this in mind it only makes sense that those less accountable, offense level should reflect such. I assume the commission in considering this proposal have arrived at level 28 by assuming that a individual will recieve a deduction in offense level for acceptance of responsibility, mitigation role, there by placing a low level defendant at a 5 year sentence (level 24 - 26). Some consideration should possibly be given to making this even lower, with respect to surrounding circumstances (i.e. first time offender).

Futhermore, the proposed amendment to Section §2D1.1(c), by basing the scale of the offense upon the quantity of the control substance which the defendant was involved in a given time period, would in my opinion result in a more accurate assumption as to the quantity involved. It is without a doubt that [Option 2:(A) if the offense involved a num-

ber of transactions over a period of time, the offense level from the drug quantity table should be determined by the quantity of controlled substance with which the defendant was involved on any one ocassion using the quantity that results in the greatest offense level].

In conclusion [a]ny law that is subsequently changed should benefit all. In the interest of Justice and Fairness. To amend a law implies that there was something incorrect about it. When a law that is unjust is applied to a individual, when that law is later corrected it should be applied to that individual whom it was applied in its incorrect form to correct that wrong. For example, when the method of weighing LSD a drug used predominately by whites was amended to reflect proper weight it was applied " Retroactively ". With this in the mind of [a]ll Americans to not make the amendments to powder cocaine/cocaine base (crack) ratio, purity and weight, retroactive would signal to all around the world that the United States is everything but one Nation with justice for [a]ll. For lawmakers not to make the lowering of crack retroactive would be the most gross, blatant act of conscious or unconscious racism since, implementation of the 100 to 1 powder cocaine/cocaine base (crack) ratio. When will lawmakers realize that by taking the bread winner out of the home and locking them up for lengthy periods only burdens the entire system. For instance the cost of housing inmates is continually rising, over burdening taxpayers. Lawmakers are always talking about finding ways to decrease the welfare rolls. How? When they continue to take away the bread winners, leaving there spouse and kids with no other option other than welfare. I myself would like to see our government take a different approach. For instance, First offense, non-violent, low level drug offenders could better serve society by serving periods of house arrest instead of incarceration. By working and being made to pay a percentage of there income (after tax deduction) to the government for a determined period in conjunction with counseling, Educational classes, Drug treatment at there expense or face a term of incarceration.

With regard to the committee hearing testimony on all the proposed amendments in the law I appeal to the moral and common sense of

our policy makers. I seek something vital to not only myself but to the future of my children, My grand children, their children and yours. Vital to the future of every American be they black or white. The hope and possibility of " Equal Protection, Equal Justice " under the law. The idea of that one day racism on a whole conscious or unconscious, openly or hidden will not be the ruling factor in deciding how successful or how far we may accel in life. Until our society begins to address the problem, Instead of locking it up for extended periods of time, Until our society begins to provide effective drug treatment, Educational programs and equal opportunity for a decent education and jobs, A bad situation will only worsen. All of us including our Children will suffer.

Sincerely,

James E. McClinton

James E. McClinton

021 - 95

EMMANUEL H. DIMITRIOU, P.C.

LAW OFFICES
522-24 COURT STREET
P.O. BOX 677
READING, PA 19603

OFFICE: 610-376-7466 FAX: 610-376-1259

February 24, 1995

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander,

This letter is in response to the Sentencing Commission's request for public comment on the proposed amendments to the Sentencing Guidelines published in the December 21, 1993 edition of the Fed.Reg (Vol. 58 No. 243 Part V). Specifically, I wish to comment on proposed Amendment No. 11, which would amend and consolidate USSG Sections 2S1.1 and 2S1.2 (money laundering offenses).

I am strongly in favor of the proposed Amendment No. 11 and urge it be adopted by the Commission with the following modifications:

1. Where the defendant committed the underlying offense, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level as in proposed Section 2S1.1(a)(2)(4). The offense level of the underlying offense would then be increased by any specific offense characteristics under proposed Section 2S1.1(b). Therefore, I suggest deleting from the instruction in 2S1.1(a) the term "(Apply the greatest)" and insert in its place, the term"otherwise" after sub-paragraph (3).

2. The Commission make the base offense level in proposed 2S1.1(a)(3) the same as the base offense level for fraud and deceit (Section 2F1.1). Further, that the Commission change proposed 2S1.1(a)(3) to a base offense level of six (6) plus the number of offense levels from the table in Section 2F1.1.

3. That all amendments to the Sentencing Guidelines, specifically including but not limited to the ones above mentioned, be made retroactive.

I have not elaborated on all the reasons for my requests that the Sentencing Commission adopt the above amendments, since I am aware that there have been many letters sent to you setting forth all the appropriate reasons. I have been a criminal defense attorney for thirty-five (35) years, practicing both in the state and federal courts, and I am presently Vice-Chairman of the Pennsylvania Supreme Court Criminal Rules Committee. I strongly urge that the Commission adopt the above amendments to the sentencing guidelines.

