Comments:

6TH Circuit "Yes, only if research can provide reliable information which can distinguish between substances with greater accuracy."

8th Circuit
"Lab operations with which we are acquainted are often sloppy, loose setups and frequently would manufacture only a smaller portion of the drug quantities of which they may theoretically be capable of making."

9th Circuit "Court can address [this issue] by going up/down within the appropriate guideline range."

4th
ED/NC "50 % is fair if no other information is know. If capability is determined to be greater use greater level."

10th
Colorado "The USSC may want to look at 'crack' manufacturing offenses to determine whether different percentages should be used in the theoretical yield equation. Also, officers felt that the percentage estimate should be based on the most abundant essential chemical rather than the most abundant precursor. This was a difficult question to answer because of our lack of expertise in chemistry."

Wyoming "In response to the second question, it should depend on reasonable 'average' yields."

1st
Puerto Rico "Yes, based on the fact that different controlled substances can produce different degrees of harm and have different market values."

Should the percentage estimate be based on the most abundant precursor on hand?

Yes 37 69.8 % No 16 30.2 %

TOTAL 53

The least precursor on hand?

Yes 9 18 % No 41 82 %

TOTAL 50

Some other method?

Yes 10 28.6 % No 25 71.4 %

TOTAL 35

Comments:

Puerto Rico Yes to the first part "Since it would probably determine its potential for harm and profit."

7th Circuit "Percentage should be based on whatever it appears the type of drug the lab was going to produce."

Wyoming "In response to the last question, precursor is acquired to be used, not put on a shelf. Use the greatest one."

Utah "What if not all the precursors are present at the time of seizure? Skill of the 'cook' plays a large role in potential for production."

(10) This amendment provides for authorizing a downward departure when the drug quantity amount overemphasizes the seriousness of the offense when a portion of the drugs counted would be for the defendant's own personal use.

Agree with this approach 15 21.7 % Disagree 54 78.3 %

TOTAL 69

Alternative approaches:

Adopting a statement that says "drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct ' or 'common scheme' as drugs intended for distribution."

Agree 8 12.7 % Disagree 55 87.3 %

TOTAL 63

Adoption of the above statement but with a rebuttable presumption that all amounts possessed by the defendant are intended for distribution.

Agree 31 48 % Disagree 33 52 %

TOTAL 64

Comments:

Colorado "Personal use amounts for any drug should be relatively small compared to a distribution quantity, and it would appear that in most cases, subtracting the personal use amount would not impact on the offense level. Officers felt that defense counsel will challenge each calculation and that the increased litigation would outweigh the need for this consideration. It may be appropriate in some cases to instruct that personal use amounts may be considered in choosing a sentence within the otherwise applicable guideline range."

Utah "Personal use is illegal! Too difficult to determine/prove quantities for personal use. Quantities at a certain level should be considered intended for distribution."

9th Circuit "One district said amount of drugs seized indicates intent. Another district noted the rebuttable presumption is needed if such an amendment is passed...let the court decide."

SD/GA "Personal use quantities will be overstated."

6th Circuit notes "Drug ranges will obliterate amounts for personal use. Is this necessary?...Too vague as worded...will increase litigation."

D/MA "Too many disputes if we get into the issue of amount for personal use."

WD/TX "Part 10 of this amendment should be omitted in its entirety. Applying this amendment with any degree of consistency would be almost impossible."

(11) This amendment adds an instruction for a downward departure where a drug offense occurred near a protected location but the location was chosen by law enforcement authorities, or otherwise does not create the enhanced risk of harm for those the guideline is designed to protect.

Agree 57 85 % Disagree 10 15 %

TOTAL 67

(12) Various words are added to clarify the meaning of the Commentary to § 2D1.8.

Agree 63 98.4 % Disagree 1 1.6 %

TOTAL 64

Approach 2

Amendment 43: Revises 2D1.1 to base determination of offense seriousness on the **type** of drug in conjunction with other sentencing factors (use of a weapon, weapon type, injury, and function and culpability of the defendant in the offense), rather than quantity of drugs. Two options are offered with this approach. **Option 1** abandons drug quantity as a measure of seriousness except in cases where the quantity is extremely large or small. In such cases a guided departure is suggested. **Option 2** offers a limited quantity measure by providing a Drug Quantity Table that allows for increases to the base offense level (2, 4, or 6 levels).

Option 1

1) Are types of drugs grouped appropriately? (§2D1.1(a))

yes 39 66 % no 20 34 %

TOTAL 59

2) Are the offense levels established for drug types appropriate? (§2D1.1(a))

yes 41 73.2 % no 15 26.8 %

TOTAL 56

3) If the offense involved multiple transactions, what time span of involvement should qualify a defendant for a 2 level increase? (§2D1.1(b)(1))

60 days 26 48.1 % 90 days 18 33.3 % (Other) 360 (3) 180 (4); 120 (1); 7(1) days entire time (1)

TOTAL 54

4) Will the specific offense characteristics of use and type of firearm, degree of bodily injury, role, and number of participants, adequately distinguish degrees of seriousness of drug trafficking offenses in a non-quantity driven approach? (§2D1.1(b)(2)-(7))

yes 52 83.8 % no 10 16.2 %

TOTAL 62

5) Are the offense level enhancements associated with use and type of firearm, degree of bodily injury, role, and number of participants appropriate? (§2D1.1(b)(2)-(7))

yes 54 90 % no 6 10 % **TOTAL 60**

Comments:

3rd Circuit "Difficult to say when we do not know where the starting point is with regard to the base offense level."

8th Circuit "Especially 'discharge' should be a greater increase past 'B' and 'D'...should have enhancement for presence of weapon."

9th Circuit "Bodily injury rarely a factor in drug offenses and should be addressed as a departure factor."

6) Does the definition and explanation of "leader" or "organizer" as set forth in App. Note # 5, adequately clarify the application of this adjustment? (§2D1.1(b)(5)(A))

yes 56 91.8 % no 5 8.2 % **TOTAL 61**

Comments:

1st Circuit
Puerto Rico "It would eliminate the need to go into Chapter 3 adjustments for role. Also, it is useful in that all of the assessments regarding the specific offense characteristics are being explained at once."

6th Circuit
"High level, mid-level, wholesale...are quantity driven terms that are not defined in this guideline...Are financiers leaders?"

7) Does the definition and explanation of "manager" and "supervisor" as set forth in App. Note #6, adequately clarify the application of this adjustment? (§2D1.1(b)(5)(B))

yes 56 92 % no 5 8 % **TOTAL 61**

Comments:

1st Circuit
Puerto Rico "Excellent to assist in this determination."

D/NH "Yes, but it does not appear that the role of a 'steerer' or 'broker' is addressed. It should be."

8) Does the definition and explanation of "peripheral" as set forth in App. Note #7, adequately clarify the application of this adjustment? (2D1.1(b)(7))

yes 56 90.3 % no 6 9.7 % **TOTAL 62**

Comments:

1st Circuit
Puerto Rico "It should probably clarify explicitly that the adjustment is intended to apply only in cases that involve more than one defendant or, where thee are identified co-participants."

6th Circuit
"Ok, if the definition clarifies that these activities are the only functions performed by these defendants."

10th Circuit
Colorado "It needs specific instructions as to how to classify 'mules' and 'couriers'."

9th Circuit
"One district who voted 'no' said terms are defined with other terms which are not instructive in objectively assessing behavior."

9) What quantity of drugs greater than that listed at 21 USC 841(b)(1)(A) should warrant an upward departure? (App. Note #14)

10 times 40 81.6% 20 times 4 8.2 % (Other) 5 (4); 2 (1) times

TOTAL 49

Comments:

10th Circuit
Colorado "Does the USSC have any data on how often someone has 10 or 20 times the drug quantity listed at 21 U.S.C. § 841(b)(1)(A)? It might provide some guidance in picking a multiplier."

9th Circuit "Departure should be left entirely to the court's discretion."

8th Circuit Unanimously agreeing to 10 times says "less disparity -- use anything over what's listed."

10) What quantity of drugs less than that listed at 21 USC(b)(1)(B) should warrant a downward departure? (App. Note #14)

1/10th 38 76 % 1/20th 9 18 % (Other) 3 6 %

TOTAL 50

Option 2

11) Does the Drug Quantity Table offered at 2D1.1(c) adequately target large scale traffickers?

yes **48** **80 %** no **12** **20 %** **TOTAL 60**

12) Does the Drug Quantity Table offered at 2D1.1(c) adequately sanction the large scale traffickers? If not, what increases would be appropriate?

yes **47** **78.3 %** no **13** **21.7 %** **TOTAL 60**

13) The quantity of drugs to be considered when applying the Drug Quantity Table is limited to that amount the defendant was "associated with" on any one occasion. Will this limiting "time factor" more effectively screen for large-scale traffickers?

yes **20** **32.7 %** no **41** **67.3 %** **TOTAL 61**

14) Which approach do you prefer?

Option 1 **32** **50.8 %** Although not offered as choice, 4 said they preferred neither. **6.3 %**

Option 2 **27** **42.8 %** **TOTAL 63**

Having read and answered the questions regarding to basic two approaches to revising the drug guideline, you must now be quite familiar with the intents and purposes of each approach.

