manner. The Commission's attempted to draft a real offense guideline system and found that such a system was impractical and "risked return to wide disparity in sentencing practice."[16] We believe that enhancements for distributing near a protected location, employing underage individuals, or distributing to underage or pregnant persons are appropriately covered under § 2D1.2 when there is a conviction under 21 U.S.C. § § 859, 860 or 861. If the defendant's conduct involves a protected location or an underage or pregnant individual, the government can charge a violation of the applicable statute. Adding enhancements to § 2D1.1 renders these statutory provisions irrelevant and permits the government to avoid meeting its burden of proof required for a conviction by simply waiting until sentencing to assert that the defendant's offense involved a protected location or an underage or pregnant individual. There has been no data to support the need to incorporate these enhancements as specific offense characteristics instead of requiring a conviction.

The proposed amendment poses application problems as well. For instance, would the enhancement for distributing near a protected location apply if law enforcement chose the protected location? Would it apply if one of fifty sales occurred in a protected location? To avoid creating disparity, we believe that these enhancements should apply only when there is a conviction under one of the corresponding statutes.

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[16]U.S.S.G. Ch. 1, Pt. A(4)(a), at 5.

Amendment 4
(Guideline Promulgation Authority)

Amendment 4 would revise the background commentary of § 4B1.1 to state that in promulgating the career offender guideline as directed by 28 U.S.C. § 994(h), the Commission exercised its authority under 28 U.S.C. § 994(a)-(f) and (o)-(p). Amendment 4 also invites comment on whether to amend Chapter I, Part A "to state that in its promulgation of specific guidelines, the Commission intends in all cases to rely on its general authority under 28 U.S.C. § 994(a) as well as any other more specific grant of statutory authority." We oppose this amendment.

The career offender mandate is like a mandatory minimum in that it introduces an element of inflexibility inconsistent with a guideline system. The Commission's policy should be to mitigate the impact of such a provision and to construe the mandate in 28 U.S.C. § 994(h) narrowly.

In addition, we oppose the proposed amendment to Chapter I, Part A. We believe that the Commission should determine on an amendment-by-amendment basis the scope of authority that the Commission is exercising.

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042-95

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April 5, 1995

Michael Courlander
U.S. Sentencing Commission
One Columbus Circle, N.E.
Ste 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments

Dear Mr. Courlander:

With regard to the Commission's request for public comment, where retroactivity is concerned and with powder cocaine in particular, it is our opinion that any change in the applicable base offense level ought to be available to those previously sentenced. This is in keeping with the legislative history of the Crime Control Act, P.L. 98-473, where, when the Commission reduces the recommended term of imprisonment for a particular category of offense, adjusting existing sentences is appropriate except where there is more than a minor downward adjustment, or where there is a class of persons affected, as opposed to isolated instances. Implementation by mathematical calculation by the Bureau of Prisons would likely effectively prevent any undue burden on the courts. In those instances where qualifying characteristics would warrant the exercise of judicial discretion (e.g. where an inmates pre-sentence report is silent as to minor or minimal role or some other similar factor not objectively ascertainable from the PSR), provision for such could be made by particular reference thereto in §1B1.10.
Thank you for your consideration of this matter.

Very truly yours,
OMNI LAW CHARTERED

By:
JANA V. JAY
Attorney at Law

JVJjf

[284]

WRITTEN, PUBLIC COMMENTS FOR THE RECORD REGARDING THE UNITED STATES SENTENCING COMMISSION'S FEBRUARY 1995 REPORT TO CONGRESS, AND FUTURE CONGRESSIONAL RECOMMENDATIONS, ON THE CURRENT 100-1 FEDERAL SENTENCING DISPARITY BETWEEN "CRACK" AND POWDER COCAINE OFFENSES

By Gerald H. Goldstein, for
the National Association of Criminal Defense Lawyers

APRIL 10, 1995

1627 K Street NW, Suite 1200, Washington DC 20006 • Tel: 202-872-8688 • Fax: 202-331-8269

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I want to thank the Commission for the opportunity to submit for the record the following public comment on the Commission's February 1995 special report to Congress regarding the current 100-1 "crack" versus powder cocaine sentencing disparity, and the Commission's intention to submit to Congress recommendations on May 1, 1995 -- for case-specific, guidelines adjustment-oriented models for modification of the federal sentencing policy as it relates to cocaine offenses.