Very truly yours,

Emmanuel H. Dimitriou, Esquire

EHD:bc

022-95

Bruce R. Bryan

Attorney at Law

Member:
New York and
Florida Bars

333 E. Onondaga Street
Syracuse, New York 13202
315-476-1800
Fax 315-474-0425

February 21, 1995

The Honorable Richard Conaboy
Chairman, United States Sentencing Commission
1 Columbus Circle Northeast
Suite 2-500, South Lobby
Washington, DC 10002-8002

RE: Proposed Amendment to Section 2S1.1 of the United States Sentencing Guidelines (Money Laundering Offenses)

Dear Judge Conaboy:

I am writing you to express support for the proposed Amendment for the Sentencing Guideline pertaining to money laundering offenses, and to urge the Sentencing Commission that in justice and fairness said Amendment should be made retroactive.

I commend the Sentencing Commission for recognizing that the present Sentencing Guideline pertaining to money laundering offenses has been inequitably applied in the past, and has not reflected the intent of Congress at the time that Congress enacted Section 1956. I agree with the Sentencing Commission's conclusion that Congress intended that heavier sentences be imposed for money laundering when connected with illegal drug activity. Unfortunately, the present Sentencing Guideline has been used by prosecutors to obtain more severe sentences than those intended by Congress in non-drug related activities, such as white collar crimes involving fraud or deceit.

Justice dictates that an individual defendant should not be subjected to a sentence for money laundering that greatly exceeds the sentence imposed for the underlying criminal charge from which the money laundering charge was derived. I believe that the proposed amendment of the United States Sentencing Commission more fairly reflects the intent of Congress, and differentiates between activities considered more severe and less severe by Congress.

I am especially writing to urge the Sentencing Commission to rule that the proposed Amendment be retroactive. I respectfully submit that in the interest of fairness and justice, defendants who have been previously unfairly sentenced under the now existing Sentencing Guideline should have the benefit of this proposed Amendment. I believe that standard statutory construction mandates retroactive application of the Amendment, once adopted. The basis of the Amendment is that Congress, at the time that it enacted Sections 1956 and 1957 of Title 18 of the United States Code did not intend for the more severe sentences for a money laundering charge to be applied to non-drug related activities, such as white collar fraud and deceit. Based upon the foregoing, an Amendment would then be a clarification of the intent of Congress as it existed in 1986 when Congress enacted such statutes. The Sentencing Commission, during the interim period, did not have the benefit of case law to interpret the intent of Congress. The Sentencing Commission has now concluded that Congress' intent in 1986 was to only impose the more severe sentences in drug related crimes. Therefore, I respectfully submit that the defendants sentenced in the interim have a right to the benefit of such re-interpretation and clarification of Congressional intent as it existed in 1986 and should be permitted the benefit of such reduction. Defendants may well have rights to such an interpretation under the due process and equal protection clauses of the United States Constitution. Moreover, I simply state as a matter of justice and fairness that it would be improper to differentiate between defendants subsequently sentenced under the new Amendment, and those who had been unfairly sentenced under the previous guidelines.

In sum, I applaud the Sentencing Commission for taking the steps to propose the foregoing Amendment, and I urge the Sentencing Commission to adopt such Amendment and to make it retroactive.

Very truly yours,

Bruce R. Bryan, Esq.

BRB/mcf

023 - 95

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
730 WARREN E. BURGER BUILDING
316 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55101-1461

CHAMBERS OF
PAUL A. MAGNUSON
CHIEF JUDGE
(612) 290-3967

March 3, 1995

United States Sentencing Commission
Attn: Public Information
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners:

I understand that an amendment to the United States Sentencing Guidelines has been proposed relating to the calculation of drug quantities for marijuana offenses. I submit this letter as a comment on the proposed amendment, which would change the Drug Quantity Table in § 2D1.1 of the guidelines to replace the one plant = one kilogram equivalency used for offenses involving more than 50 marijuana plants with the one plant = 100 grams equivalency. This amendment is practical, reasonable, and fair, and I support it wholeheartedly.

In my experience as a United States District Court Judge in Minnesota, I have presided over trials in which defendants were convicted of growing numerous marijuana plants. In many if not all of these cases, the one plant = one kilogram equivalency did not reflect the facts of the situation, nor did it accurately reflect the culpability of the defendants. For example, in *United States v. Angell*, 11 F.3d 806 (8th Cir. 1993), an expert witness *for the Government* testified at sentencing that a one plant = one pound ratio was more appropriate in this region of the country. Nevertheless, because of the equivalency set forth in § 2D1.1, the Eighth Circuit held that the defendants could only be sentenced using the one plant = one kilogram equivalency.

As you no doubt are aware, it is common knowledge that many of the marijuana plants that are used in calculating drug quantities would never reach the drug marketplace. Weather and other environmental forces often reduce the number of plants before the plants reach maturity. In addition, marijuana plants that grew not from cultivation by the offender but through the natural spread of

vegetation are typically included with those counted for the offense, despite the fact that the defendant frequently had no intention of selling those plants. The proposed amendment would help reduce the inequities resulting from the one plant = one kilogram method of calculation.