Which approach do you prefer?

Approach 1 maintains quantity, but collapses the drug tables and provides for several other changes to § 2D1.1

Yes **35** **63.6%** No **20** **36.4 %** **TOTAL 55**

Approach 2 which divorces quantity from the guideline levels, but provides for enhancements for aggravating circumstances and a more descriptive, drug trafficking-specific approach to role adjustments.

Yes 24 42.8 % No 28 50 % Although not asked, 4 districts said they liked neither approach. 7.2 %

TOTAL 56

Comments on Approaches:

8th Circuit
"Drug quantity is still the single most significant and telling factor regarding the scale of the drug trafficking operation in most cases...Approach 2 looks real intersting. I'm so used to looking at quantity, I would like to see how approach 2 can be applied and then compare them both...Would rather see 2D1.1 left as is than apply either approach. I believe quantity is important and either option penalies small or middle management as much as large scale dealers or manufacturers. Role enhancements/reductions do not make enough difference to compensate."

9th Circuit
"Both approaches unduly complicate the sentencing process and do nothing to more accurately identify 'upper level dealers.' ....would like to see fewer specific offense characteristics rather than more...General feeling that the proposed amendments confuse rather than clarify."

9th Circuit
"One district opting for approach 1 said amendments 33,34 and 35 better allow for an objective guideline application. It more effectively addresses goals of reducing disparity and enhancing appropriate proportionality...One district opting for approach 2 saw advantages and disadvantages in both approaches. They want amendments that will minimize interpretations and objections. Unusual circumstances should be addressed as departure factors. They also commented that sentencing has evolved into a USPO 'on trial'."

10th Circuit
Colorado "Officers would like to see a compromise between the two different approaches. Quantity must figure into the equation, but it must have less of an impact on the guideline range."

Wyoming "Option 1 preserves the integrity of the drug table with reasoned changes. Option 2 appears to be too much of a shortcut. The biggest issue on either option is completely ignored -- will the amendment be retroactive? Fairness seems to indicate it should be (remember the LSD guideline changes) but practicality says NO! Making these drug guideline amendments retroactive will keep the courts clogged for years. I don't see how they can be retroactive."

Utah "Again, we see quantity as influential to many elements of the crime. We also believe quality is important. We would like to

see a table that identifies substances by dose and then consider quality in determining the offense level. More important, however, is the individual, something the Guidelines do not allow us to consider. Who is he? What is his motivation? What are the significant factors in his life? Also locale plays a role in this. Kilo quantities are not prosecuted in some large districts while a kilo in others carries a minimum mandatory sentence. We've got a long way to go!"

ND/OK "Option 1 only."

7th Circuit
"Prefer to further investigate approach 1. I do not feel determination should be made without considering quantity. Less discretion on a case by case basis is better so the guidelines cannot be manipulated by PO, AUSA, Def. Attorney or Judge...Approach 1 maintains accountability for all drug dealers of all levels and allows for some considerations for those more or less involved in drug distribution. Maintaining focus on quantity does frequently provide an idea of the position of drug trafficking in an organization...Approach 2 appears to open the door for too much subjectivity. It paves the way for more litigation. In some ways it becomes more complex...Approach 2 represents too much of a change in direction from current method which has been in existence since the inception of guidelines sentencing...It is easier for all users of the guidelines to have a few changes, rather than an entire new set of application instructions."

5th Circuit
SD/TX "Approach 2 is less cumbersome in its ease of application and provides better sanctions for leaders/managers. Suggest commentary be added to suggest that leaders who cooperate should not receive a sentence less than those less culpable. One district comment indicated that Amendment 43 would not only fail to meet the statutory mission of deterrence but would actually stimulate drug trafficking...Approach 2 lacks specificity in how to determine what base offense level to select within the 'range' offered. Could and probably will result in significant disparity given this lack of direction."

ED/TX "Either approach will be effective in reducing the guideline range for most traffickers. Approach 2 is preferable. The behaviors that need to be most severely sanctioned are those involving the actual use or possession of a firearm in any drug trafficking offense, regardless of the kind of drug, drug amount, or role in the offense. The adjustments for firearm related behaviors should be much higher than offered in either approach 1 or 2."

1st Circuit
D/MA "Quantities, to some extent, should influence the guidelines. Money does so with the fraud, theft, etc., guidelines and I do not

see why drugs should be different."

D/Puerto Rico "Approach 1 seems good; however, it does not account for the drug quantity when it eliminates the table under 2D1.1(c). I believe that Approach 2 is more detailed, but should incorporate the adjustment regarding multiple drug transactions and defendant's continued involvement over a time span. (See 2D1.1(b)(1) in approach 1). If this is incorporated, Approach 2 wold be complete. Additional guidance/clarification is needed as to which level applies within each drug type; i.E., 28 for heroin, 27 for cocaine, etc."

Maine "...some staff feel that quantity should not be the ruling factor in determining drug guidelines, others conclude that it is the most equitable system and prevents the raising of litigious issues."

D/NH "Two things are needed: 1) Guidance should be provided in selecting the point in the base offense level range which should be selected; 2) Discussion of role should include that of the 'steerer' or 'broker.'"

6th Circuit
"A dramatic change in drug guideline is inappropriate. The cumulative effect of safety valve feature, capping defendants with mitigating roles, enhancements for firearms, injury, amy negate the need for dramatic change. Let's see what the results of these changes may be...We are not in favor of totally eliminating drug quantity."

11th Circuit
SD/GA "We think approach 2 is too drastic."

MD/GA "Approach 2 appears to provide a more efficient measure in determining a sentencing range with respect to the defendant's overall role and association with drug distribution. This approach eliminates issues with respect to determining drug amounts. I strongly favor this approach."

4th Circuit
SC "Quantity is a factor that is too critical to the issue of culpability to ignore. Although often difficult to determine precisely, the general size of the operation can be determined by debriefing defendants on the quantity."

WD/VA "Quantity is indicative of the [size] of an organization."

ED/NC "These approaches are too different from the present guidelines which doesn't need radical change."

3rd Circuit
"Several districts were concerned about the proposals that measured

the size of the conspiracy and pointed out that in their districts, a conspiracy with three or four persons would be considered a big drug network and they would probably never have a case with as many as 30 defendants. In contrast, ED/PA has often had cases with 35 or more defendants."

2nd Circuit:
ED/NY "Approach 2 is totally inconsistent with the structure of the guidelines and is not viewed as a viable alternative. The answer partly lies in making the role adjustment proportional to the offense level (Example: minimal participant receives a 25 - 30 % reduction in the offense level)."

APPENDIX 2

RESULTS OF ADVISORY GROUP SURVEY
ON THE CRIME BILL

#1HIV Exposure - Issue for Comment

(a)Do you believe infectious bodily fluid should be defined expressly as a "dangerous weapon?"
__5__ yes __9__ no

(b)Should definitions relating to serious bodily injury and permanent or life-threatening bodily injury be amended to expressly include infection by HIV-infected bodily fluid? __7__ yes __7__ no

#2Minor Assault (§2A2.3) - Issue for Comment

The crime bill establishes a new offense for assault that results in substantial bodily injury against a person under age 16. Substantial bodily injury is defined as:

"bodily injury that involves a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental facility."

(a)Does the present §2A2.3(a)(1) provide adequate penalty for a violation of this new offense?
__2__ yes __12__ no

(b)If not, how and to what extent should §2A2.3 be amended? For example, should §2A2.3(a)(1) be amended by deleting "physical contact" and inserting "bodily injury" thus providing a base offense level of six for bodily injury or weapon possession with a threat of use and a base offense level of three for other cases?

1 yes 7 No

Or should a specific offense characteristic for bodily injury or a specific offense characteristic if the defendant is convicted of a violation of 18 USC §113(a)(7) be added?

9 yes 1 No

Should a cross reference be added to §2A2.3 that leads to §2A2.2 (Agg. Assault) to account for cases that involve serious bodily harm, although the offense of conviction does not qualify as aggravated assault?

7 yes 5 No

#3Involuntary Manslaughter (§2A1.4) - Issue for Comment

The crime bill raises the maximum penalty for involuntary manslaughter from three years to six

years. The present §2A1.4 applies a base offense level of 10 (if the conduct was criminally negligent) or level 14 (if the conduct was reckless). Do the present base offense levels provide adequate punishment? __5__ yes __9__ no

If no, to what extent should they be increased?

12 - 16 18 - 24 Average of State
13 - 19 30 - 37 Penalties
13 - 17 (2) 5 levels each
15 - 19 Use Stats to Complete
20 - 24

#4International Parental Kidnapping Crime Act - Proposed Amendment

A new statute makes it unlawful to remove a child from the U.S. with intent to obstruct the lawful exercise of parental right? The maximum penalty is three years imprisonment. There are two proposed options.

Option 1creates a separate base offense level of 12 under §2A4.1 (Kidnapping).

Option 2references this statute to §2J1.2 (Obstruction of Justice) because the underlying conduct involves interference with a court's order.