I.

NACDL Applauds the Commission's Work and Urges Commission Action in Full Accordance With the Report's Comprehensive Research

The members of NACDL, front-line defenders of the People's rights and liberties, have long recognized and pushed for reform of the irrational and unfair federal requirements that impose a mandatory minimum sentence of at least five years for the first-time possession of more than five grams of cocaine "base" ("crack"), while imposing a minimum sentence of probation for the possession of the same quantity of cocaine hydrochloride (powder cocaine). The mandatory sentence for possession of 50 grams of crack is ten years. While for this same penalty, a defendant would need to be convicted of possessing *100 times* as much powder cocaine. A defendant with no prior convictions who is found guilty in federal court of possessing 70 grams of powder cocaine with the intent to sell it faces between 21 and 27 months in prison. Meanwhile, a like conviction involving the same amount of crack cocaine would qualify for a sentence more than five times as long -- between 10 and 12 1/2 years. From both the market-value *and* the potential punishment perspectives, powder cocaine, and not crack, is in fact the more profitable drug.[1]

As the report states: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), created the basic framework of mandatory minimum penalties that currently apply to federal drug offenses. This Act establishes two tiers of mandatory prison terms for those convicted as first-time drug distributors -- a five year and a ten-year minimum sentence. Under the terms of the statute, the different minimums are triggered depending on the quantity and

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[1] *See, e.g.*, Table 19 in *Special Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission 173 [herein the February 1995 report or the report] ("Street-Level Value of Drug Quantity By Drug Type and Base Offense Level") (reflecting, for example, that in order for one to reach a quantity-oriented, "base offense level" for sentencing purposes of "20," one must either have been convicted of $21,400 worth of powder cocaine, or else, $230 worth of crack; likewise, to reach the highest base offense level, "38," one must be convicted of either $16,050,000 worth of powder cocaine, or else $172,500 worth of crack).

the type of drug involved. This 1986 Act gave birth to the federal criminal law sentencing distinction between cocaine "base" and other forms of the same drug. The quantity thresholds triggering the penalties create the 100-1, crack versus powder cocaine sentencing ratio.

As the report also well notes: the 1986 Act "was expedited through Congress. As a result, its passage left behind a limited legislative record."[2] While many individual members delivered floor statements about the Act, Congress dispensed with most of the typical legislative process, including committee hearings. And no committee produced the standard committee report on the legislation reflecting actual *analysis* of the Act's provisions.[3] The legislative history thus does not include any discussion of the Act's 100-1 crack versus powder cocaine quantity-based sentencing disparity.[4]

But we do know this:

> The sentencing provisions of the Act were initiated in August 1986, following the July 4th congressional recess during which public concern and media coverage of cocaine peaked as a result of the June 1986 death of NCAA basketball star Len Bias.[5]
>
> A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's case was cited 11 times[ ] in connection with crack.[6]
>
> Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack

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[2] *Id.* at 116.

[3] *See id.* at 116-117. *See also, e.g.*, 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process.").

[4] February 1995 report, *supra* note 1, at 117.

[5] *Id.*

[6] *Id.* at 123 (citing transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress).

> cocaine overdose death of NCAA basketball star Len Bias" [ ] was instrumental in the development of the federal crack cocaine laws. During 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.[7]
>
> Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.[8]
>
> And still, for almost a decade now, this irrational and unfair system of cocaine sentencing disparity -- child of hysteria and haste -- has existed without comprehensive examination. There have been many victims of this system over the years. And they have been among the most vulnerable, at-risk members of our society: the poor, the young and the minority.