I strongly support the adoption of the proposed amendment and add that provision should be made to allow its retroactive application. Thank you for your consideration of these remarks.

Warm regards,

Paul A. Magnuson
United States District Court

024 - 95

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION

"A Professional Association for Federal Law Enforcement Officers"

Representing Members of the:

Dept. of Agriculture — O I G — Special Agents
U S Forest Service — Special Agents
Dept. of Commerce — Office of Export Enforce. — S A
Office of Inspector General — Special Agents
National Marine & Fisheries Serv. Law Enf. — S A
Dept. of Defense
US Army — CID — Special Agents
Defense Investigative Service — Special Agents
Defense Criminal Investigative Service — S A
Naval Investigative Service — Special Agents
U S Air Force — OSI — Special Agents
Dept. of Education — Investigation — S A
Dept. of Energy — O I G — Special Agents
Dept. of Health & Human Services — S A
Dept. of Housing & Urban Devel. — Inves. — S A
Dept. of Interior — O I G — Special Agents
US Fish & Wildlife Services — Law Enforce. — S A
Bureau of Indian Affairs — S A & Police
US Park Police — Park Police Officers
Bureau of Land Management — Special Agents & Rangers
Dept. of Justice — US Attorneys — C I & Attorneys
Drug Enforcement Administration — S A
Federal Bureau of Investigation — S A
INS — Special Agents & Border Patrol
US Marshals Service — Marshals & Dep. Marshals
Parole & Prob. Service — Parole & Prob. Officers
Dept. of Labor — O I G — Special Agents
Office of Labor Racketeering — S A
Dept. of State — Diplomatic Sec. Ser. — Special Agents
Investigation — Special Agents
Dept. of Trans. — Investigation — Special Agents
US Coast Guard — Inter. Officers & S A
Federal Aviation Admin (FAA) — Investigators
Dept. of Treasury
B A T F — Special Agents
US Customs Service — Office of Enforcement — Special Agents
Customs Investigators
Internal Affairs — Special Agents
Internal Revenue Service
Criminal Investigation Division — S A
Inspection Service — Inspectors
US Secret Service — S A & Police
Environmental Protection Agency
Office of Criminal Investigations — Special Agents
Office of Inspector General — Special Agents
General Services Administration
Office of Investigations — Special Agents
National Archives — Criminal Investigators
Nuclear Regulatory Commission - Special Agents
U S Capitol Police — Police Officers
U S Postal Service — Inspectors & Postal Police
US Printing Office — Special Agents
Veteran's Administration — Investigations — S A

March 6, 1995

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

Dear Commissioners,

On behalf of the members of the Federal Law Enforcement Officers Association (FLEOA), the largest representative of Federal law enforcement officers in the nation, I want to urge the Commission to raise the sentencing guidelines for those offenses that have been outlined in the Department of Justice published proposal.

Passport and visa fraud have become the means by which terrorists and international narcotics traffickers are able to operate with impunity. Stricter penalties are needed as an deterrent against these international criminals. Today the deterrence factor does not exist. Many individuals arrested with fraudulent documents serve little to no prison time.

Since the bombing of the World Trade Center the public has come to realize how vulnerable our nation is to international terrorism. The amount of confidence the public has in our criminal justice system is vital our national security. A system that does not punish those who violate the law erodes that confidence.

Raising the sentencing guidelines for passport and visa fraud will send a message to criminals around the world that the United States is serious about enforcing its laws and protecting its citizens.

Very truly yours,

Victor Oboyski
National President

1920 "L" STREET N.W. - SUITE #602, WASHINGTON, DC 20036-7222
TELEPHONE: 202-296-7222 FAX: 202-296-7220

[113]

025 - 95

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

MAR 7 1995

CC-44,818 FE:BSO

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

Dear Sir:

This is in response to the Notice of Proposed Amendments to the Sentencing Guidelines published in the Federal Register on January 9, 1995. The Bureau of Alcohol, Tobacco and Firearms would offer the following comments on the Commission's proposals.

I. FIREARMS

A. Felons Possessing Firearms with Previous Violent Felony Convictions

The Violent Crime Control and Law Enforcement Act of 1994 (hereinafter "the Act") provides that the United States Sentencing Commission (Commission) shall amend the guidelines to appropriately enhance sentencing in cases where a defendant, who is a felon in possession of a firearm in violation of section 922(g) of the Gun Control Act of 1968 (GCA), Title 18 U.S.C., has 1 or 2 prior convictions for a violent felony or a serious drug offense as defined by 18 U.S.C. § 924(e).

The current sentencing guideline in section 2K2.1 for a section 922(g) offense provides a base offense level of 14. The offense level for felons who have 1 prior conviction for a crime of violence or a controlled substance offense is 20, and the level for felons who have 2 prior convictions is 24.

The Commission requests comments on whether the current offense levels should be increased and, if so, by what amount. In our view, there is no discretion with respect to an increase because the Act requires the Commission to enhance the penalties in the above-described cases.

Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), whoever violates section 922(g) and has 3 previous convictions for violent felonies or serious drug offenses is

subject to a mandatory sentence of not less than 15 years. Therefore, we believe it appropriate to enhance by 3 levels the sentence of felons having 1 predicate conviction and an additional 3 levels for felons having 2 such convictions. This would result in a sentence of approximately 5 years in the first instance and 10 years in the second instance.

Furthermore, we would point out several disparities between the 2K2.1 guidelines and the section 924(e) treatment of commercial burglary, foreign convictions, convictions which occurred more than 15 years ago, and related offenses. With respect to commercial burglaries, the guidelines include only burglaries of dwellings as crimes of violence. See section 2K2.1, Application Note 5 and section 4B1.2, Application Note 2. However, under section 924(e), burglaries of any building or structure are violent felonies. The Supreme Court has noted that all burglaries carry an inherent potential for harm to persons. See Taylor v. United States, 495 U.S. 575, 588 (1990). Therefore, we believe that the guidelines should be amended so that commercial burglaries are treated similarly to other violent felonies.

Likewise, under the current guidelines, foreign convictions for crimes of violence or controlled substances offenses are not treated as prior felony convictions and do not result in an increase in offense levels under section 2K2.1. Rather, section 4A1.2(h) provides that sentences resulting from foreign convictions may be considered in determining the defendant's criminal history category. On the other hand, foreign convictions for violent felonies and serious drug offenses are considered to be convictions for purposes of mandatory sentencing under section 924(e).[1] Therefore, we

[1] See United States v. Winson, 793 F.2d 754 (6th Cir. 1986), holding that a foreign felony conviction was a conviction for purposes of 18 U.S.C. 922(h), the predecessor to section 922(g). The court suggested that a foreign conviction should be treated as a disabling conviction if it was not the result of a violation of civil rights or contrary to other American constitutional principles.

recommend that the guidelines be amended to provide that foreign convictions for crimes of violence or controlled substance offenses be treated consistently with domestic offenses.

In addition, section 2K2.1 provides that prior sentences for crimes of violence or controlled substance offenses must have been imposed within certain time limits. More specifically, a conviction which is more than 15 years old cannot be viewed as a predicate for enhancing the sentence of a felon in possession of a firearm. On the other hand, convictions more than 15 years old count as predicate convictions for purposes of sentencing under section 924(e). See, e.g., United States v. Daniels, 3F.2d 25, 28 (1st Cir. 1993). We recommend that section 2K2.1 be amended so that all prior felony convictions for crimes of violence or controlled substance offenses be considered as predicates to increase the defendant's offense levels regardless of when they occurred.

Section 2K2.1 also provides that sentences imposed for controlled substance offenses count as only 1 prior conviction. See section 4A1.2(a)(2) and Application Note 3. Application Note 3 states that prior sentences are not considered related if they were for offenses separated by an intervening arrest, i.e. the defendant was arrested for the first offense prior to committing the second offense. Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single scheme or plan, or (3) were consolidated for trial or sentencing. On the other hand, under section 924(e), a defendant who has committed violent felonies or serious drug offenses on 3 different occasions has committed the requisite 3 predicate offenses. See, e.g., United States v. Maxey, 989 F.2d 303 (9th Cir. 1992); United States v. Arnold, 981 F.2d 1121 (9th Cir. 1992). The fact that the offenses are consolidated for trial or sentencing is immaterial. We, therefore, recommend that section 2K2.1 be amended so that multiple crimes of violence and controlled substance convictions count as multiple convictions so long as the offenses were committed on different occasions.

United States Sentencing Commission

B. Manufacture, Transfer, or Possession of Semiautomatic Assault Weapons

The Act amended the GCA to make it unlawful to manufacture, transfer, or possess "semiautomatic assault weapons." 18 U.S.C. § 922(v). It also increased the penalty in 18 U.S.C. § 924(c) for using or carrying a semiautomatic assault weapon "during or in relation to any crime of violence or drug trafficking crime" to a mandatory term of 10 years or, in the case of a second or subsequent conviction, 20 years.

Section 2K2.1 covers firearms offenses involving semiautomatic assault weapons. For example, the base offense level for possession of an unlawfully imported semiautomatic assault weapon is level 12, with an upward departure recommended if the offense involved multiple military-style assault weapons. Section 2K2.1(a)(5) further provides for an offense level of 18 if the offense involved a National Firearms Act (NFA) firearm, as defined in 26 U.S.C. § 5845(a).

The Commission recommends that section 922(v) offenses be included in section 2K2.1. The Department of Justice (DOJ) proposes an enhanced offense level under section 2K2.1 for a conviction under section 922(v). We support the DOJ's position and recommend that section 922(v) offenses have a base offense level of 18. This is consistent with the level provided for unlawful possession of National Firearms Act (NFA) weapons, e.g., machineguns, as set forth in guideline section 2K2.1(a)(5). Since semiautomatic assault weapons and NFA weapons are highly restricted under Federal law, consistent sentencing guidelines for these offenses are warranted.