Which option do you prefer? __9__ Option 1 or __5__ Option 2

#5Aggravated Sexual Abuse; Sexual Abuse (§§2A3.1 and 2A3.2 to address four concerns.)

- enhancing the sentence for more than one defendant;
- reducing unwarranted disparity between defendants who are known by the victim and those who are not;
- making federal penalties commensurate with state penalties;
- considering general problem of recidivism, severity of the offense, and devastating effects on survivors.

(a)Should §2A3.1 be amended to include an enhancement for more than one assailant? __6__ yes __8__ no

If yes, what weight should be given to this factor, and how should its inclusion affect role consideration under aggravating and mitigating role in Chapter Three, Part B?

"Chapter 3, Part B should apply and is sufficient e.g., a leader of a sexual attack involving several (4) people should get increased punishment for role & number...2 levels for each assailant (max 6 levels), role adjustment as usual...multi assailants treated under SOC...4 levels...Adjustments as usual --mitigating in extremes."

(b)In general, do the guidelines adequately account for the seriousness of the sexual abuse offense, including the effects on the victim of the offense? __8__ yes __4__ no. If not, what changes should be applied?

(c) List any additional offense characteristics that should be added to §2A3.1?
5 None; Exposure to HIV 7 Other STD; Previous convictions; +6 for repeat offender

#6Death of Victim - Proposed Amendment

The crime bill increases the penalty for various offense resulting in the death of a victim. There are two options to address the increased penalties:

Option 1amends the Statutory Index to reference the new provisions to Chapter Two, Part A guidelines. (Under §1B1.2 this reference will apply only if it is found beyond a reasonable doubt that death resulted from offense.)

Option 2amends the guidelines for underlying offense to include a cross reference to Chapter Two, Part A, if death results from the offense. (Under §1B1.3 this reference will apply if it is found by a preponderance of the evidence that death resulted from the offense.)

Which option do you prefer? **2** Option 1 **7** Option 2
Comments:
"Must establish weight of evidence re cause of dealth in cases not charging murder...'Beyond a reasonable doubt' is the appropriate standard to use when looking at enhanced penalties of death or life imprisonment...Because preponderance is the standard of proof for sentencing, option 2 is chosen and cannot exceed statutory meaximum in any case...Not clear from synopsis which standard to apply -- give defendant benefit of doubt and make standard higher."

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

The crime bill doubles the statutory maximum term of imprisonment for defendants convicted of sexual abuse offenses under Chapter 109A of Title 18 who have been convicted previously of sexual offenses.

The proposed amendment creates a new application note in Chapter Two, Part A guidelines that indicates an upward departure may be warranted if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense. The policy statement in §4A1.3 (Adequacy of Criminal History) is also expanded. Do you believe this proposed change is adequate? **9** yes **5** no.

Issue for Comment (as an alternative to the proposed amendment in #7)

Should the criminal sexual abuse guidelines in Chapter Two, Part A, Subpart 3 be amended to provide higher offense levels if the defendant has a prior conviction for aggravated sexual abuse, sexual abuse, or aggravated sexual contact?
6 yes **8** no

If yes, how should a provision be drafted to account for the wide variations in offenses of conviction that may involve such underlying conduct?

"Offense levels would be based on severity of prior conviction...Underlying conduct...level increases graded according to severity of prior conduct...Conduct encompassed by SOC (b)(1) too broad -- should be 5 levels if weapon possessed."

What should be the appropriate amount of any such increase?

1 to 3 levels

#8Counterfeiting and Forgery (§2B5.1 and §2F1.1)

The Crime Bill directed the Commission to provide for an increased punishment for violations of 18 USC §471-513, counterfeiting and forgery felonies, if the defendant used or carried a firearm during and in relation to the felony.

Choose the option:

__7__Option 1: Amend §2B5.1 and §2F1.1 to provide an adjustment for using or carrying a weapon in connection with the offense.

__7__Option 2: Amend §2B5.1 and §2F1.2 to recommend an upward departure in such circumstances.

Should the form of any enhancement for a dangerous weapon be that used in §2B3.1 or that used in Chapter Two, Part D (Offenses Involving Drugs)? §2B3.1__1__ §Chp.2, Pt.D__9__
Comments:

"Less argumentative...Method is established with drug offenses & is familiar to the court."

#9The crime bill created a new offense, 18 USC §36, which prohibits the firing of a weapon into a group of two or more persons in furtherance of, or to escape detection of, a major drug offense with intent to intimidate, harass,injure, or maim, and in the course of such conduct cause grave risk to any human life or kill any person. A "major drug offense" includes violations of 21 USC §848(c), §846, §963, §841(b)(1)(A) and §960(b)(1).

Choose the option:

__6__Option 1: This new offense is referenced to §2D1.1 in the Statutory Index.
__7__Option 2: This new offense is referenced to §2D1.1 in addition to the applicable Chapter Two, Part A offenses (§2A1.1, §2A1.2, §2A2.1 and §2A2.2).

Should there be an enhancement under §2D1.1 for reckless endangerment by firing a weapon into a group of two or more persons in a circumstance described above when no injury occurs?
__10__Yes __4__ No
Comments:

#10(A) Issue for Comment: The crime bill amended 18 USC §1791 to provide four different maximum penalties depending on the type of controlled substance possessed in prison.

Should the enhanced offense level in the cross reference in §2P1.2 (two levels plus the offense level from §2D1.1) be expanded to apply to all drug trafficking offenses under 18 USC §1791?
__14__ Yes ____ No

Should the minimum offense level of 26 in this cross reference be applied to methamphetamine offenses to reflect that such offenses now have the same 20-year statutory maximum penalty as the other controlled substance distribution offenses to which this cross reference applies? _
__13__ Yes ____ No

What are the appropriate offense levels under §2P1.2 for offenses involving the simple possession of controlled substances that occur in correctional facilities?
Comments:
"Same as 2D1.1 unlawful possession...same as base offense levels at 2P1.2...2 plus offense level from 2D1.1...2 levels higher for each drug at 2D1.1...drug possess. guideline w/1 higher level 8 plus 2 levels for possession within a prison."

(B) Issue for Comment: The crime bill directed the Commission to amend the guidelines to provide an adequate enhancement for (1) an offense of simple possession of a controlled substance that occurs in a federal prison or detention facility, and (2) an offense that involves distributing a controlled substance in a federal prison or detention facility.

Should the distribution offenses be referenced to §2D1.2, which provides enhanced penalties for controlled substance distribution offenses involving protected locations?
__8__ Yes __4__ No

Is a two-level enhancement for the simple possession offenses appropriate?
__11__ Yes __2__ No

If no, should the enhancement be __1__ higher or ____ lower.

How can the offense levels for simple possession offenses in a correctional facility under §2D2.1 and §2P1.2 be coordinated better?
"Cross reference...2 level enhancement...utilize 2P1.2 (not 2D1.1) plus 2 level enhancement."

#11Issue for Comment: The crime bill directed the Commission to amend the guidelines to provide "an appropriate enhancement" for a defendant convicted of violating 18 USC §860, which prohibits drug trafficking in protected locations.

Is the enhancement for these offenses in §2D1.2 adequate to account for this directive? __13__ Yes __1__ No

If not adequate, how and to what extent should §2D1.2 be amended to provide an appropriate enhancement?

Should the guidelines be amended to provide a lower base offense level if an offense is committed in a protected location selected by law enforcement or it agents?
Yes 6 No 8

#12This amendment conforms §2D1.11 and §2D1.1 to sections of the Domestic Chemical Diversion Act of 1993.

The designation of listed chemicals in §2D1.11 would be changed to the new terminology of "list I chemicals" and "list II chemicals."

Pills containing ephedrine are added as a list I chemical. These pills contain about 25% ephedrine, which is used to make methamphetamine. §2D1.11 would be amended to provide that only the amount of actual ephedrine contained in the pill is to be used in determining the offense level.

The Act removes d-lysergic acid from the listed chemicals controlled under the Controlled Substances Act and adds two chemicals. Two other chemicals were removed, but they were never listed in the guidelines. All references to d-lysergic acid would be deleted from §2D1.11 and the commentary to §2D1.1 regarding this chemical would be deleted. Benzaldehyde and nitroethan, used to make methamphetamine, would be added to the Chemical Quantity Table in §2D1.11.

The note at the end of the Precursor Chemical Equivalency Table in §2D1.11 which states, "[i]n cases involving both hydriodic acid and ephedrine, calculate the offense level for each separately and use the quantity that results in the greatest offense level...," would be expanded to cover other chemicals that may be used together, including the two new chemicals added by the statute.
Comments:

11 think it's okay; one says it's too complicated.

#13The Domestic Chemical Diversion Act of 1993, broadens the prohibition in 21 USC §843(a) to cover possessing, manufacturing, distributing, exporting, or importing three-neck round-bottom flasks, tableting machines, encapsulating machines, or gelatin capsules having reasonable cause to believe they will be used to manufacture a controlled substance. Guideline 2D1.12 would be amended to provide a three-level reduction in the offense level when 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.
Comments:
"Litigation mess but does conform w/§2D1.13; Tools for gov't manipulation; 8 okays; argumentative"

#14This is a three-part amendment responding to directives in the Crime Bill: 1) a subsection to §3A1.1 is added to provide for a three-level enhancement for hate crimes; 2) guidelines 2H1.1, 2H1.3, 2H1.4 and 2H1.5, involving civil rights, are consolidated into a new guideline at §2H1.1; 3) 18 USC §248 (the Freedom of Access to Clinic Entrances Act of 1994) is referenced in the consolidated guideline.

The proposed §2H1.1 provides alternative offense levels using the greatest of the following: 1) the base offense level for the underlying offense; 2) level 10 for offenses involving the use or threatened use of force or the actual or threatened destruction of property; or 3) level 6, otherwise. A default offense level is also provided for conspiracies involving individual rights. Two options for this default level are shown.

Choose the option:

__3__ Option 1: A default level of 12 is set for offenses involving two or more participants. This option is two levels higher than the default offense level for substantive offenses involving force or the threat of force and six levels higher than the default offense level for substantive offenses not involving force or the threat of force.

__9__ Option 2: A default level of 10 is set, which is consistent with the default level for substantive civil rights offenses involving force or threat of force and four levels higher than the offense level for substantive offenses not involving force or threat of force.

Under proposed §3A1.1 the enhancement for hate crimes committed by persons who are not public officials is three levels, one level greater than under the current guidelines. Proposed §2H1.1 provides an enhancement for non-hate crimes committed under color of law of either two, three, or four levels above the offense level for the underlying offense. With the additional enhancement under proposed §3A1.1, the proposed amendment would provide a combined enhancement for hate crimes committed by public officials of five, six, or seven levels.

Should the enhancement be __3__ 2 levels, __6__ 3 levels, or __3__ 4 levels?

The proposed amendment as described above is Option 1. The Department of Justice has proposed an alternative amendment set forth as Option 2, which is as follows: A new victim related adjustment would be created at §3A1.4, providing for a three level enhancement for hate crimes. Guideline 2H1.1 would be amended to include a one level increase if proof of the conspiracy requires a showing that a defendant acted for an improper purpose as defined in 18 USC §§245, or 247, or 42 USC §3631. Guideline 2H1.3 would be amended to increase by one level the three base offense levels provided: 1) from 10 to 11, if no injury occurred; 2) from 15 to 16, if injury occurred; 3) from 2 to 3 plus the offense level applicable to any underlying offense.

Choose the option:

__10__ Option 1.
__2__ Option 2.

Issue for Comment: If Option 2 is adopted, how should the Commission implement the penalty provisions of the Freedom of Access to Clinic Entrances Act of 1994?
"Apply vulnerable victim to all & cross reference to underlying offense."

#15Crime Bill - §2K2.1

Should there be an enhancement under §2K2.1 for a conviction under 18 USC §922(v) a new law created by the 1994 Crime Bill which prohibits the unlawful manufacture, transfer, or possession of semiautomatic weapons? 4 Yes 9 No
If your answer is yes, what would you consider to be an appropriate enhancement? Please briefly explain your rationale in choosing a particular enhancement.

#16Three amendment options are presented to address 18 USC 922(x), a new law created by the 1994 Crime Bill which prohibits the transfer of a handgun or handgun ammunition to a juvenile. Option 1 results in a base offense level of 6; Option 2 results in a base offense level of 12; and Option 3 results in a base offense level of 14.

Which option do you prefer and why? 1 Opt.1 6 Opt.2 7 Opt.3

#17The 1994 Crime Bill directs the Commission to provide an "appropriate enhancement" for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved (the "heartland" case, according to USSC statistics).

How should the Commission amend the offense level to address the directive? Should such an enhancement apply to all semiautomatic firearms or should the Commission focus this enhancement on firearms that have characteristics that make them more dangerous than other firearms (e.g., semiautomatic firearms with a large magazine capacity)? Please briefly explain the basis for your answer.

"SOC for the semiautomative firearm" what about automatic firearms? Use descriptions offered by ATF...magazine capacity is irrelevant...semiautomatic firearms should be those that are known for their excessive firepower -- not simply clip type...deal with it as upper end of guidelines or departure...focus on the particularly dangerous semi-automatic weapons...No need to change if heartland cases already sanction this behvior -- but if necessary, more dangerous guns sentenced at mid or top of range...Add a 2 level enhancement at appropriate guidelines for semiautomatice weapons"

Should such an enhancement apply only to crimes of violence and drug trafficking offenses as specified in the directive, or should it apply to other offenses such as those covered by §2K2.1, or should it apply to all offenses? Please briefly explain the basis for your answer.

"Only to crimes of violence & drug trafficing. Stick with congressional directive (7)...must apply to all (7)...because determination of "more dangerous" will complicate sentencing...

#18The 1994 Crime Bill directs the Commission to "appropriately enhance" penalties for cases in which a defendant convicted under 18 USC §844(h) has previously been convicted under that section. NOTE: 18 USC §844(h) covers defendants who use fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or who carry an explosive during the commission of any felony which may be prosecuted in a court of the United States.

How should the Commission amend §2K2.4 to appropriately address this directive? Please comment on the following three possible approaches and describe any other approach that you feel would be appropriate:

1.§2K2.4 could be amended to increase the sentence by a specific amount if the defendant previously had been convicted under 18 USC §844(h). If you are in favor of this approach, what do you believe to be an appropriate enhancement, and why?
"double counting...okay(5), enhance by 2 levels...enhance by 5 year level addition...A fixed enhancement would not address different fact patterns of prior conviction to correspond with such a wide statutory range of 10-25 years..

2.§2K2.4 could be applied using the minimum term of imprisonment required by statute, with departure recommended when this sentence, combined with the sentence for the underlying offense, does not provide adequate punishment. Please explain why you are or are not in favor of this approach.
"In favor (6)...Not in favor (4) Too complicated...How to control?

3.§2K2.4 could be amended to reference the underling offense, in addition to providing an appropriate enhancement for the weapon or explosive. A provision could be added for apportioning the sentence imposed to avoid double counting. Please explain why you are not in favor of this approach.

"Not in favor (8)...Too complicated...too much like 5G1.3...too much room for error."

4.Other:

#19The 1994 Crime Bill directs the Commission to "appropriately enhance" penalties for cases in which a defendant is convicted of 18 USC §922(g) and has one or two prior convictions for a "violent felony" or a "serious drug offense" as set forth in 18 USC §§924(e)(2)(A) and (B). The Commission's definitions of "crime of violence" and "controlled substance offense" are similar but not identical to those referenced in the directive.

Should the current offense levels in §2K2.1 be increased, and if so, by what amount? Please briefly explain the basis of your answer. __2__Yes __11__No

For consistency, should the definitions and counting of prior convictions in §2K2.1 and §4B1.1 be the same? __12__Yes ___No

#20The 1994 Crime Bill covers several stolen firearms and stolen explosives offenses. Two proposed amendments are offered to address the disparity in penalties between §2B1.1 and §2K2.1. Option 1 amends 2B1.1 to include a cross reference to §2K2.1. Option 2 amends §2B1.1 to recommend an upward departure.

Which option do you prefer and why? __13__Option 1 __1__Option 2

#21Firearms (§2K2.1); Explosives (§2K1.3) - Issue for Comment.

The crime bill amends 18 USC §924 to add a new subsection (n) to provide that "[a] person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than twenty (20) years, fined under this title, or both; and if the firearm is a machine gun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life." This section also amends 18 USC §844 to add a new subsection (m) increasing to twenty (20) years the maximum imprisonment penalty for a conspiracy to violate 18 USC §844(h).

Guideline 2K2.4 provides for the term of imprisonment required by 18 USC §924(c). Guideline 2K2.1 applies to an offense under 18 USC §371 involving conspiracy to violate 18 USC §924(c) and provides for an offense level of at least 18 (base offense level 12 plus increase to an offense level of at least 18 if the forearm or ammunition was used or intended to be used in connection with another offense). Should additional adjustments apply? 1 Yes 13 No

If yes, to what extent should they be increased?

A conviction for a conspiracy to violate §924(c) should be more closely referenced to,

7 (a) the penalty in 18 USC §924(c) or,

8 (b) the guideline for the underlying offense.

#22Immigration, Naturalization, and Passports (§§ 2L1.1, 2L1.2) -Issue For Comment.

The Crime Bill increases the statutory penalty for bringing in or harboring an alien from five (5) to ten (10) years, establishes a penalty of up to twenty (20) years imprisonment if serious bodily injury results, and establishes a penalty of imprisonment for any term of years or life, if death results.

The crime bill alters the penalties for failing to depart and for reentering the United States. This provision reduces the statutory maximum penalties for some offenses from ten (10) years to four (4) years, and increases the statutory maximum penalties for reentry after commission of a felony or an aggravated felony from five (5) to ten (10) years, and from fifteen (15) to twenty (20) years, respectively. This provision also establishes the offense of reentry after conviction for three (3) or more misdemeanors involving drugs, crimes against the person, or both.

Should the offense levels under the applicable guideline, §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) be increased, and if so, to what extent?
5 Yes 9 No

Are the current offense levels provided for reentry after conviction of a felony or aggravated felony appropriate? 12 Yes 2 No

If not, how should the guidelines be amended?