NACDL accordingly applauds the Commission for its February 1995 report's comprehensive research, and for the report's unequivocal conclusion that the current 100-1 sentencing ratio between crack and powder cocaine offenses is too high, irrational and unfair. Further, though, NACDL respectfully urges the Commission to act in accordance with the facts canvassed in the report. While NACDL commends the Commission for the studied research reflected in the February 1995 report, NACDL submits that the Commission should immediately follow the data referenced in the February 1995 report to the data's full, logical conclusion: there is no rational justification for any sentencing disparity between powder and crack cocaine; racism and unfounded suspicion should be removed from the federal sentencing law; the sentencing guidelines' (and statutory) ratio between powder and crack cocaine should be 1-1, with *all* cocaine offenses being subject to the same penalties as those now in effect for powder cocaine.

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[7] *Id.* (citing testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993).

[8] *Id.*

II.

There Is No Rational Basis for Any Disparity Between Crack and Powder Cocaine

Although several courts have generously deferred to the congressional cocaine sentencing conclusion -- i.e., assuming that Congress *must* have had some reason for its creation of the crack versus powder cocaine sentencing disparity -- the research and analysis of the Commission's report shows that any assumed congressional "rationale" must be regarded as simply unfounded, and erroneous. The abbreviated, murky legislative history does not provide a consistently cited "rationale" for the crack versus powder cocaine penalty structure.[9] But, as the Commission's report rightly points out, to the extent Congress can be viewed as having perhaps thought about support for its statutory conclusion to create a 100-1 crack versus powder cocaine sentencing disparity, it's conclusion rests upon mere "assumptions": assumed qualities of addictiveness; speculative correlations to other, serious crimes; conjured special psychological effects of this newly discovered bogey-man called crack; fears of heightened risks to youths; and the supposedly peculiar "purity and potency," market incentives, and ease of movement qualities of crack.[10]

A.

Regarding "Pure and Potent," and Ease of Movement and Administration Assumptions

Yet, as the Commission's report clarifies: the mood altering ingredient in both powder and crack is the same -- cocaine. "Pure and potent" cocaine powder can be *easily* moved and administered, and it can be easily transformed into crack by combining the powder with baking soda and heat.

The difference in *effect* between the two varieties of cocaine lies in the way the drug is *ingested*. Cocaine powder is generally sniffed or snorted through the nostrils or dissolved in water and administered intravenously, whereas crack is usually smoked in a pipe. The onset of drug effects is slowest for swallowing and sniffing, and fastest for smoking and injection. Intravenous injection deposits drugs directly into the user's bloodstream, for fast transmission to the user's brain.

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[9] *See id.* at. 121.

[10] *See generally id.* at 118.

B.

Regarding Medical and Addiction Assumptions

Of course, the use of drugs, including all forms of cocaine, impacts upon the public health of the United States.[11] But speculation and Congress-inspiring sports celebrity deaths aside,[12] according to *emergency medical experts*: there is no objective scientific data to support the oft-cited assumption that crack is more addictive or dangerous than the powder cocaine from which it is derived. In fact, studies disclose that the most frequent route of administration for cocaine-related deaths is through *injected*, water-dissolved, powder cocaine -- not by the smoking of crack.[13] Crack cannot be injected.

Likewise, the injection of cocaine powder -- and not the smoking of its derivative, crack -- increases the social threat of infections (including HIV and hepatitis).

And as the Commission report also notes, although the national estimate of (crack *and* powder) cocaine-exposed infants according to some studies is notable at between two to three percent, cocaine is actually used less frequently during pregnancy than are all sorts of other drugs, both "licit" and "illicit."[14]

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[11] Still, as the report points out, studies by organizations including the Drug Abuse Warning Network (DAWN) and the Rand Foundation reflect that the casual use of cocaine has *decreased* since 1988; and that fewer Americans are now using cocaine than in the 1980's. *Id.* at 46-47. In fact, in terms of drug-based causes of hospital emergency room visits, cocaine ranks behind *alcohol*. *Id.* at 41.

[12] In addition to the assumed crack-related death of the Boston Celtics's first-round basketball draft pick, Len Bias, Congress was moved by the drug-related death of Cleveland Browns football player Don Rogers. "Recalling [these deaths], members of Congress [supporting the proposed 1986 Act] repeatedly described the dimensions of the drug problem in such dramatic terms as 'epidemic.'" *Id.* at 121.