C. Juveniles

The Act added a new section 922(x) to the GCA making it unlawful to sell or transfer handguns to juveniles. It also prohibits the possession of handguns by juveniles. The maximum penalty for violating the subsection is 1 year. However, an adult who transfers a handgun to a juvenile knowing that the juvenile intends to carry, possess, or use the handgun in a crime of violence is subject to a maximum penalty of 10 years.

United States Sentencing Commission

Section 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a juvenile or to a person prohibited under section 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant. A defendant who transfers a firearm knowing or having reason to believe that it may be used in connection with another felony offense is subject to the greater of a 4-level adjustment with a minimum offense level of 18, or a cross-reference to the guideline for the other offense.

The Commission offers 3 different options to deal with violations of new section 922(x). We favor option 3 which would amend section 2K2.1(a)(6) by inserting "or if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person or was underage," resulting in a base offense level of 14 for such transfers. We believe that the 2-level increase is warranted since Congress has indicated its desire to impose greater punishment on persons providing firearms to juveniles.

D. Persons Under Restraining Orders in Possession of Firearms

The Act amended 18 U.S.C. § 922(d) and (g) to make it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to persons subject to specific types of court-issued restraining orders or for any person subject to such orders to possess or receive any firearm or ammunition.

Violations of section 922(d) and (g) are addressed in section 2K2.1 of the guidelines. Section 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a person prohibited under section 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant.

The proposed guideline adds persons under a disabling restraining order to the definition of a "prohibited person" in the commentary section under Application Note 6. This

proposal would result in such persons being treated similarly to persons under other Federal firearms disabilities. We support this proposal.

E. Sentence Enhancements for Using Semiautomatic Firearms During Crimes of Violence or Drug Trafficking Crimes

The Act directs the Commission to provide an appropriate enhancement for a conviction under section 924(c) (using or carrying a firearm during the commission of a crime of violence or drug trafficking crime) if a semiautomatic firearm is involved in the violation.

Currently, section 924(c) provides that persons who use or carry a firearm in the commission of a crime of violence or drug trafficking crime shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to a mandatory 5-year term of imprisonment, and if the firearm is a short barreled rifle or shotgun or a semiautomatic assault weapon, to imprisonment for 10 years, and if the firearm is a machinegun or a destructive device or is equipped with a silencer, to imprisonment for 30 years. In the case of a second or subsequent conviction under section 924(c), the person shall be sentenced to imprisonment for 20 years and if the firearm is a machinegun, or a destructive device or is equipped with a silencer, to life imprisonment.

The Commission requests comment on the appropriate offense level for an offense involving a semiautomatic firearm. We believe that use of a semiautomatic firearm in crimes of violence or drug trafficking crimes should result in a sentence enhancement of 2-4 levels. Such an enhancement is warranted since Congress specifically increased the penalty for using or carrying a "semiautomatic assault weapon," a specific type of semiautomatic firearm, during such crimes. Specifically, Congress provided a mandatory prison term of 10 years.

The Commission also requests comment on whether such an increase should apply to all semiautomatic firearms or whether the Commission should focus this enhancement on firearms that have characteristics that make them more dangerous than other firearms (e.g., semiautomatic firearms with large magazine capacity). We believe that any increase

should apply to all semiautomatic firearms. Moreover, we also believe that an additional 2-level enhancement be applied with respect offenses involving semiautomatic firearms equipped with large capacity magazines.

F. Firearms Which Have Moved in Interstate Commerce

The Act added a new section 924(k) providing a term of imprisonment of not more than 10 years for stealing a firearm which has moved in interstate or foreign commerce. It also amended section 922(j) to clarify that it is unlawful to receive or possess any stolen firearm that has moved in interstate commerce, regardless of whether the movement occurred before or after the theft. Further, it added a new section 924(l) making it a Federal crime to steal any firearm from a licensed importer, manufacturer, dealer, or collector.

Section 2K2.1 covers offenses involving stolen firearms. These offenses are subject to a base offense level of 12. A 2-level enhancement applies if a firearm is stolen, unless the only count is a stolen firearm offense.

Section 2B1.1 governs general theft offenses, including offenses of goods traveling in interstate commerce. The general theft statute, 18 U.S.C. § 659, provides a maximum term of 10 years imprisonment for theft from an interstate shipment. Guideline 2B1.1(b)(2)(A) provides for a 1-level increase (to no less than 7) if a firearm or destructive device was taken, compared with a base offense level 12 under section 2K2.1.

The proposed guideline contains 2 options to address the disparity between guideline sections 2B1.1 and 2K2.1. We favor option 1, which would amend section 2B1.1 to include a cross reference to section 2K2.1 applying the greater offense level of the two provisions. This option accurately reflects Congress concern about theft of firearms.

G. Conspiracy to Commit Section 924(c) Violations

The Act adds a new section 924(n) making conspiracy to commit a section 924(c) violation a Federal crime. The penalty is imprisonment for not more than 20 years, and if the firearm is a machinegun or destructive device, or is

equipped with a silencer or muffler, imprisonment for any term of years or life.