Should the offense level currently applicable for reentry after deportation for a felony also be applied to deportation after conviction of three (3) or more misdemeanors involving drugs, crimes against the person, or both?

___3 Misd. Drug Offenses __1__3 Misd. Crimes Against Person __11__Both

#23Immigration, Naturalization, and Passports - (§§ 2L1.1, 2L1.2) Issue for Comment

The crime bill increases the statutory maximum penalties for passport and visa offenses to ten (10) years. It also provides an increased statutory maximum penalty of fifteen (15) years if the offense is committed to facilitate a drug trafficking crime, and twenty (20) years if the offense is committed to facilitate an act of international terrorism.

Does the proposed enhancement provide adequate punishment with respect to passport and visa offenses? __10__Yes __3__No

If not, how and to what extent should additional enhancements for commission of the offense to facilitate certain unlawful conduct be imposed?

#24Terrorism (§5K2.15); Career Offender (§4B1.1) - Issue for Comment

The crime bill directs the Commission to provide an appropriate enhancement for any felony that involves or is intended to promote international terrorism (unless such involvement or intent is itself an element of the crime).

Does the present §5K2.15 provide an appropriate means for an enhancement for any felony that involves or is intended to promote internationai terrorism? __11__Yes __3__No

If no, should the guideline be amended to address this directive? For example, should the Commission add an adjustment to Chapter Three that would apply to all Chapter Two offenses and that would prescribe a specific increase in offense level if the offense involved or was intended to promote terrorism? If so, what level of enhancement would be appropriate?

Should the Commission amend §4B1.1 (Career Offender) to enhance the sentences of such defendants under this section as if they were career offenders? __3__Yes __11__No

#25Juvenile Involvement - Issue for Comment

The crime bill directs the Commission to provide an enhancement applicable to a defendant 21 or older who involved a person under 18 in the offense.

The Commission can best implement this directive by:

__5__(a)Creating a departure policy statement in Chapter Five, Part K (Departures)

__9__(b)Creating a Chapter Three adjustment that would apply to all Chapter Two offenses and would provide a specific enhancement.

If a Chapter Three adjustment is appropriate, should the adjustment be two levels, commensurate with the adjustment for abuse of position of trust, or a higher or lower number of levels? __6__2 levels __3__Higher ___Lower

#26Criminal Street Gangs - Issue for Comment

The crime bill creates a neww section 18 USC §521 that provides for a statutory sentencing enhancement of up to 10 years if a person commits a specified felony controlled substance offense or crime of violence and participates in, intends to further the felonious activities of, or seeks to maintain or increase his or her position in, a criminal street gang. A "criminal street gang" is defined as an ongoing group, club, organization, or association of five or more persons" (A) that has as one of its primary purposes the commission of one or more of the following offenses: a federal felony involving a controlled substance for which the maximum penalty is not less than five (5) years, a federal felony crime of violence that has an element the use or attempted use of physical force against another, and the corresponding conspiracies; (B) whose members engage (or have engaged during the past five years) in a continuing series of these same offenses; and (C) the activities of which affect interstate or foreign commerce.

The Commission can best implement this directive by:

__10__(a)Creating a departure policy statement in Chapter Five, Part K (Departures) providing that if the enhancement contained in 18 USC §521 (Criminal Street Gangs) is determined to apply, the court may increase the sentence above the authorized guideline range.

__4__(b)Creating a Chapter Three adjustment that would apply to all Chapter Two offenses and would provide a specific enhancement.

#27Elderly Victim - Issue for Comment

(a)Do the guidelines provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim? __12__Yes __2__No

(b)How and to what extent might existing factors be modified to provide for punishment in crimes of violence against an elderly victim?

(c)What additional factors should be considered?

(d)Are the current victim related adjustments adequate to address cases involving violations of fraud statutes in which applications of vulnerable victim, §3A1.1 are applicable? __8__Yes __6__ No

If no, and this adjustment needs to be amended, what factors should be considered?

(e)What age should be equated with victim vulnerability (recognizing that age 55 is recognized for fraud offense while age 65 is recognized for certain violent offenses)? Why?
"Age 55 (4)...65(4)...60(1)

(f)Should there also be a counterpart presumptive age for vulnerability of young victims, (e.g., victims under age 16)? __9__Yes __3__No

(g)Should §3A1.1 be amended to require an upward adjustment in the offense level if the offense involved victims older or younger than the designated threshold ages?
__2__Yes __11__No

(h)Should provisions concerning vulnerable victims be different for telemarketing fraud versus other type of fraud offenses? 2 Yes 11 No

#28Career Offender - Issue for Comment

(a)How should amendments to 18 USC §3559 (three strikes) be incorporated into the Sentencing Guidelines?
"Application note to 4B1.1, reference 18:3559 (4)...Separate section under Career Offender Guideline (4)"

(b)Should the career offender guidelines be replaced with a new guideline incorporating the current career offender provisions and the statutory requirements of the three strikes mandatory life sentence? 8 Yes 4 No

(c)Does §5G1.1 provide sufficient instructions on the application of mandatory statutory penalties? 9 Yes 3 No

#29"Safety Valve" Provision (§5C1.2) - Issue for Comment

(a)Should §5C1.2 be modified to fully effectuate congressional intent regarding the "safety valve" provision? 8 Yes 5 No

#30Restitution, Fines, Assessments, Forfeitures (Chapter 5, Part E - Issue for Comment)

(a)This amendment provides for commentary regarding restitution applicable to convictions under certain statutes, in which the statutes shall control in cases involving conflicts with the guidelines.
Comments:
"Agree that the note is fine (7)...Add some more explanatory language to this note. The sysnopsis of the proposed amendment is very helpful and can be incorporated in the App. Note."

#31Supervisied Release (§§ 7B1.3, 7B1.4) - Issue for Comment

(a)Outdated statutory references in policy statements will be eliminated allowing for re-imposition of a term of supervised release when revoked.
Comments:
"Agree (8)...add examples...this commentary is necessary...No (2)"

(b)Commentary will be added reflecting the statutory exception from mandatory revocation if an offender fails a drug test and eliminates outdated statutory references.
Comments:
"okay (10) no (2)"

#32Amendments to Appendix A and Guideline Titles - Issue for Comment

(a)Conforms Appendix A to revisions in existing statutes and revises titles of several offenses.

Comments:
"Agree (10)"

036-95

NAPAS National Association of Protection & Advocacy Systems

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

ATTN: Public Comments

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

To the Commission:

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

The National Association of Protection and Advocacy Systems (NAPAS) welcomes this opportunity to comment on the Commission's guideline formulations process. NAPAS is national organization representing federal funded programs that provided professional legal and advocacy services to people with disabilities, including HIV.

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

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

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Neither of these requirements can be satisfied here.

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

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

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

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

length of the defendant's life.

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

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

Needless to say, any attempt to develop such specific standards would involve a scientific undertaking that is beyond the Commission's expertise. Furthermore, the resulting guideline would single out HIV status, as opposed to any other infectious disease status, that could result in harm to a crime victim.

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

Very truly yours,

Curtis Decker, J.D.
Executive Director

037-95

Mississippi State Senate
JACKSON

COMMITTEE ASSIGNMENTS:
Insurance, Chairman
Corrections
Environmental Protection, Conservation and Water Resources
Finance
Forestry
Labor
Public Health and Welfare

SENATOR MARGARET "WOOTSIE" TATE
47th District
Hancock-Harrison-Pearl River-Stone Counties
P. O. Drawer 490, Picayune 39466
Retired

March 15, 1995

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

Dear Sirs:

Enclosed please find comments to be considered in establishing new guidelines for sentencing federal offenders.

The comments enclosed have come to me through the diligent efforts of many of my past constituents. I have taken the time to study your proposals which are most progressive and timely.

I served on the Mississippi Legislative "Corrections" committee for four years and have a solid background and a good understanding of many of our problems.

I would certainly hope that these comments are timely and could prove useful to you.

Margaret Wootsie Tate

Sincerely yours,

Margaret "Wootsie" Tate
Senator - Retired

Years in office - eight
Retired Jan. 1 1992

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

Dear Sirs,

The proposals for this years amendments are long, and at times difficult to interpret. The complexity of such an undertaking is daunting to say the least. Because of the length and depth of the proposals comments will be somewhat limited; to attempt to address each individual proposal is too great a challenge for the average individual.

Before making specific comments it is noted that the Commission has attempted to place a greater emphasis on crimes involving violence and mitigate the impact of drug quantity. This is a step in the right direction. The Commission should be applauded for the courage to take this common sense step. These improvements need to be made on a retroactive basis in order to allow mistakes of the past to be corrected for individuals who have been previously affected.

Some specific comments as to proposals need to be expressed. It will be commented on by page number and proposal number where possible.

1. Page 2432, proposed amendment for 4A1.3 is quite good. There should be an upward departure for sexual offenses especially those in which force is used. Previous offenses in this area need to be considered heavily as this is a crime which affects individuals for years to come. The Commission does need to examine the wording on page 2433 because it appears possible to greatly enhance the sentence of someone with a prior controlled substance offense as if it were a crime of sexual violence. If that is the intention then further thought is required. Violent sexual offenses need to receive the attention of the Sentencing Commission because of the impact they have upon individuals, and society as a whole. To equate this behavior with controlled substance offenses is simply incorrect.

2. The Commission invites comments on the offense levels under 2P1.2 involving simple possession of controlled substances in a correctional setting. Most possessions in such a setting are minor in scope to begin with, an enhancement of 2 points would seem sufficient: if any enhancement is necessary at all. Correctional settings have a variety of administrative sanctions already available, which should be adequate.

3. Page 2434 seeks comments concerning the potential of amending the guidelines for offenses committed in a protected location if the location is selected by law enforcement. This is a good idea which should be expanded even further. To allow individuals who are supposed to enforce laws to create crimes seems a paradox at best. Nobody should be exposed to harsher punishment due to the manipulation of law enforcement officials.

4. Page 2435 provides an amendment which would give a three point downward departure where "the defendant.. (had no) actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance." It is difficult that our system of justice would allow any prosecution of an individual who had no actual knowledge of a crime being committed. To charge individuals for a "reasonable cause to believe" should have no place in our society.

5. Page 2436 is more the type of amendment we should be having to supplement existing law. Under 3A1.1 to exploit an individual who is vulnerable do to age or diminished capacity should result in an upward departure. To prey on the weak is repulsive.

6. Page 2438 Issue for Comment #17 is overly broad. There are a sufficient number of enhancements for the USE of weapons as is. To keep adding categories for specific weapons is overcounting. Semiautomatic weapons could range from assault weapons to small hand guns. This needs rethinking. The potential for abuse in this issue is considerable. As written it could enhance an individual who has a small hand gun in his home while in possession of a controlled substance for personal use. Please utilize all the other enhancements for use of a weapon rather then create a category which is as all encompassing as this.

7. Page 2439 invites comment on counting prior crimes of violence and drug offenses. The Commission should attempt to separate the two categories as they represent two very different forms of behavior.

8. Page 2441 under section 2L1.1(b) the Commission has addressed correctly the concept of aggravating the guidelines in relationship to the degree of injury inflicted. This is a good beginning to address the impact that violent crime has on an individual, and society.

9. Page 2441 Issue for Comment Section 130009. To provide a 7 point upward departure under 2L2.1 for fraudulent issue of passports used to facilitate a drug offense is far too severe. The guidelines provide ample punishment for either crime. This allows the potential abuse of alleging drug involvement without meeting the burden of proof necessary to substantiate a drug charge.

10. Page 2442 and 2443 Issue 27(A) the Commission invites comment concerning the punishment for crimes of violence against the elderly. While we are all concerned about this particularly vicious type of offense the Commission has addressed this situation in previous amendments by adding guideline points for crimes against vulnerable individuals, and providing upward departures based on the degree of injury incurred. The only way to address this issue otherwise is to return discretion to judges who can evaluate individual cases.

11. Page 2443 invites comment on the "safety valve" provision. There needs to be a mechanism to allow a rational approach to treat minimally involved individuals in a manner which does not destroy their lives. Compression of the quantities used in the guidelines assists in this task, and is welcome. However a method to depart from minimum/mandatory sentences in case of minimal participation is also essential.

12. Page 2445 begins the debate on Drug Offense Guidelines. It is encouraging to know that the Commission is realistic about having previously "assigned too much weight in constructing its initial guidelines." Correction of this, and other factors, affecting sentencing are overdue.

There are such a multitude of proposals that to comment on each one individually would lengthen this reply excessively. That being the case comments will be limited to the most salient issue(s) for which comment is solicited.

Beginning on page 2446 the proposed revision for the guideline tables are welcome. Option C would seem to provide acceptable punishment levels, especially when role adjustments are included. The idea holding minimal participants to level 28 regardless of the quantity involved is excellent. This, in addition to a role departure downward is the proper approach to dealing with a multiplicity of individuals. It should be further that in an operation there can only be one overall leader/organizer. This has been a most abused area of the PSIR. If comment on levels are solicited for minimal participants it would be respectfully suggested that a level below 28 would be deemed proper. Minimal or Minor participants are simply that, and should not be subjected to severe punishment when they have no role in the determination of quantity.

In the Additional Issue for Comment on page 2447 it is suggested that the ceiling level for Minimal/Minor participants be separated by drug type. This is an excellent idea, however, there should be additional thought given as to which drugs should be separated out as less detrimental. Drugs which have no known, or very limited, hazard potential should not be grouped with the others. This would specifically be Marihuana. Minimal/Minor participants in an operation involving this substance should be considered for a low base offense level: perhaps level 20 prior to adjustments.

The examples given as to who deserves an adjustment are so broad as to allow anyone to be a manager. If the PSIR author decides to enhance everyone then role adjustment is non-existent. There needs to be a common sense standard applied here. There can only be one overall leader in an operation. This conforms not only to Military dogma, but to a reasonable view of how organizations are structured. When a determination of who is a manager becomes subjective it will not be applied in a rational manner. As a counter example if two individuals are transporting a substance in a car and one mentions to the other "slow down there is a curve on the road ahead", is this individual a manager? By applying the standard on page 2448 he is, because: "a manager is a person who managed or supervised another participant, whether directly or indirectly." This area is far too broad and needs attention to more reasonably reflect who is a true manager. Additionally the burden to determine a mitigating role should not be borne by the defendant, it should be incumbent upon the Government to prove an aggravating role, but not for a defendant to prove a mitigating one. The burden of proof must rest solely with the Government.

The amendments begin to return to more appropriate role when defining adjustments for firearms in the commission of a drug felony. There does need to be more clarification in this area however. On page 2450 it is stated that "If a dangerous weapon is found in the same location as the controlled substance... possession of the weapon facilitated, or was otherwise related to commission of the offense." This leaves open the potential for someone with a small amount of substance in their home to receive an upward departure by virtue of having a hunting rifle in their home. Increases in the offense level must be better defined to include the actual discharge or display of a weapon in a threatening manner. There are already proposals to enhance the guidelines if there is some bodily harm caused, this should be the ultimate standard. To provide an increase for simple possession of a weapon in a home setting would only foster disrespect for the guidelines.

Proposal 37 on page 2451 is excellent. This brings the realities of cultivation into focus. The proposal is well thought out and realistic, as well as a welcome change in an area which was quite inequitable.

Proposal 38 is a similar item. The present ratio of 100 to 1 is so disproportionate as to require a drastic revision. The chemical similarities between Cocaine and Cocaine Base are such that they should be treated as equivalent. If, however, the Commission wishes to create a higher offense level for this specialize form of Cocaine a 2 to 1 ratio would seem appropriate. This represents a degree of punishment which is twice as harsh as for the Hydrochloride form. Any punishment which is double the normal penalty is ample to provide deterrence. This is an area of priority which should be addressed.

Page 2452 considers options for the consideration as to amount of controlled substance involved in an offense. This is an area of concern because there is so much room for abuse. Perhaps the best option which is proposed is to use the greatest amount of substance for any single transaction. A single transaction will normally be a good indicator of an individual's ability to produce. While it figures that someone who can produce 100 units of a substance could also produce 10 units it does not indicate that a person who produces 10 units at a time is capable of producing 100 units at any one time. Single transaction quantity is many times the maximum capacity an individual is capable of producing. The Commission should also contemplate how to determine amount when the only indication of quantity is the unsupported word of someone who hopes to benefit from his testimony. The potential for abuse there is self evident. Far too many individuals have suffered from inaccurate and sometimes outright false statements concerning the quantity of substances from individuals who stood to benefit from such statements. Hopefully this issue will be addressed before long.

Page 2453 continues to address the difficult problem of determining quantity in controlled substances. The Commission has made an attempt to address the issue of diluted substances in a manner which is beneficial to all parties. There still remains the same difficulty of determining purity of theoretical substances, that is substances which exist only in the mind of an individual attempting to better his position at the expense of another. Perhaps the Commission should consider a ceiling on such theoretical substances.

Page 2454 requests input on how to compare methamphetamine to other substances. Being as how it is a stimulant perhaps it should be rated the same as cocaine. The Commission should solicit input from Medical Experts and then submit proposals for comment.

Page 2456 again visits the idea of weapons possession enhancement. This can be too easily used against individuals who simply have (legal) possession of a weapon in their homes at time of arrest. There needs to be clear distinction between the USE of a weapon, or it's brandishment, as opposed to simple possession.

Page 2457 poses two interesting questions. How to find the offense level in a theoretical production, and how to calculate the amount of personal possession vs distribution amount. In the first question the amount should be calculated by the MOST limiting factor. No matter how much of a precursor chemical that you have you can only produce as much substance as the LEAST available chemical will allow. For the second question option 3 which gives a downward departure from the total for personal use would seem reasonable.

Page 2458 returns once again to the weapons in association with another crime. Once again there must be mechanism to exclude individuals who merely had a weapon in their home at the time of arrest, or similar circumstances. The distinction between use of a weapon and proximity to one must be addressed.

Page 2459 addresses another approach to reducing the impact of drug quantities. The overall intent is heading in the right direction, but some of the specifics need further thought. When groupin gdrugs according to their potential for harm Marihuana needs to be placed with the least harmful substances; not with methamphetamine, PCP et.al. What the proposals for enhancement do to weapons is correct in general, especially in assigning points based on actual harm caused in the commission of another act. This second proposal adds too many departures in the upward direction to be as effective as proposal number 1. This proposal also creates penalties for individuals who ue their skills to further an enterprise, this has the potential to go too far. Once again it also goes too far in assigning the term leader organize.. In reality there is one true leader/organizer, everyone subordinate to this individual does not deserve the upward departure that comes with the title. While page 2461 tries to mitigate the application of manager and supervisor there still is far too much discrection given to the author of the PSIR to determine the upward departure for role assessment.

Page 2462 goes even further in penalizing an individual for use of their skills by either adding 2 points to the offense level, or by raising the offense level to 26 if it is lower. This could make a dramatic, and unwarranted increase to what would otherwise by a substantially lower offense level.

SUMMARY

This year's proposals have more positive steps then previous year's proposals. The proposals make an effort to address issues which concern everyone, and in many areas do an effective job of such. The Commission does need to remain vigilant to insure that its good intentions are not perverted by individuals who have been issued too much leeway by guideline changes. This is especially true in the determination of leader/organizer, and manager/supervisor. Most of us believe that an organization is run essentially by one individual, not a majority of the participants. The Commission has attempted to address concerns which we all have relating to violence in our society, and to preying on the less able in our population. For these changes sincere congratulations are due. The proposals to mitigate the impact of quantity in the area of controlled substances is also welcome. Attention should be focused primarily on violent behavior which affects all. Under the proposals for reducing the impact of quantity involved in controlled substances the first proposal seems more reasonable.

The task assigned to the Commission is not an easy one, yet it has been approached in a cogent fashion in general. We all look forward to further refinement in the future and appreciate your efforts this year..

UNITED STATES SENTENCING COMMISSION
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April 24, 1995

MEMORANDUM:

TO: Chairman Conaboy
Commissioners
Staff Director
Deputy Staff Director
Office Directors
Peter Hoffman

FROM: Mike Courlander

SUBJECT: Late-arriving Public Comment

Attached for your information is public comment regarding the proposed amendments to the guidelines. One or two of these submissions you may have already, but the comment in this packet has been numbered and hole-punched for insertion into your public comment notebooks. A revised index to the notebook will be coming your way shortly.

039-95

NATIONAL
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April 10, 1995

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

Dear Chairman Conaboy:

This commentary is submitted for the limited purpose of commenting on certain issues presented in the Commission's Special Report on Cocaine and Federal Sentencing Policy, including the crack/powder cocaine ratio issue presented in proposed guideline amendment no. 38.

The National Legal Aid and Defender Association commends the Commission's detailed critique of the 100-to-1 sentencing ratio contained in title 21. We are concerned not only about the broad issue of unwarranted sentencing disparity for these two varieties of the same drug, but also about the disparate racial impact, with the burden of the longer crack sentences falling overwhelmingly and vastly disproportionately on low income African American cocaine offenders. Since the weight of all evidence is clearly that the two drugs act pharmacologically the same, we support the setting of a 1-to-1 ratio in the guidelines, with any additional harms such as distribution-related violence or crack houses reflected on a case-by-case basis through adjustments or departures.

We wish to highlight two related issues. One is the effect of changes in crack sentencing on other drugs. The Commission has asked for comment on whether any changes in the crack guidelines should apply to drug offenses generally or only to cocaine offenses. And the emerging debate in Congress has raised a similar question, with conservatives arguing that whatever disparities exist between crack and powder sentencing should be addressed not by lowering the punishment for crack but by raising the punishment for powder (as has been specifically proposed by Rep. McCollum in House Judiciary Committee markup of crime legislation). Since everything the Commission does to bring rationality to the crack/powder sentencing ratio is subject to this type of congressional response, we believe that the Commission should indeed address the effect on other drugs, including specifically

evaluating the consequences of raising all other drug punishments to proportionately match the severity of current crack quantity trigger levels.

The Commission's role as the watchdog of unwarranted sentencing disparity will require it to identify all other drugs which are as dangerous as crack cocaine and should be treated no less severely. This the Commission may already have considered, in suggesting in the discussion of current proposed amendment no. 43 that: "Most would agree that heroin, cocaine, and cocaine base pose the greatest degree of harm."[1] The question then becomes: what might be the consequences of establishing a mandatory minimum sentence of five years (or two years, as Rep. McCollum once suggested) for simple possession of five grams of powder cocaine or heroin, plus the ripple effect on distribution offenses, in terms of prison populations, costs, and burdens for the courts, corrections, prosecution, indigent defense and other components of the criminal justice system? We note that the latest figures from the National Institute on Drug Abuse indicate that there are more than three times as many frequent users of powder cocaine than crack (among high school seniors, 0.8% reported crack use within the past month, compared with 2.8% for powder and 0.3% for heroin, plus 1.5% for other opiates). In light of both Congress' and the Commission's interest in maintaining systemwide sentencing proportionality, the effect of commensurate increases in punishment for other serious drugs must also be evaluated, such as PCP, LSD and crystal methamphetamine (0.7%, 2.6% and 0.7% monthly use by high school seniors, respectively, according to the NIDA study).

Since the current Congress is so emphatically inclined to take the course of raising, rather than lowering any punishments (witness the pending cutbacks in even the very limited mandatory minimum "safety valve" contained in last year's crime bill), we believe it would be irresponsible not to assume this outcome in the crack debate, and develop impact assessments thereon.

The other related issue on which we wish to comment is the death penalty. Little attention appears to have focused on the fact that the ratio between powder and crack cocaine drives one of the death penalties enacted in the 1994 crime legislation. Under new 18 U.S.C. §3591(b)(1), the death penalty is established

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[1] We strongly support the thrust of option 1 under amendment no. 43, abandoning drug quantity as the measure of offense seriousness for offenses subject to inflexible mandatory minimums, and relying instead on more accurate indicators of seriousness and violence, including use of a weapon, injury and role in the offense.

for certain large drug distribution offenses even though no death results. The penalty is directly tied to drug quantity, incorporating precisely the same 100-to-1 ratio for crack and powder cocaine where the defendant played a managerial role in a continuing criminal enterprise. The quantity necessary to trigger a death penalty for crack is three kilograms of any substance containing a detectable amount of cocaine base; if the drug is in powder form, three hundred kilograms would have to be involved. [The quantities triggering the death penalty for other drugs also starkly demonstrate the arbitrariness of the congressionally mandated quantity levels: 60 kilograms of heroin, 6 kilograms of PCP or methamphetamine, 60,000 kilograms of marijuana or 600 grams of LSD.]

The stakes are far higher than even the Sentencing Commission's excellent report indicates. And harking back to our earlier point, we urge the attention of both the Commission and Congress to the consequences of raising other drugs to match the harshness of crack sentences. What would be the consequences of reducing the drugs-without-homicide death penalty to a 3 kilogram threshhold for powder cocaine, or to 600 grams for heroin (assuming a continuation of the current powder cocaine/heroin ratio), with proportional decreases in the quantities for other drugs? How many cases would thus qualify for the death penalty? What sentences are these defendants currently receiving? How would this affect proportionality for other federal offenses? What other sentence increases would be dictated to maintain proportionality? What implications does this type of sentence inflation have for the pursuit of proportionality and the criminal law's deterrent power (e.g., to deter a mid-level drug enterprise manager from increasing the volume or the violence of his criminal conduct)?

Our fundamental point is that it would be a grave mistake to view the crack/powder differential, and the Commission's resolution of it, in isolation. We strongly urge that the Commission's proposed resolution of the issue include a careful discussion of significant potential alternative resolutions.

The Commission's kind consideration of our comments is greatly appreciated.

Sincerely,

Clinton Lyons
Executive Director

H. Scott Wallace
Special Counsel

040- 95

PUBLIC COMMENT OF

THE AMERICAN CIVIL LIBERTIES UNION

and the

COMMITTEE AGAINST THE DISCRIMINATORY CRACK LAW

on

PROPOSED AMENDMENTS TO SENTENCING GUIDELINES

derived from the
COMMISSION'S SPECIAL REPORT TO CONGRESS:
COCAINE AND FEDERAL SENTENCING POLICY

APRIL 10, 1995

submitted by
Nkechi Taifa
legislative counsel, ACLU

[271]

The American Civil Liberties Union (ACLU) is a nonpartisan organization of over 275,000 members nationwide dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at the core of our mission, we have a particular interest in ensuring that equal protection of the law and freedom from disproportionate punishment are upheld wherever threatened.

The ACLU is a founding member of the Committee Against the Discriminatory Crack Law, which is a non-partisan coalition of over 20 criminal justice, civil and human rights, and religious organizations, who have joined together to educate the public and Congress about the unwarranted disparity in cocaine law sentencing.

In addition to the ACLU, other member organizations of the Committee Against the Discriminatory Crack Law include the Americans for Democratic Action, Center for the Study of Harassment of African Americans, Criminal Justice Policy Foundation, Drug Policy Foundation, Families Against Discriminative Crack Law, Families Against Mandatory Minimums, General Board of Church and Society of the United Methodist Church, National Association for the Advancement of Colored People, National Association of Black Social Workers, National Association of Criminal Defense Lawyers, National Black Caucus of State Legislators, National Black Police Association, National Committee Against Repressive Legislation, National Conference of Black Lawyers, National Legal Aid and Defender Association, National Islamic Political Foundation, National Lawyers' Guild, National Rainbow Coalition, National Urban

League, The Sentencing Project, Southern Christian Leadership Conference, and the Special Committee on Racism and the Drug War.

The American Civil Liberties Union and the Committee Against the Discriminatory Crack Law hereby adopt the "Statement of Federal Public and Community Defenders on Proposed Amendments to Sentencing Guidelines published March 15, 1995" submitted to this Commission on April 10, 1995. For ease of reference a copy of that statement is attached.

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FEDERAL PUBLIC DEFENDER
Western District of Washington

041-95

Thomas W. Hillier, II
Federal Public Defender

April 10, 1995

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

Dear Judge Conaboy:

Enclosed are materials submitted on behalf of Federal Public and Community Defenders in response to your call for public comment on several additional proposed amendments to the Sentencing Guidelines.

As always, we appreciate the opportunity to provide input to the Sentencing Commission and trust you will give serious consideration to our comments before moving forward on the important proposals presently before the Commission.

Thank you for your consideration.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington,
on behalf of the Federal Public
and Community Defenders

TWH:rmm

Enc.

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Statement

of

Federal Public and Community Defenders

on

Proposed Amendments to Sentencing Guidelines
published March 15, 1995

April 10, 1995

Amendment 1
(Crack Cocaine)

Amendment 1 seeks comment on how to incorporate in the guidelines the recommendations of the Commission's report on federal sentencing of cocaine offenses. This amendment asks whether to amend the guidelines by adding specific offense characteristics to § 2D1.1 "to enhance sentences for violence and other harms associated with some crack and powder cocaine offenses as well as some other drug offenses." The amendment also asks for comment "on the usefulness of adding or amending commentary and policy statements regarding possible departures to take account of the increased harms associated with some cocaine offenses." In addition, the amendment asks whether any amendments designed to address violence and other harms of cocaine offenses should also apply to other drug offenses. If any new enhancements are added, the amendment asks whether other changes in the drug guidelines are necessary. Finally, the amendment asks whether "any of these changes" should be retroactive and "how might this process be accomplished."

The Commission has "firmly conclude[d] that it cannot recommend a ratio differential as great as the current 100 - 1 quantity ratio."[1] The Commission further notes that "[a] review of the relatively sparse empirical evidence available concerning those factors Congress considered in distinguishing crack from

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[1]U.S. Sentencing Com'n, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 196 (Feb. 1995).

powder cocaine leads to mixed conclusions and few clear answers."[2] As we have stated previously, we believe that the appropriate ratio between crack cocaine and powder cocaine is one-to-one. This is best accomplished by deleting all references to cocaine base in the drug quantity table. In light of the paucity of evidence to support the penalty structure and the resulting disparate racial impact, failing to act to equalize the ratio becomes an endorsement of racial discrimination in sentencing.

Other than revising the drug quantity table, we do not believe that any other amendments are necessary to reflect the findings of the Commission's report on cocaine sentencing. Although the report states that "a policymaker could infer that crack cocaine poses greater harms to society than does powder cocaine,"[3] and that "crack cocaine poses somewhat greater harm to society," the report lacks objective data to support this conclusion. For example, while the report assumes that crack cocaine offenses result in more ancillary violence, the report also states that "pulling apart the systemic crime associated with crack cocaine versus powder cocaine is difficult if not impossible."[4] And, while the marketing of crack may make the drug more accessible to lower income people, "[t]he Commission found virtually no research that compared the respective association of crack and powder cocaine with

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[2] Id. at 195.

[3] Id.

[4] Id. at 95.

economically driven crime."[5]

In addition, it is difficult to comment on any proposed enhancements to the drug guidelines without knowing just what those enhancements are. Although this amendment seeks comment on whether to amend the guidelines to add specific offense characteristics to account for "violence and other harms" associated with drug offenses, the amendment fails to present a concrete proposal upon which to comment. The amendment lists some examples, including use of a firearm, victim injury, crack houses, "violence and other harms," yet it is unclear whether the Commission is considering including all or some of these factors and how these enhancements would be implemented and relate to each other.[6] Further, most of the perceived additional harms associated with crack cocaine offenses, such as illegal use of a firearm, violence, and distribution in a protected location are already punishable as separate offenses or statutory enhancements.[7] There is no reason

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[5] Id. at 186.

[6] If the Commission intends to add specific offense characteristics or departure language to account for those factors that the Commission believes distinguish crack offenses from other drug offenses, then we believe that those enhancements should be limited to sentences for crack offenses.

[7] We understand that there are some perceived harms that are not covered by statute, but these perceptions are unsupported by objective data. For instance, the Commission's report asserts that crack cocaine is more psychologically addictive and that "crack smokers are more likely to engage in binging," yet the report contains no objective data to substantiate this assertion. In addition, without comparing the addictiveness of crack cocaine with that of drugs other than cocaine, we believe that it would be unreasonable to use the perceived addictive quality of crack as a justification for an increased penalty.

to render the statutes irrelevant by creating enhancements. The suggested methodology creates the additional temptation for the government to bypass charging under the statute and thereby avoid proving either an offense or statutory enhancement beyond a reasonable doubt.

Finally, we urge the Commission to act this amendment cycle and to make the revisions retroactive. The Commission's report makes clear that the 100 to 1 ratio is unwarranted. Those defendants who have been sentenced pursuant to the ratio are being treated unfairly. If the Commission acts to remedy the disparity inherent in the current crack cocaine penalty scheme, fairness requires that any such changes be made retroactive.

Amendment 2
(Simple Possession of Crack Cocaine)

Amendment 2 seeks comment on whether to amend § 2D2.1 for offenses involving simple possession of crack cocaine. We believe that § 2D2.1 should be revised to provide for a base offense level of six if the offense involved crack cocaine. In addition, we support the deletion of the cross-reference in § 2D2.1(b) which requires the application of § 2D1.1 if the defendant is convicted of simple possession of more than five grams of a mixture or substance containing cocaine base. The disproportional treatment of simple possession of the crack form of cocaine is perhaps the most glaring indication of the unfairness of the crack cocaine penalties.

As pointed out in the report, "the crack simple possession penalties have created sentencing anomalies and unwarranted

disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act."[8] Further, the dramatically increased penalty for simple possession of more than five grams of crack cocaine allows a drug trafficker to be sentenced less severely than a drug possessor.[9] There is no data to support the presumption in the sentencing scheme that possession of more than five grams of crack is necessarily inconsistent with possession for personal use.[10]

The Commission's report states that "because powder cocaine can be converted easily into smaller doses of crack that can be sold more cheaply and in potent quantities, crack is more readily available to a larger segment of the population, particularly women, children, and the economically disadvantaged."[11] Thus, the increased penalty for simple possession of five or more grams of crack cocaine falls heavily on "the most vulnerable members of society: the poor and the young"[12] who presumably are less likely

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[8] Id. at 198.

[9] For instance, a first-time defendant who sells 5.5 grams of heroin to an undercover officer faces a guideline range of 15 to 21 months, while a first-time defendant who possesses 5.5 grams of crack for personal use is subject to a five-year mandatory minimum and a guideline range of 63 to 78 months.

[10] The Commission's report states that "the unique approach to emphasizing severe punishment of those who possess crack for personal consumption is at odds with the prevailing, treatment-oriented approach prescribed by Congress for other drug user/possessors." Id. at 198.

[11] Id. at xiv.

[12] Id. at 195.

to possess cocaine in its more expensive powder form.

Further, these harsh penalties for simple possession are falling disproportionately on black defendants. According to the report, the mean sentence for crack cocaine possession offenses from October 1, 1992 through September 30, 1993 was 30.6 months, while the mean sentence for powder cocaine possession offenses was 3.2 months.[13] The overwhelming percentage of defendants sentenced for simple possession of crack cocaine was black. As stated in the report, 84.5 percent of crack defendants were black, 10.3 percent were caucasian, and 5.2 percent were hispanic.[14] For simple possession of powder cocaine, 73.8 percent of the defendants received probation, and of those defendants, 58 percent of were caucasian, 26.7 percent were black, and 15 percent were hispanic.[15] The disparate impact of these penalties on black defendants is unjustifiable and unfair and is inconsistent with the principles that underlie our system of justice.

Amendment 3
(Offenses Involving Underage or Pregnant Individuals)

Amendment 3 seeks comment on whether to amend § 2D1.1 by adding enhancements for distribution in a protected location or to certain individuals. We oppose this amendment.

This amendment would further convert the present guideline system into a real offense sentencing system in a piece-meal

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[13] Id. at 154.

[14] Id. at 156.

[15] Id. at 154-56.