[13] *See, e.g., id.* at 44-45. But it is also important to recognize, as the Commission has in its report, that "[a]mong cocaine-related deaths, concurrent use with *alcohol* was the most deadly combination." *Id.* at 45 (emphasis added).

[14] *See, e.g., id.* at 52 (citing *inter alia* D. Gomby & P. Shiono, *Estimating the Number of Substance-Exposed Infants*, The Future of Children 22 (Spring 1991)). As the report has well-recognized: fetal *alcohol* syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in the United States than fetal cocaine syndrome (whether caused by crack or powder -- there is no way to

C.

Regarding Assumptions About "Special Psychological Effects"

Certainly, when cocaine use becomes uncontrolled, an individual's links to the social and economic world disintegrate. As the report reflects, some studies even find that physical, psychological, and behavioral changes in an individual can begin soon after the person begins to use cocaine. But there is nothing peculiarly pernicious about crack cocaine.

When users of cocaine, powder or crack, become dependent upon the drug, their family and social lives typically disintegrate. And the most "at risk" users -- the unemployed -- frequently are asked, or forced, to leave their family or friendship units. For example, as the report notes: in a study of voluntary inpatients in a hospital unit, 18.7 percent of the 245 study participants disclosed that they had been asked or forced to leave their social units; and of these individuals, more than half (51.1%) became homeless.[15] Research shows that those who are drug abusers and become homeless will likely abuse alcohol and other drugs. And homeless shelters in New York City, for example, have reported that the current most frequently abused drug among the shelter residents is cocaine -- but again, both crack *and* powder.[16] Yet, as the Commission's report suggests, it seems as likely that cocaine abuse is a *reflection* of sociological and psychological illness as it is likely that (as some members of Congress might be seen to have assumed in 1986) such use *causes* such illness.

Further, the report's discussion of psychopharmacological-driven crime data is telling. For example, *alcohol-related* homicides are considered to be psychopharmacological-driven at a considerably more significant rate than any other drug -- including cocaine (of either the powder or crack variety).[17] And at least one influential study concludes that "to date, there has been no systematic research linking crack cocaine use with increased

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distinguish the particular variety of the drug used by the effects on the infant); and a much more significant percentage of newborns in this country are reported to suffer from fetal tobacco-exposure or fetal marijuana-exposure, than from fetal cocaine syndrome. *Id.*

[15] *Id.*, at 58 (citing B. Wallace, *Crack Addition: Treatment and Recovery Issues*, Contemporary Drug Problems 74 (Spring 1990)).

[16] *Id.* at 58-59 (citing W. Breakey & P. Fischer, *Homelessness: The Extent of the Problem*, Journal of Social Issues 40 (1990)).

[17] *See e.g., id.* at 98-99 (citing P. Goldstein, Drugs and Violent Crime, Pathways to Criminal Violence, table 2, 665 (Neil A. Weiner et al., eds. 1989)).

[291]

[psychopharmacological driven] violence."[18]

D.

Regarding Market-Value Assumptions

As stated above, the market-value assumption about crack cannot withstand analysis. The report recognizes this:

> Individuals at the top of the drug distribution chain make considerably more money than others [lower down] in the organization. [ ] DEA data for 1992 indicate domestic wholesalers can purchase a kilogram of powder cocaine from Columbian sources for $950-$1,235. Powder cocaine from other source countries such as Bolivia and Peru generally is more expensive, typically selling for $1,200-$2,500 and $2,500-$4,000 a kilogram, respectively. * * * [A] kilogram of powder cocaine can be sold wholesale, after dilution, for $11,000-$42,000, and can be marketed, after further dilution, in gram quantities for $17,000-$173,000. These figures, not considering distribution expenses, produce profits of $16,000-$171,000 per kilogram of powder cocaine.[19]

And yet, the 100-1 sentencing disparity between crack and powder cocaine results in market-oriented sentencing irrationality: for example, in order for one to reach the quantity-oriented base offense level of "20," one must either have been convicted of $21,400 worth of powder cocaine, or else, a mere $230 worth of crack.[20]

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[18] J. Fagan, *Intoxication and Aggression, in* M. Tonry & J.Q. Wilson Drugs and Crime (1990)), *quoted in id.* at 99.