Despite the creation of this new conspiracy offense, the proposed guideline would not provide specific penalties for such violations. Rather, it merely provides a cross-reference to the guideline for conspiracy in general. Congress set the penalty for conspiracy to violate section 924(c) at a level 4 times greater than the penalty for other conspiracy violations. Accordingly, we believe the offense level for violations of section 924(n) should be 4 times greater than the offense level for the general conspiracy statute.

II. EXPLOSIVES AND ARSON

The Act directed the Commission to provide an appropriate enhancement for cases in which a defendant convicted under 18 U.S.C. 844(h) (use of fire or explosives during a felony) has previously been convicted under that section. In addition, it revised the mandatory 5-year penalty for a first offense to a range of 5 to 15 years and changed the mandatory penalty for a second offense from 10 years to a range of 10 to 25 years.

The Commission requests comment on how section 2K2.4 should be amended to address the directive. We believe that the mandatory 5-year minimum for first offenses and the mandatory 10-year minimum for second offenses should be enhanced by an analysis of the risk factors set forth in section 2K1.4 with respect to arson. These risk factors take into account the risk of death or bodily injury caused by the offending conduct.

In addition, the Act adds a new section 844(k) providing for a term of imprisonment of not more than 10 years for stealing explosives which have moved in interstate commerce and a new section 844(l) making it a Federal crime to steal explosives from licensed dealers. We incorporate our previous comment favoring option 1, which amends section 2B1.1 to include a cross reference to section 2K2.1, applying the greater offense level of the two provisions. We believe this option accurately reflects the seriousness

of offenses involving stolen explosives.

The Act adds a new section 844(m) increasing to 20 years the maximum penalty for a conspiracy to violate section 844(h). We incorporate our previous comment that, pursuant to the direction of Congress, the Commission should establish an offense level which is 4 times greater than that for general conspiracy.

III. PROVISIONS NOT ADDRESSED

Several amendments in the Act are not addressed in the Commission's proposals, including an increase in the penalty for making a false statement to a firearms licensee in connection with the acquisition of a firearm (18 U.S.C. § 922(a)(6)) and adding a new section making it an offense punishable by not more than 10 years imprisonment to acquire firearms interstate to carry on an illegal firearms business (18 U.S.C. § 924(m)). Another significant amendment made it unlawful for felons to possess explosives (18 U.S.C. § 842(i)). We believe the Commission should address the guidelines relative to these provisions at the next opportunity.

We appreciate the opportunity to comment on the proposed guidelines. If we can be of further assistance to the Commission, please let us know.

Sincerely yours,

Charles Thomson
Associate Director
(Enforcement)

026 - 95

CUA

THE CATHOLIC UNIVERSITY OF AMERICA

Columbus School of Law
Office of the Faculty
Washington, D.C. 20064-8030
(202) 319-5140

March 7, 1994

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1995 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1995 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit

conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

* * *

COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 1 will be our comment on proposed amendment (or issue for comment) number 1 and so forth. We also are enclosing a disc with this letter on it, in case you wish to print out or edit any of our proposals.

1. Proposed Amendment #1 - **HIV Exposure**

The PAG supports the general concept of this proposed amendment, but is concerned about how intent will be interpreted. An argument could be made for the position that an individual who engages in casual sexual activity, knowing that he or she is HIV-infected, does so with the expectation and knowledge that the sexual partner is likely to become HIV-infected, and therefore could be deemed to have intended that the partner become so infected. Any new commentary should provide clear guidance regarding how intent is to be determined and indicate that there must be a clear pre-disposed and malicious specific intent on the part of the defendant to cause another to become HIV-infected through sexual activity.

The PAG opposes "**infectious bodily fluid of a person**" being defined expressly as a "**dangerous weapon**" on the grounds that it makes the term overly broad. **Dangerous weapon** is set forth and defined in the Commentary to §1B1.1(d), thereby making it generally applicable throughout the guidelines. To so define **infectious bodily fluid** as a **dangerous weapon** means that any person whose saliva contains an infectious influenza virus could be deemed to be in possession of a **dangerous weapon**, and thereby making it generally applicable to pertinent provisions throughout the guidelines. Even if the term were further narrowed to include "**HIV-infected bodily fluid of a person**" into the definition of a **dangerous weapon**, this still would be overly broad since it would include the bodily fluid of an individual with no knowledge that he or she was HIV-infected, or an individual with knowledge, but whose bodily fluid had no involvement in the particular crime of conviction, e.g., mere possession of a dangerous weapon is a 2 level enhancement under §2B2.1 (Burglary of a Residence or a Structure Other than a Residence).

The PAG supports the amendment of the definitions relating to "**serious bodily injury**" and "**permanent or life-threatening bodily injury**" so as to include the "**intentional infection by HIV-infected bodily fluid.**" The PAG emphasizes its position that there must be an intentional infection and that the term "intentional" be incorporated into these two proposed amended definitions. Again, any new commentary should provide clear guidance regarding how intent is to be determined and indicate that there must be a clear pre-disposed and malicious specific intent on the part of the defendant to cause another to become HIV-infected through sexual activity.

The PAG has no opinion as to whether basing enhanced penalties for willful sexual exposure to HIV will have any implications for HIV testing.

2. Proposed Amendment #2 - **Minor Assault (§2A2.3)**

The PAG believes that §2A2.3 already provides an adequate penalty for violation of 18 U.S.C. § 113(a)(7). No amendment is necessary.

3. Proposed Amendment #3 - **Involuntary Manslaughter (§2A1.4)**

The PAG believes that §2A1.4 already provides an adequate penalty for violation of 18 U.S.C. § 1112. No amendment is necessary.

4. Proposed Amendment #4 - **Kidnapping, Abduction, Unlawful Restraint (§A4.1)**

The PAG endorses this amendment and believes that it should be referenced as proposed under Option 2. Although 18 U.S.C. § 1204 is entitled "International Parental Kidnapping," it uses terms like "removes" or "retains" which are significantly less harsh than the terms of the substantive kidnapping statute, 18 U.S.C. § 1201, which contains terms like "seizes," "kidnaps," or "abducts." The heart of 18 U.S.C. § 1204 is "the intent to obstruct the lawful exercise of parental rights." The PAG believes that the underlying conduct of this offense involves interference with a court order - not violent conduct like kidnapping, and therefore is more suitably addressed as obstruction of justice than as kidnapping.

5. Proposed Amendment #5 - **Aggravated Sexual Abuse; Sexual Abuse (§§2A3.1; 2A3.2)**

The PAG favors no action at this time. The Commission should complete the study required by § 40112 of the crime bill, disseminate the results, seek comment and only then publish a concrete proposed amendment.

6. Proposed Amendment #6 - **Death of the Victim**

The PAG favors Option 1 which would amend the Statutory Index to reference the new provisions to guidelines in Chapter Two, Part A, when death results from the underlying offense. Option 1 is favored because by referencing the new provisions to Chapter 2, Part A, the standard of proof for establishing that the death of the victim resulted from the underlying offense will be "beyond a reasonable doubt." Because of the severe potential penalties associated with these types of crimes, the standard of proof must be "beyond a reasonable doubt" instead of "by a preponderance of the evidence."

7. Proposed Amendment #7 - **Adequacy of Criminal History Category; Abusive Sexual Contact (§§4A1.3; 2A3.4)**

The PAG favors the proposed amendment which builds on §4A1.3 by specifically listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense. As a result, an application note would be added under the Commentary to each of the offenses in Chapter Two, Part A, Subpart Three (Criminal Sexual Abuse), providing for such an upward departure. We oppose changing the offense levels.

8. Proposed Amendment #8 - **Offenses Involving Counterfeit Bearer Obligations of the United States; Fraud and Deceit (§§2B5.1; 2F1.1)**

The PAG opposes Option 1 because of its automatic enhancement to a level 13 when a dangerous weapon is merely possessed in connection with the §§2B5.1 and 2F1.1 offenses. Enhancement to level 13 would more than double the base offense level of 6 for §2F1.1 when in fact the defendant may have merely possessed a dangerous weapon without necessarily having displayed, brandished or otherwise used it. The present §2F1.1(b)(4) already provides for an automatic enhancement to level 13 "if the offense involved the conscious or reckless risk of serious bodily injury." Since mere possession of a dangerous weapon, with nothing further, is less egregious conduct than required for a subsection (b)(4) offense, it should not be equated and elevated to that same level. If the defendant elevates his or her conduct from mere possession to the conduct included in §2F1.1(b)(4), then adequate penalties are already provided.

The PAG favors Option 2 because it properly provides for an upward departure if warranted. However, PAG believes that any upward departure should be limited to 2 levels for mere possession of a dangerous weapon in both §§2B5.1 and 2F1.1 if the offense does not involve the conscious or reckless risk of serious bodily injury.

The PAG believes that the form of any enhancement for a dangerous weapon should be that used in the current Chapter Two, Part D (Offenses Involving Drugs), particularly in regard to the inclusion of an application note similar to Application Note #3 under the current Commentary to §2D1.1. The current Application Note #3 provides that the enhancement for weapon possession should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. It gives as an example that enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

9. Proposed Amendment #9 - **Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession: Continuing Criminal Enterprise (§2D1.1)**

The PAG favors Option 1, which references this offense to §2D1.1, especially if proposed amendment #36 is approved as proposed by the PAG. Under comments submitted by the PAG as to proposed amendment #36, an enhancement of up to 9 levels under §2D1.1(b)(4) and (7) is proposed for various uses of firearms. The PAG proposal for proposed amendment #36 also advocates a five level enhancement for merely discharging a weapon, whether injury results or not. This would encompass the situation for which the Department of Justice has requested comments as to whether there should be an enhancement for reckless endangerment by firing a weapon into a group of two or more persons when no injury occurs.