[19] The report, *supra* note 1, at 87 (citing *inter alia*, United States Department of Justice, *Drug Enforcement Administration, Source to the Street: Mid-1993 Prices for: Cannabis, Cocaine, Heroin* 6 (Sept. 1993)).

[20] *See* Table 19, *id.* at 173.

E.

Regarding Assumptions About Correlations to Other, Serious Offenses

The report notes that at least one major study has concluded that it is the frequency with which one sells a cocaine product, and not the selling of cocaine in its *smokeable form*, that seems to best explain any violence associated with cocaine distribution.[21] Several researchers agree: "[T]he primary association between [crack] cocaine and violence is systemic. It is violence associated with the black market and distribution."[22] And as also noted in the February 1995 report, studies reflect that systemic violence of this sort is found in analyses of powder cocaine, and presumably other illicit drug markets as well.[23]

F.

Regarding Assumptions About Other Heightened Risks

Already-existing guideline enhancements sufficiently account for any additional harm that may actually be found associated with cocaine offenses. Federal sentencing guidelines account for the involvement of firearms, or other dangerous weapons; serious bodily injury, or death; the use or employment of juveniles; leadership roles played by one in the commission of an offense; prior criminal histories; and other aggravating factors. Additional, sweeping, "built-in" sentencing enhancements reflecting crack cocaine's *presumed*, peculiar, always-aggravating qualities are unnecessary, unfair, and -- in the creation of irrational, increased incarceration time -- economically inefficient in their undue cost of tax dollars, as well.

For example, with regard to the issue of youth, especially youth gang related activity: as the report reflects, noted researchers have concluded that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."[24] And as the report reflects, other

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[21] *See* the report, *supra* note 1, at 95 (quoting K. Chin & J. Fagan, *Violence as Regulation and Social Control in the Distribution of Crack*, *in* M. de la Rosa, B. Gropper, and E. Lambert (eds.), Drugs and Violence: Causes, Correlates and Consequences 36 (1990)).

[22] United States Sentencing Commission, Hearing on Crack Cocaine (Nov. 1993).

[23] *See, e.g.*, February report, *supra* note 1, at 97-98.

[24] Testimony of Dr. J.H. Slotnick before the United States Sentencing Commission, Hearing on Crack Cocaine (Nov. 1993), at 70, *quoted in id.* at 104. *See also* E. Walsh, "Chicago Street Gang

researchers have drawn like conclusions about the various, complex, non-crack-oriented social factors underlying gang and inner-city cultural violence -- such as "the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns . . . .".[25] Indeed, as the Commission's report points out: researchers tend to agree that from a historical perspective, crack cocaine is not unique. For example, as Professor Paul J. Goldstein testified before the Commission, the national homicide rate has "changed very little over the last 25 years." Indeed, in 1992, the homicide rate was lower than in 1980, when systemic violence arising out of the newly developing powder cocaine market was about at its peak, and lower than in *1933* -- at the end of *alcohol prohibition*.[26]

G.

Recap Regarding Assumptions

Although some courts have generously deferred to Congress with regard to the 100-1 sentencing disparity between crack and powder cocaine -- i.e., assuming that Congress must have had some "reasons" for creating this disparity -- the Commission's report shows that any such assumed "rationales" are but flawed, erroneous assumptions. In short, the 100-1 crack versus powder cocaine sentencing disparity is shown by the Commission's report to be irrational, unwarranted, unfair, and economically inefficient -- when assessed under the very terms assumed to have been assumed by Congress.

III.

Race Matters

Certainly given the irrational 100-1 cocaine sentencing policy, the racial ramifications of this sentencing policy invoke strong questions about our Nation's constitutional conceptions of equal protection, fundamental fairness and the People's right to be free from illogical, excessively disproportionate punishment.

Study Shows Fearful Toll of Powerful Weapons," Wash. Post A 4 (Nov. 29, 1993) (citing study conducted by Carolyn Rebecca Black and Richard Black, which concluded that *gang turf battles* in many areas were more likely to lead to homicides than were drug trafficking disputes).

[25] Statement of Steven Belenko *in* J. Fagan, *Intoxication and Aggression, in* M. Tonry & J.Q. Wilson, Drugs and Crime (1990), at 27, *quoted in* February 1995 report, *supra* note 1, at 105.

[26] February report, *supra* note 1, at 108 (citing J. Inciardi & A. Pottieger, *Crack-Cocaine Use and Street Crime*, Journal of Drug Issues (1994), at 65).

The evidence does reflect that crack cocaine is significantly different from powder cocaine in one respect: crack sentences are almost exclusively meted out to African-Americans, while most powder cocaine sentencees are Caucasian-Americans (the latter group being also the predominant group in Congress, in the federal Judiciary, and in the upper economic echelons of the populace generally).

Indeed, as this Commission knows and has recognized in its report, of all the defendants sentenced for crack cocaine offenses in the federal system, approximately 90% are African-American. In 1992, for example, *92.6%* were African-American; and *all* of the persons sentenced in the federal system for simple possession of crack cocaine were African-American.

Certainly, in the light of the sentencing policy irrationality reflected in the report and referenced above, such "statistics" raise grave concerns about the grossly negative impact of this 100-1 policy on African-Americans -- given our society's supposedly equal, constitutional democracy. These African-Americans are subject to serving long mandatory minimum sentences for simple possession of small amounts of crack cocaine, while those typically Caucasian first time offenders convicted of possession of a much greater quantity of cocaine powder are subject to minimal sentences (even probation).

IV.

Sentencing Irrationality and Socio-Economic Inefficiency

NACDL points out that the irrational, unfair sentencing disparity between crack and powder cocaine offenses carries serious macro-economic costs in addition to the costs such a policy extracts from individual sentencees and, in turn, from our Nation's fundamental conceptions of justice. Increased mandatory minimums of the irrational sort existing under the current system of cocaine sentencing take substantial amounts of taxpayer dollars to fund; dollars that could be more usefully and rationally applied, e.g., to the *future* of this country -- to education or national debt interest payments.

V.

NACDL Urges the Commission to Recommend *Retroactive* Application of a 1-1 Crack/Powder Cocaine Sentencing Ratio

The current cocaine sentencing system has been allowed to exist for too long, at great costs to individual lives and great cost to taxpayers. NACDL encourages the Commission to recommend to Congress a 1-1 ratio between crack and powder cocaine sentences. Further, NACDL strongly urges the Commission to recommend that this change be given immediate, *retroactive* effect.

It is not the fault of the victims of this flawed and racist eight-year old policy -- those sentenced under the crack 100-1 automatic enhancement policy -- that this policy came into existence and was allowed to exist for a significant period of time. They should be peculiarly and irrationally punished under this pernicious regime no longer. They should not be forced to continue the unreasonable forfeiture of their lives to this clearly flawed system of cocaine sentencing. The similarly situated should be similarly situated. This is a priceless fundamental value.

Further, though, the taxpayers deserve retroactive relief. They should be given the monetary relief associated with a retroactively applicable implementation of a more equitable, efficient cocaine sentencing policy. Indeed, any institutional costs associated with such retroactive application of a 1-1 cocaine sentencing ratio are obviously and substantially less than the costs associated with the continued subsidized irrationality of incarcerating those convicted of crack offenses, who should by all rights be serving but the sentence they would have received had they been but convicted of a powder cocaine offense. At the very least, such sanity and fairness would make room for the incarceration for the truly violent offenders among us, and perhaps even save us all the tax costs of a new prison or two.

VI.

Conclusion of NACDL Comments

Again, NACDL applauds the comprehensive research reflected in the Commission's report, and is grateful to the Commission for this opportunity to offer comments about the report and the Commission's forthcoming recommendations to Congress on cocaine sentencing policy. NACDL respectfully encourages the Commission to follow through on the implications of its study -- to recommend to Congress an immediate and retroactively applicable establishment of a fair and rational, 1-1 cocaine sentencing ratio, with all cocaine offenses being subject to the same penalties as those in effect for powder cocaine.

NACDL is a specialized bar association representing the nation's criminal defense lawyers. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. The 36-year old association is devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
PROBATION AND PRETRIAL SERVICES OFFICE

044 - 95

NORMAN E. MUGLESTON, Chief
U.S. Probation/Pretrial Services Officer

REPLY REQUESTED TO

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April 12, 1995

Phyllis Newton, Director
U.S. Sentencing Commission
Federal Judiciary Building
Washington, DC 20002-8002

RE: Proposal for Amendments to the Guidelines

Dear ~~Ms. Newton:~~ Phyllis

I have attached a memorandum from Mary Frances Barnes, Sr. U.S. Probation Officer in our district, which summarizes our proposals for amendment on a few areas of the guidelines.

Please call me if you have any questions.

Sincerely,

Norman E. Mugleston
Chief U.S. Probation/Pretrial Services Officer

Enclosure

NEM:vhi

UNITED STATES PROBATION AND PRETRIAL SERVICES OFFICE

MEMORANDUM

DATE: March 31, 1995

REPLY TO ATTN OF: Mary Frances Barnes MFB
Sr. U.S.P.O.

SUBJECT: **Proposals for amendments to the guidelines**

TO: Norman Mugleston
C.U.S.P.O.

I have reviewed the guidelines and queried both the investigative and supervision units for their input. There are only a few areas suggested for improvement and clarification.

- As always the drug guideline **U.S.S.G. § 2D1.1** is at issue. One "camp" would like to see the guidelines calculated on the type not quantity of drugs. One "camp" would like to see other specific characteristics and not quantity alone considered in setting the offense level.

- Regarding the Restraint of Victim guideline, **U.S.S.G. § 3A1.3**, we find this guideline too narrow.

  First issue: the guideline does not define **victim.** Can a co-conspirator also be a victim? The Sentencing Commission was consulted and stated that in the absence of an explicit statement in the guidelines, the Court would have make the decision. As far as I know this issue has come up before Singleton Twice and he has ruled that a co-conspirator can be a victim and applied the enhancement. The last case involved the Jay Vought case and the defendant is currently appealing the enhancement.

  Second issue: the **term "physically restrained" is too narrow.** U.S.S.G. § 3A1.3 relies on the definition of physical restraint at U.S.S.G. 1B1.1, comment.(n.1(i)), which describes a forcible restraint such as being tied, bound, or locked up. We would like to see the definition expanded to include physical restraint by use of force or the threatened use of force. We found case law that supported the enhancement when the victim was restrained at knife point and gun point. Judge Singleton has twice ruled for the enhancement when it included restraint by use or threatened use of force. Example: Jay Vought forced a victim (and co-defendant) into a vehicle at gun point, took her for a long car ride and threatened to kill her if she did not continue to sell drugs for him. The definition could include language such as physically restrained is when someone believes they are not free to leave because of the presence of a firearm or some other weapon or the threatened use of such.

file - Public Comment

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

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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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.

manner. The Commission's attempted to draft a real offense guideline system and found that such a system was impractical and "risked return to wide disparity in sentencing practice."[16] We believe that enhancements for distributing near a protected location, employing underage individuals, or distributing to underage or pregnant persons are appropriately covered under § 2D1.2 when there is a conviction under 21 U.S.C. § § 859, 860 or 861. If the defendant's conduct involves a protected location or an underage or pregnant individual, the government can charge a violation of the applicable statute. Adding enhancements to § 2D1.1 renders these statutory provisions irrelevant and permits the government to avoid meeting its burden of proof required for a conviction by simply waiting until sentencing to assert that the defendant's offense involved a protected location or an underage or pregnant individual. There has been no data to support the need to incorporate these enhancements as specific offense characteristics instead of requiring a conviction.

The proposed amendment poses application problems as well. For instance, would the enhancement for distributing near a protected location apply if law enforcement chose the protected location? Would it apply if one of fifty sales occurred in a protected location? To avoid creating disparity, we believe that these enhancements should apply only when there is a conviction under one of the corresponding statutes.

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[16]U.S.S.G. Ch. 1, Pt. A(4)(a), at 5.

Amendment 4
(Guideline Promulgation Authority)

Amendment 4 would revise the background commentary of § 4B1.1 to state that in promulgating the career offender guideline as directed by 28 U.S.C. § 994(h), the Commission exercised its authority under 28 U.S.C. § 994(a)-(f) and (o)-(p). Amendment 4 also invites comment on whether to amend Chapter I, Part A "to state that in its promulgation of specific guidelines, the Commission intends in all cases to rely on its general authority under 28 U.S.C. § 994(a) as well as any other more specific grant of statutory authority." We oppose this amendment.

The career offender mandate is like a mandatory minimum in that it introduces an element of inflexibility inconsistent with a guideline system. The Commission's policy should be to mitigate the impact of such a provision and to construe the mandate in 28 U.S.C. § 994(h) narrowly.

In addition, we oppose the proposed amendment to Chapter I, Part A. We believe that the Commission should determine on an amendment-by-amendment basis the scope of authority that the Commission is exercising.

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April 7, 1995

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

Dear Chairman Conaboy and Commissioners:

In response to your request for comment of March 13, 1995, concerning the crack-powder ratio, the Practitioners Advisory Group would like to re-emphasize our positions taken in our previous written and oral presentations for this amendment cycle.

Because of the appearance of racial bias in the 100 to 1 ratio, and because the harms associated with crack cocaine do not rise to the level of compelling governmental interests in support of the current ratio, the Practitioners Advisory Group supports a reduction. We prefer a 1 to 1 ratio, and certainly no greater ratio than 5 to 1. We believe that the societal harms associated with crack should be addressed as specific offense characteristics. Our modification of Proposal 36 is particularly appropriate because it addresses the violence and weapons possession that exist with greater frequency in crack distributions in a proportionate manner, with punishment increasing as the severity of the harms increases. We believe our Proposal 36 is the sound choice because it limits its significant effects on sentence to only those offenders who actually possess or use the weapon or to those who induce others to act so as to further deter other members of an organization from engaging in violent acts, once one member qualifies for an enhancement. If all members receive the enhancement for one person's violence, there is no deterrent for each person to commit violent acts.

We strongly favor making these characteristics applicable to all offenses and not just to crack prosecutions. While 27% of the crack offenders possess firearms, 16% of the powder offenders also

possess guns. Underage and pregnant individuals are victimized by perpetrators whose drug of distribution involves many drugs other than crack, including powder cocaine and heroin. Most importantly, increasing punishment because offenders engage in damaging conduct in addition to drug distribution furthers the goals of proportional punishment based on racially neutral criteria.

As a necessary adjunct to applying these new specific offense characteristics to distributions of all type and forms of controlled substances, the drug quantity table must be adjusted downward by four levels. (Proposal 33, Option B) Absent this adjustment in the influence weight has on drug sentencing, the new characteristics will drive the non-crack sentence to disproportionate heights. It is important to select for increased punishment those offenders who commit egregious acts, but it is equally important to only select those offenders for the harshest sentences so that there remains a deterrent against a defendant aggravating his or her offense which would otherwise involve simple distributions.

We believe each of the components of a 1 to 1 ratio accompanied by specific offense characteristics which adequately address violence, guns, youth, and pregnancy for all drug offenses and a 4-level reduction in the drug tables, can combine to create a firm but just punishment scheme for drug offenders that is non-biased in its intentions and its practice.

A system that is firm but fair must continue to be the guidepost of this Commission's endeavors. Our proposal achieves these goals.

We thank you for the opportunity you continue to afford to us for input in this important undertaking.

Seen and approved!
Fred Warren Bennett
Chairman, PAG
4/7/95

Sincerely yours,

Lyle J. Yurko, Chairman
Controlled Substance Sub-Committee
Practitioners Advisory Group

LJY:mep