10. Proposed Amendment #10 - **Providing or Possessing Contraband in Prison (§2P1.2); Drug Offenses Occurring Near Protected Locations (§2D1.2)**

Amendment 10 (A).

The PAG does not oppose the enhanced offense level (two levels plus the offense level from §2D1.1) that would be provided by the cross reference in §2P1.2 being expanded to apply to all drug trafficking offenses under 18 U.S.C. § 1791(a)(1); however, the cross reference should not be expanded to cover the offenses under 18 U.S.C. § 1791(a)(2). It is obvious that this cross reference is limited in application and is intended to provide increased punishment for violation of 18 U.S.C. § 1791(a)(1), which is directed at the provider or facilitator of drugs and other controlled substances going to an inmate, rather than for the violation of 18 U.S.C. § 1791(a)(2), which is directed at the inmate who makes, receives, possesses, or obtains the drugs and other controlled substances.

For the same reasons stated above as to the intent and application of the cross reference in §2P1.2, the PAG does not believe that the minimum offense level of 26, provided by the cross reference, should be applied to all methamphetamine offenses. It should be limited to the trafficking violations under 18 U.S.C. § 1791(a)(1) and not the making, receiving, possessing, or obtaining offenses set forth in 18 U.S.C. § 1791(a)(2).

Amendment 10 (B).

In regard to an offense under 21 U.S.C. § 841 that involves distribution of a controlled substance in a federal prison or detention facility, the PAG believes that these offenses should be referenced to §2D1.2, which provides enhanced penalties for controlled substance distribution offenses involving protected locations.

With respect to simple possession of a controlled substance under 21 U.S.C. § 844 that occurs in a federal prison or detention facility, the PAG believes that a 2 level enhancement to §2D2.1 for these possession offenses would be an appropriate enhancement. However, these enhanced offense levels would not reconcile with the offense levels provided for under §2P1.2 (Providing or Possessing Contraband in Prison).

The PAG would recommend reconciling the offense levels under §§2D2.1 and 2P1.2 for simple possession offenses in a federal correctional facility. This could be accomplished by creating two new base offense level categories under §2P1.2 and renumbering two of the existing categories of §2P1.2.

The first new base offense level category under §2P1.2 would be (a) (3) which would include any Schedule I or II opiate, an analogue of these, or cocaine base and which would provide for an offense level of 10. This new base offense level of 10 under §2P1.2 would equate to an offense level of 8 under §2D2.1 for these same drugs, plus its proposed 2 level enhancement for possession in a federal correctional facility.

The second new base offense level category under §2P1.2 would be (a) (4) which would include cocaine, LSD, or PCP and which would provide for an offense level of 8. This new base offense level of 8 under §2P1.2 would equate to an offense level of 6 under §2D2.1 for these same drugs, plus its proposed 2 level enhancement for possession in a federal correctional facility.

The current §2P1.2 base offense level (a) (3) would be renumbered to become (a) (5) and would include controlled substances other than those listed in (a) (3) and (a) (4) above. It would retain its current offense level of 6. This renumbered category equates to an offense level of 4 under §2D2.1 for these same drugs, plus the proposed 2 level enhancement for possession in a federal correctional facility.

The current §2P1.2 base offense level (a) (4) would be renumbered to become (a) (6) and would retain its current offense level of 4. In addition the reference in the current §2P1.2 base offense level category (a) (2) to "LSD, PCP, and narcotic drug" would be deleted because these drugs would be included in the proposed new base offense level categories.

If the Commission agrees to amend the offense level categories of §2P1.2 to make them comparable to those of an enhanced §2D2.1, as proposed by the PAG, then it would be much simpler to merely reference the simple possession of a controlled substance in a federal correctional facility offenses to §2P1.2 rather than to §2D2.1. This would avoid having to amend §2D2.1 to provide for the enhancement and would make the offense more appropriately related to those offenses involving federal prisons and correctional facilities.

11. Proposed Amendment #11 - **Drug Offenses Occurring Near Protected Locations (§2D1.2)**

The PAG believes the current guideline enhancement is adequate to cover the requirement of Crime Bill § 90102 which directs the Commission to amend the guidelines to provide an appropriate enhancement for a defendant convicted of drug trafficking in protected locations. In light of the fact that it appears that Congress was seemingly unaware of the current enhancement, no additional Commission action is necessary.

The PAG also supports the position of the Federal and Community Defenders that the guidelines should be amended to provide a lower base offense level if an offense is committed in a protected location which has been selected by law enforcement or its agents. Specifically, the PAG supports the specific language set forth in the Additional Issue for Comment which would provide a base offense level of 13.

12. Proposed Amendment #12 - **Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical (§2D1.11)**

The PAG supports the technical amendments to the drug Guidelines. The proposed amendment would conform §2D1.11 to the new terminology to avoid confusion.

13. Proposed Amendment #13 - **Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment (§2D1.12)**

The PAG supports this proposed amendment. We specifically urge the Commission to revise §2D1.12 to provide a three-level reduction in the offense level for cases in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance.