Public Comment

Proposed Amendments

1995

UNITED STATES SENTENCING COMMISSION
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June 19, 1995

MEMORANDUM:

TO: Chairman Conaboy
Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Mike Courlander

RE: Public Comment on Retroactivity

Attached for your information is public comment regarding retroactivity of the guideline amendments. We received hundreds of other letters, mostly form letters from inmates and their families, and we are in the process of counting them (by guideline amendment).

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

June 16, 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:

On behalf of the Federal Public and Community Defenders, I am requesting that the Commission designate as retroactive a number of the guideline amendments submitted to Congress on May 1, 1995. As you know, we represent thousands of individuals in federal court and have considerable experience working with the guidelines. We were impressed with the Commission's productive work this amendment cycle, and believe that real progress is being made toward achieving more fairness and rationality within the guideline sentencing structure. As you determine which of the guideline amendments will be specified as eligible for retroactive application under § 1B1.10, p.s., we hope that you will take our comments into consideration.

We understand that in selecting amendments to be covered under § 1B1.10 (d), the Commission considers, among other factors, "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively." We have attempted to address these concerns.

We recommend that the Commission select the following amendments for retroactive application:

Amendment 5. Crack Cocaine.

This amendment revises §§ 2D1.1 and 2D2.1 to equalize the offense levels for offenses involving similar amounts of crack cocaine and powder cocaine at the level currently provided for powder cocaine. In addition, this amendment adds enhancements to § 2D1.1 for either the presence or use of a firearm or weapon. We urge the Commission to designate this amendment as retroactive.

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The Commission unanimously agrees that the 100 to 1 ratio greatly overpunishes crack offenses. Defendants presently serving sentences for crack cocaine offenses, therefore, are being overpunished. Retroactive application of the amendment can prevent perpetuating the unwarranted sentencing disparity created by the 100 to 1 ratio. The magnitude of the change in the guideline range of crack cocaine offenses made by this amendment is substantial. According to the Commission's estimate, this amendment will reduce the average length of crack cocaine sentences from 104.9 months to between 79.6 and 82.1 months.

Although we are aware that retroactive application of this amendment will affect a substantial number of people, principles of fairness greatly outweigh any inconvenience that may result. Retroactive application of this amendment will advance the goals of sentencing reform by correcting injustices and inequities. Failure to designate the amendment as retroactive will reinforce what the Commission has found to be an "unjust and mistargeted" sentencing scheme. In addition, it is easy to recalculate a sentence already imposed for a crack cocaine offense. All that is required is to apply the offense level for the equivalent amount of powder cocaine and determine whether any of the new enhancements apply. A resentencing will not result in a prolonged hearing, because the factors relevant to determining the new offense level will have already been established at the initial sentencing.

Amendment 7. Safety Valve.

Amendment 7 repromulgates § 5C1.2 and amends § 2D1.1 to provide a two-level decrease in the offense level if the offense level is 26 or above and the defendant meets the criteria set forth in § 5C1.2(1)-(5), the safety valve provision. When Congress enacted the safety valve legislation, it authorized the Commission to provide for a guideline sentence as low as 24 months for a safety valve defendant subject to a mandatory minimum of five years. By excluding certain offenders from the rigidity of mandatory minimum sentences, Congress sought to give greater deference to the guidelines system.

Amendment 7 simply exercises the authority Congress has given to the Commission. To ensure fairness and consistency, the two-level reduction authorized by Amendment 7 should be made retroactive. The amendment would not be difficult to apply retroactively because the recalculation of the guideline range would consist of merely subtracting two-levels from the offense level and selecting a sentence within the new range. The initial sentencing hearing will have already resolved any disputes over

factual or legal issues relevant to the sentence.

Amendment 8. Marijuana Plants.

Under this amendment, the equivalency between marijuana plants in offenses involving more than 50 plants will be the same as the equivalency used in cases involving fewer than 50 plants: one plant equals 100 grams of marijuana, unless the weight of the actual marijuana is greater. The current ratio for 50 or more plants is derived from 21 U.S.C. § 841 and makes one plant the equivalent of one kilogram of marijuana. As the Commission has recognized, based on studies of the actual yield of marijuana plants, this statutory ratio is unrealistically high. This amendment provides a more rational approach to sentencing cases involving marijuana plants by eliminating the arbitrary distinction based on whether the offense involved more or fewer than 50 plants. The impact of this change upon a defendant can be significant. Any resentencing would be simple because all that is involved is a recalculation of the offense level using the new ratio.

Amendment 9. Drug Quantity Determination for Pills.

This amendment revises the drug quantity table to determine the offense level of Schedule I and II depressants and Schedule III, IV, and V controlled substances based on the number of the pills, capsules, or tablets rather than the weight. The amendment rectifies the anomaly that "heavy pills lead to higher offense levels even though there is little or no relationship between gross weight and the potency of the pill."

We believe this amendment should be designated as retroactive to remedy the disparate sentences that have been imposed under the current method for determining quantity. Few cases will be affected by making the amendment retroactive, and therefore resentencing should not pose an undue burden on the federal courts. The presentence report ordinarily will contain the number of pills, capsules, or tablets, so recalculating the offense level should be simple.

Amendment 10. Wet Marijuana; Khat; Negotiated Drug Transactions.

We request that the Commission designate as retroactive three portions of this amendment to § 2D1.1.

1. Wet Marijuana: This amendment revises application note 1 to § 2D1.1 to state that if the offense involved wet marijuana, an approximation of the weight of the marijuana without the excess moisture should be used to determine the offense level. This amendment clarifies Amendment 484, which revised application note 1 to state that the term "mixture or substance" does not include materials that must be separated from the controlled substance before the controlled substance can be used. Moisture in marijuana must be removed before marijuana can be used. Because the Commission designated Amendment 484 as retroactive, this amendment should also be designated as retroactive.

2. Khat: This amendment provides that 1 gram of khat, a recent addition to the list of controlled substances, is equivalent to .01 grams of marijuana. Because khat cases arose before an appropriate equivalency could be determined, there could have been no uniformity in the way in which khat was treated. Retroactivity, therefore, is necessary to eliminate any disparity that may have resulted from the lack of an equivalency. To our knowledge, there have been few cases involving khat, and therefore, applying the ratio to previous sentences should not be time-consuming or otherwise burdensome to the courts.

3. Negotiated Drug Transactions: This amendment revises the method for determining the offense level of an offense involving a negotiated drug transaction by providing that the negotiated quantity is to be used unless the completed transaction establishes a larger quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to produce that amount. This amendment makes clear that the amount under negotiation should be used only if the defendant was reasonably capable of trafficking in the quantity under negotiation and actually intended to traffic in that quantity.

The new provision can have a substantial impact upon a sentence. We recognize that there may be greater difficulty in applying this amendment retroactively than in applying other amendments retroactively because reapplication of this amendment would require the court to revisit the determination of quantity. We believe, however, that fairness requires that those already sentenced should not be overly punished simply because they were

sentenced before the ambiguity in the application note was remedied. The potential impact of this amendment upon a sentence is significant enough to justify the effort involved in recalculating the guideline range.

Amendment 18. Money Laundering.

This amendment revises the method for determining the offense level of a money laundering offense by consolidating §§ 2S1.1 and 2S1.2 and tying the offense levels more closely to the underlying offense that was the source of the illegal proceeds. As the Commission has found, the current method for determining the severity of money laundering offenses does not "adequately distinguish the varying degrees of offense conduct," and that the existing guidelines were promulgated when there were not very many cases upon which to base the guidelines. We have found that the application of the existing money laundering guideline can result in the imposition of a disproportionately severe sentence. By tying the punishment more closely to the underlying conduct, the amendment can have a significant impact upon a sentence. Further, resentencing should not be difficult because the information required to recalculate the offense level will, in most instances, be available in the presentence report.

Thank you for considering our views.

Very truly yours,

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

TWH:ls

FAMM
Families Against Mandatory Minimums
FOUNDATION

June 16, 1995

The Honorable Richard P. Conaboy
Chairman, U.S. Sentencing Commission
One Columbus Circle, NW
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

On behalf of the 29,000 members of Families Against Mandatory Minimums, I am writing to request that the Sentencing Commission make a number of the 1995 guideline amendments retroactive.

Retroactivity is the rational conclusion of guideline changes. Principles of fairness dictate that the defendant's sentencing date not be the determining factor in the length of his sentence. Failure to make the amendments retroactive merely reinforces sentencing inequities that the guideline system seeks to eliminate. We ask the Commission to continue to uphold it's mandate of providing fair and rational sentences, independent of the political machinations of Congress.

We recommend that the Commission make the following amendments retroactive:

Amendment 5 - Crack Cocaine

The bold step the Commission took in April to equalize crack and powder sentences at the current level of powder cocaine, must be applied to qualified individuals already in prison. The Commission has found the current 100 to 1 ratio to be "unjust and mistargeted" and unanimously agrees that it overpunishes crack offenders. Although the retroactive application of this amendment would effect a large number of people, recalculation of their sentences would be relatively easy. All that is required is to apply the offense level for the equivalent amount of powder cocaine and add any enhancements that applied to the person's original sentence. Enhancements and departures are already calculated in each defendant's presentence report.

Amendment 7 - Safety Valve

The safety-valve amendment complies with congressional intent to provide for a guideline range as low as 24 months for qualified defendants who otherwise would serve a five year mandatory minimum. It is clear from the safety-valve legislation that Congress intended this from the beginning and therefore the 24 month range should be available to all defendants who have

benefitted from the safety-valve to date. The number of defendants is relatively small--approximately 450 in the nine months that the safety-valve has been in effect. Applying the amendment retroactively would merely involve subtracting two-levels from the offense level.

Amendment 8 - Marijuana Plants

The unanimous vote of the Commission to apply a standard weight of 100 grams per marijuana plant, regardless of the number of plants, indicates that the Commission recognizes the statutory ratio is unrealistically high. Although unable to correct the statute, the Commission can change the guidelines retroactively and substantially impact the sentences of some incarcerated marijuana growers. Due to the lack of data about the number of growers in the federal prison system, it is impossible to determine how many people might actually qualify for retroactive application of this amendment. But any resentencing would be a straightforward process of recalculating the offense level using the new ratio.

Amendment 9 - Drug Quantity Determination for Pills

The Commission has agreed that the weight of the carrier should not determine the length of the sentence. In this case, big pills lead to big sentences, regardless of the potency of the pill. Retroactivity of this amendment would apply to few cases, but is critical to maintaining sentencing equity.

Amendment 10 - Wet Marijuana

Retroactivity of this amendment follows the same logic as the retroactive LSD amendment (Amendment 484) which revised the application note to insure that the "mixture or substance" does not include materials that must be removed before the controlled substance can be used. Wet marijuana cannot be used. The retroactive application of this amendment would apply to few defendants, but should be approved because Amendment 484 was made retroactive.

Amendment 18 - Money Laundering

FAMM hears from many low-level drug defendants who were also charged with money laundering which resulted in disproportionately long sentences for their offenses. This amendment corrects that injustice by tying the offense levels more closely to the underlying offense. Because the amendment could have a significant impact on sentences, we urge the Commission to make it retroactive.

Sincerely,

Julie Stewart

Julie Stewart
President

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

COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION
ON RETROACTIVE APPLICATION OF COCAINE
OFFENSE GUIDELINE AMENDMENTS

JUNE 16, 1995

Submitted by Nkechi Taifa
Legislative Counsel, ACLU

The American Civil Liberties Union welcomes this opportunity to comment on whether this Commission's amended guidelines for cocaine offenses should be made retroactive to previously sentenced defendants.

The ACLU feels that the principle of retroactivity lies at the heart of the American justice system. Our system of justice must be flexible and adapt to the changing trends and new knowledge in society, or, as stated in Trop v. Dulles, conform to "the evolving standards of decency that mark the progress of a maturing society." 356 US 86, 100-1 (1958) The current sentences for crack cocaine offenses, being one hundred times more severe than sentences for comparable amounts of powder cocaine, were irrational when passed and remain groundless today. Congress hastily enacted these laws in 1986 and 1988, making policy without careful study, and based on erroneous assumptions, faulty data and media sensationalism.

After meticulous study and analysis nearly a decade later,

this Commission unanimously agreed that the crack cocaine penalties were unfair and must be changed. The following six "inescapable facts" led this body to conclude that fundamental fairness requires that the base sentences for crack and powder cocaine should be equal:

-- The Sentencing Guidelines already provide for severe punishment for those trafficking in powder cocaine, and there have been few, if any, complaints that these guidelines are too lenient

-- The same active ingredient exists in both powder and crack cocaine, and both produce the same type of physiological and psychological effects.

-- Although smoking crack cocaine can lead to addiction in a greater number of cases than can snorting powder, injecting powder cocaine is as dangerous as or more dangerous than smoking crack. In light of the fact that crack cocaine can be easily produced from powder cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use.

-- Any quantity ratio greater than equivalency will lead to the unfair result that more sophisticated, higher-level powder distributors will be sentenced relatively less severely than some of the retailers they supply.

-- The present system results in obvious punishment inequities by providing the same penalty for 500 grams of powder -- yielding between 1,000 and 5,000 doses and costing up to $75,000 -- as for five grams of crack cocaine -- yielding between 10 and 50 doses and costing up to $750.

-- Any quantity ratio higher than equivalency will impact almost entirely on minority defendants

(See Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy.)

Equalization of prospective sentences for crack and powder cocaine is a critical step in the quest for justice, but it excludes a significant group of people -- those who were sentenced prior to the effective date of the law. Such persons should not be

required to continue serving unfair sentences while their more contemporary counterparts are sentenced more appropriately. Indeed, the denial of retroactivity would create the anomalous predicament of a single class of offender governed by two very different laws and goals.

Factors to be considered by this Commission in determining the retroactivity of a given amendment include the amendment's purpose, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively. (See The Federal Sentencing Guidelines Manual, 1994 edition, U.S. Sentencing Commission, p.38) All three of these factors militate in favor of retroactive application of the Commission's amended guidelines for cocaine offenses.

The Sentencing Commission's purpose in equalizing the base cocaine penalties is to uphold the principles of fundamental fairness and equal justice under the law, ensuring that similar defendants convicted of comparable offenses are treated the same. This purpose can only be actualized if the amendment is applied retroactively.

Although upon first blush it may appear as if it would be difficult to apply the amendment retroactively because the change in the guideline range may result in large numbers of crack cocaine offenders being released from prison, this Commission's own analysis reveals otherwise. Table 1, "Estimated Average Sentences for Powder and Crack Cocaine Defendants With Various Drug Amounts," demonstrates that, under the amended guidelines, crack offenders

will receive sentences that are, on average, generally at least twice as long as powder cocaine offenders involved with the same amount of drug. This is primarily due to the fact that crack offenders are more likely to receive aggravating adjustment enhancements, which work to lengthen sentences for those who use violence or a weapon in connection with a drug offense, or are involved with criminal street gangs or employ juveniles in the crime. (See Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, p. 3). Thus, if made retroactive, the change in the guideline range made by the amendment will apparently not affect great numbers of convicted offenders.

Another reason that it is critical that the guideline amendments be applied retroactively is because of the disproportionate impact the law has on African Americans. Based on statistical data, this Commission reached the "inescapable conclusion" that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine. Indeed, nearly 90% of those convicted federally for crack offenses in 1993 were African American. "When a sentencing policy has a severe disproportionate impact on a minority group, it is important that sufficient bases exist for the policy. The law should not draw distinctions that single out some offenders for harsher punishment unless these distinctions are clearly related to a legitimate policy goal. This commission found that no "sufficient policy basis for the current penalty differential existed." (See Statement

of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, p. 6-7)

In conclusion, disparate cocaine sentencing laws have been in effect for nine years, and, as a result, nonviolent prisoners are suffering disproportionately harsh penalties, because their convictions predated careful study, analysis, and rectification of the disparity. Making the cocaine guideline amendments retroactive would help relieve prison overcrowding, making room for the truly violent offender. Those persons who commit crimes before defects in laws could be rectified should not be punished to a greater extent than those committing crimes today. The change in the law must encompass all convicted cocaine offenders, regardless of the date on which they were sentenced.

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June 14, 1995

United States Sentencing Commission
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Attn: Public Information

Re: Amendments to the Sentencing Guidelines for the United States Courts, reported to Congress on May 1, 1995, and published at 60 Federal Register 25074 - 25090 (May 8, 1995).

Dear Sirs:

In response to the above-referenced Federal Register notice, we are commenting concerning the effective date of the amendments to the sentencing guidelines, policy statements and official commentary. Specifically, we are responding to your solicitation of comments regarding "which, if any of the amendments submitted to the Congress that may result in a lower guideline range should be made retroactive to previously sentenced defendants under Policy Statement 1B1.10." *Id.* at 25074. In our view, the fifth amendment to the Guidelines, amending Section 2D1.1(c)(1), should be applied retroactively to all persons previously sentenced under the Guidelines.

Lack of Policy Bases. The present guidelines impose harsher sentences on defendants convicted for offenses involving cocaine base ("crack"), than for offenses involving other forms of cocaine. Although the Sentencing Commission has determined that there is no conclusive evidence that racial bias "undergirded" the present penalty scheme, the scheme does have a significant and disproportional adverse impact on racial minorities[1]. 60 Federal Register 25076. "The Commission was deeply concerned that almost ninety percent of offenders convicted of crack cocaine offenses in the federal courts are Black" *Id.* So are we. Further, and more importantly, the Commission found that "sufficient policy bases for the current penalty

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[1] We strongly urge the Commission, to the maximum extent possible and consistent with its statutory authority, to examine the relationship between enforcement practices and this startling statistic.

differential do not exist." *Id.* The Commission has concluded that continuation of the present guidelines cannot be justified. We strongly concur with both this analysis and conclusion.

Since there are not sufficient bases to justify continued application of the current penalty differential, then previously imposed sentences pronounced under this differential cannot be justified either. In view of the long sentences imposed for offenses involving "crack" cocaine, it would be both arbitrary and outrageous for an individual sentenced in October 1995, or even October 1993, to be subjected to the disparate treatment demonstrated.

No doubt some have suggested that the administrative burdens and costs associated with re-evaluating sentences imposed under the current guidelines are too great to justify retroactive application of the amended guidelines. However, we also note that a majority of probation officers (a group that would experience a great deal of the administrative burdens) has expressed opposition to the 100-to-1 quantity ratio because it is unwarranted, arbitrary, and "too high." United States Sentencing Commission, Cocaine and Federal Sentencing Policy, p. 209 (February 1995). While the administrative challenges should not be underestimated, they pale in comparison with the inequity of refusing to reconsider sentences that were imposed under an unjustifiable penalty system. Further, failure to provide for retroactive application of the amendments to Section 2D1.1 will undoubtedly result in numerous habeas corpus challenges in every judicial circuit and the issue will be decided piecemeal, a case at a time. Such an approach would defeat the purpose of uniformity in sentencing and place an unnecessary burden on the judiciary. Reasonable uniformity in sentencing goes to the very heart of the Sentencing Guidelines and the statutory mission of the Sentencing Commission. The Guidelines themselves state that:

> Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. ... Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.
>
> U.S.S.G., Ch. 1, Pt. A.3 (policy statement) (Emphasis added.)

Therefore, it is not enough for the Sentencing Commission to modify the guidelines to remove the disparity prospectively. The injustice that has already resulted from the application of the present guidelines must also be corrected. Since, as the Sentencing Commission has observed, the present Guidelines have resulted in the impositon of inappropriately harsh sentences for crack offenders vis-a-vis powder cocaine offenders, those sentences must be reevaluated.

Disparate Racial Impact. Applying the new guidelines retroactively would correct, to some extent, the disproportionate and adverse affects on racial minorities that have resulted

from the present scheme. However, although the Commission, the Department of Justice and at least several courts[2] have expressed deep concern over the apparent disparate racial treatment that resulted from the application of the present sentencing guidelines with respect offenses involving cocaine base, this is not a matter that the sentencing courts can address through departures from the guidelines. Section 5H.1.10 of the guidelines specifically prohibits the courts from taking into account race as grounds for departure.[3] Thus, the courts have had no choice but to sentence offenders by applying the racially biased sentencing guidelines, even after the racial bias became apparent. This is contrary to the purpose of the Sentencing Reform Act of 1984 to create a sentencing system that results in uniform, just punishment.

In addition, it would be patently unjust not to apply the new guidelines retroactively when the fundamental racial disparity in sentences issued under the guidelines has been known for several years. The Federal Register notice refers to a study issued by the Department of Justice in 1993 that noted that "the discrepancy in the sentence lengths for cocaine base and powder cocaine has been a major factor in a growing gap between the average sentence imposed on Whites and on minorities in the federal courts" *Id.* at 25076 (citing, U. S. Department of Justice, Office of Justice Programs, Bureau of Statistics, Sentencing in the Federal Courts: Does Race Matter? (November 1993). Concerns over this issue were reported even earlier. See: Gibbs, "Public Defender: Sentences for Crack Discriminatory," New Jersey Law Journal, vol. 131, n. 14, p. 4. (August 3, 1992). That it has taken the Sentencing Commission and Congress so long to identify and address this issue, should not be used as a basis for denying justice to those who have been inappropriately sentenced in the interim.

We note that the Sentencing Commission could have elected to address the disparity in sentencing by increasing the offense levels for offenses involving powder cocaine, a change that would have affected Whites more than minorities. That change would not have been applied retroactively. However, the Commission did not do so. Some may postulate that the Sentencing Commission's reluctance to address the present racial disparity by increasing guideline sentences

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[2] See for example, U.S. v Moore, 94-1030 (2nd Cir. 4/25/95); U.S. v. Clary, 846 F. Supp. 768 (E.D. Mo 1994), rev'd. 34 F.3d. 709 (8th Cir. 1994); U.S. v. Walls, 841 F. Supp. 24 (D.D.C. 1994); U.S. v. McCoy, 802 F. Supp. 133 (W.D. Mich 1992); U.S. v. Patillo, 817 F. Supp. 839 (C.D.Cal. 1993) "I, for one, do not understand how it came to be that the courts of this nation which stood for centuries as the defenders of the rights of minorities against abuse at the hands of the majority, have so abdicated their function that this [crack] defendant must serve a ten year sentence." Patillo at 843.

[3] But see, U.S. v. Maxwell, 25 F.3d 1389 (8th Cir.), cert. denied 115 S.Ct. 610 (1994) (discriminatory impact not considered by the Sentencing Commission and so affords a basis for departure).

for offenses involving powder cocaine was itself racially motivated. We do not believe this to be the case. It is our understanding that the Sentencing Commission determined that, with respect to offenses involving "crack" cocaine, the base offense levels specified in the Drug Quantity Table of Section 2D1.1(c) are indefensible.

Reduced Demand for Prison Beds. Further, while we are aware that some expenditures will be have to made to reevaluate previously imposed sentences, these costs will undoubtedly be offset by a reductions elsewhere in the criminal justice system. Retroactive application of the sentencing guidelines will result in the release of some presently incarcerated individuals, relieving the government of the expense of housing, feeding, clothing, and guarding these individuals. In addition, retroactive application will reduce the length of incarceration, thereby increasing the space available in existing penal and correctional institutions and reducing the demand for construction of additional federal correctional institutions.

Eligibility for Shock Incarceration. Pursuant to 18 U.S.C. § 4046, the Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of imprisonment of more than 12, but not more than 30, months, if such person consents to that placement. Individuals in a Criminal History I are likely to receive sentences of between 12 and 30 months imprisonment if the offense level, after adjustments, is between 13 and 18. Individuals with a criminal history II are likely to receive such sentences for offenses between level 12 and 17.

Title 21, Section 841 of the United States Code imposes no minimum sentence for offenses involving less than 5 grams of a substance containing cocaine base. Under the present sentencing guidelines, however, a person sentenced for an offense involving more than 3 grams of cocaine base would not be eligible for shock incarceration, while a person sentenced for an offense involving up to 300 grams of cocaine could be eligible (depending on criminal history and acceptance of responsibility). Especially given the lack of bases for distinguishing between cocaine base and cocaine in other forms, precluding offenders not subject to a mandatory minimum sentence from participating in a shock incarceration program is unjustifiable and counterproductive. In light of the Commission's conclusions that the present guidelines as applied have disproportionately affected Blacks, the effect of refusing to apply the revised guidelines retroactively would be to preclude Blacks sentenced prior to November 1, 1995, from the participating in the shock incarceration program. Again, while arguably the initial disparity in sentences was not "undergirded" by racial bias, in light of the information now available regarding racial impact of the sentencing guidelines, a decision to refrain from retroactive application of the revised guidelines would be tainted by a perceived motivation of racial bias.

Applying the revisions to Section 2D1.1 of the Guidelines retroactively would render more individuals eligible for the shock incarceration program. This, we believe, is consistent with the rehabilitation objective of the Sentencing Reform Act of 1984. It seems especially so

with regard to those sentenced for possession of small quantities of crack. "The unique approach emphasizing severe punishments of those who possess crack for personal consumption is at odds with the prevailing, treatment oriented approach prescribed by Congress for other drug users/possessors." United States Sentencing Commission, Cocaine and Federal Sentencing Policy" p. 188 (February 1995). The mean criminal history level of individuals convicted of crack offenses is Level II (*Id.* at p. 164), which suggests that these individuals have not had much involvement with the criminal justice system and would respond to rehabilitation.

In summary, because there are not adequate policy or factual bases to support the 100-to-1 quantity ratio for crack cocaine, because the application of that ratio has resulted in imposition of sentences that disproportionately affect a racial minority to such a degree as to shock the conscience, because the application of the ratio in the past has operated in the past to deny many user/possessors of crack cocaine rehabilitative opportunities available to other user/possessors of the other forms of cocaine, and because the ratio has resulted in unnecessarily lengthy incarcerations, thereby placing stress on already over-burdened correctional system, we strongly encourage retroactive application of the amendments to Section 2D1.1(c) to individuals sentenced under the current guidelines. Retroactive application is not only fair, it is fiscally responsible.

We appreciate the opportunity to comment on such an important and controversial issue. We would be happy to elaborate on these comments or answer any questions that the Sentencing Commission may have regarding our comments and our concerns.

Respectfully submitted,

SCHWING & SALUS, P.C.

Eric M. Schwing

Babette P. Salus

Babette P. Salus

COMMENTS FROM

THE DRUG POLICY FOUNDATION

TO THE

UNITED STATES SENTENCING COMMISSION

REGARDING

THE RETROACTIVE APPLICATION OF NEWLY PROPOSED AMENDMENTS TO THE "CRACK" COCAINE SENTENCING GUIDELINES

submitted

June 16, 1995

The Drug Policy Foundation
4455 Connecticut Ave. N.W. Suite B-500
Washington, D.C. 20008

Arnold Trebach, President
David Condliffe, Executive Director

The Drug Policy Foundation [DPF] welcomes the opportunity to comment upon the desirability of a retroactive application of newly proposed amendments to the "crack" cocaine sentencing guidelines. DPF strongly opposed the disparity in penalty between cocaine base (crack) and cocaine hydrochloride, considering it a prime example of the excesses of the massive worldwide war on drugs which has cost our country $130 billion in the last 20 years but which has had no impact on the level of drug abuse in this country. We strongly support the retroactive application of these corrective amendments.

DPF is an independent, non-profit organization with over 19,000 active members that researches and publicizes alternatives to current drug strategies. DPF believes that the drug war is not working - it erodes individual rights, is extremely expensive, sustains a new class of criminals and does not address the health aspects of drug control. In that spirit, we commend the Sentencing Commission for proposing to equalize the vastly unjust discrepancy between sentences for crack and powder cocaine.

We strongly urge the Commission to apply the new guidelines retroactively. The new guidelines acknowledge the moral bankruptcy of current sentencing guidelines - which were supported by neither evidence nor logic and which spawned a suspicious racial imbalance in prosecutions and incarcerations. Many injustices were perpetrated under the current sentencing regime. The retroactive application of the new guidelines will not only free up valuable prison space which can, in turn, be used for the violent felons who prey upon our citizens, but will also provide redress for many of those receiving vastly excessive sentences for minor drug offenses.

In the alternative, DPF recommends a policy of "conditional retroactivity". Under such a system, upon enactment of the new sentencing guidelines, every inmate would immediately become eligible for parole, but actual release would be conditioned on an actual review by whatever authority the Commission deems appropriate. In this way, a "fail-safe" mechanism would exist to protect the public from an unscrutinized mass release of previously sentenced defendants.

I. The Newly Proposed Guidelines Represent a Shift in Direction in our Sentencing Policy from an "Anything Goes" mentality to a more considered approach to policy making. We should acknowledge that policy change up front and apply the relevant amendments retroactively to clear away the vestiges of an ill-conceived and ill-executed policy.

It has been amply documented that the development of the current sentencing regime for "crack" cocaine occurred in an informational and analytical void. A veritable political frenzy on Capitol Hill resulted in the arbitrary elevation of the originally proposed 50-1 sentencing disparity between crack and powder cocaine to a mind boggling 100-1 ratio. In contrast, during the development of the newly proposed adjustments to cocaine sentencing policy, the Sentencing Commission embarked upon a more considered approach to policy making - a process which included

the marshaling of all relevant information, informed debate both within and without the Commission, and completion of a thorough analysis resulting in a well documented decision to recommend substantial change.

The Commission's unanimous recommendation that the 100-1 ratio be deleted demonstrates that the current sentencing regime, with the concomitant discrepancy between penalties for crack and powder cocaine, is inappropriate. Many people were sentenced under this regime, including many defendants who heard their own sentencing judge decry the sentence mandated under the law. Indeed, some federal judges have declined to hear drug cases due to the inordinate sentences attached to even possessory drug charges. After a long period of contemplation and debate, the Sentencing Commission has decided to end this disparity. It cannot be enough to just say "Sorry!" We now have the opportunity to review cases with an eye toward correcting some of the more egregious errors made under the previous sentencing regime. We should do so.

The Retroactive Application of the Newly Proposed Guidelines for Crack Cocaine will not result in the release of large numbers of violent felons from prison and will help address existing overcrowding problems within the Federal Correctional System.

DPF believes firmly that the question of whether or not to apply a sentencing adjustment retroactively should be an inquiry into the merits of the issue, we understand the pragmatism underlying a consideration of such an application.

The Commission is to be commended for its attention to and separation of the aggravating behaviors surrounding the crack market [guns, violence, etc.] which have tainted the rational analysis and development of penalties for crack cocaine. The Commission dealt with these aggravating factors by developing a list of sentencing enhancements which provide adequately long sentences for those who traffick in violence as well as crack. These enhancements assure that the system targets those violent felons who prey on the citizenry.

These enhancements provide a dual function: (1) assure that when applied retroactively to previously sentenced defendants, the guidelines will not allow violent felons to escape a rational sentence for their crimes; and (2) assure that, when applied prospectively, the guidelines will not allow violent felons to escape a rational sentence for their crimes. The goal of our sentencing policy is just this - that offenders receive a rational sentence bearing some relationship to their crime. Thus, the retroactive application of the newly proposed guidelines [or the conditionally retroactive application of same] for crack cocaine will not abrogate the general goal of our sentencing policy.

The untold tragedies occasioned by drug abuse in our society will not be corrected by the sentencing scheme. We have had years of egregious sentencing under current sentencing guidelines; these guidelines have had no effect on the level of drug abuse in this country. However, as a result

of the current guidelines, the prison industry has experienced a major expansion, resulting in the formation of a new "cottage industry" of prison building. Meanwhile, alternative strategies, such as education, prevention, treatment, - our only long term hope for affecting the level of drug abuse in our society - etc. are perennially under funded and usually are the first to fall victim to the budget cutters' axes. It is clear that we can't "build" our way out of the drug trade. The economics of such a complex market as the international drug trade does not provide for "deterrence by sentence."

There is too much money involved, and arresting one person [be s/he courier or street salesperson] only results in the next person in the hierarchy moving up. We should focus our limited resources on strategies that actually have a chance of reducing drug consumption in our society. By limiting the number of non-violent drug offenders and the lengths of their sentences, we can conserve our prison space for those violent predators that now often receive much less lengthy sentences than their non-violent drug offender colleagues.

A more considered approach to sentencing generally will provide additional resources within our criminal justice budgets. At DPF, we favor increased funding for education, prevention and treatment regimes - long term strategies. Incarceration is a short term strategy, and as our prison population has topped all others in the world, it should be clear that this short term strategy cannot provide a full answer to the problem. We must adopt multiple strategies - including incarceration - which focus on both short term and long term strategies, but with equal funding for both. Our prison construction budgets siphon money from these other foci. Simply holding prison spending to some realistic figure [not to mention reducing such spending] would allow us to focus more clearly on some other strategies - strategies that might even have a chance at working.

The Retroactive Application of the newly proposed guideline amendments will redress an unintentional racial imbalance in a criminal justice system already conceived as unapologetically suspect by many communities of color in this country.

Race and racism is still an interminably difficult question for America to even contemplate, let alone to discuss and or debate in a rational and objective way. This phenomenon becomes magnified many times when discussions of the criminal justice system arise, with the inherent focus on matters of "right" and "wrong." However, the Commission is to be commended for its willingness to address such sensitive matters.

Sentencing disparities between powder and crack cocaine are, perhaps, one of the clearest examples of a p olicy with a clearly racial impact even though the policy makers may have harbored no such conscious thoughts during the process of policy making. 90% of federal crack defendants are Black although the majority of crack users are White. Crack is made [in approximately 15 minutes] from powder cocaine. The distribution chain for cocaine differentiates between powder and crack only at the lowest rungs on the chain-street dealers and low level managers - yet Federal prosecutors targeted the considerable power of their offices on this rung - not on the groups who supply the

movie industry or Wall Street.

Unfortunately, the Commission can be chided for engaging in a similar myopia: "If more persons of one group **behave in ways** that justify harsher treatment, then the Commission believes it is fair to treat those individuals more harshly, even if it results in a higher percentage of one group going to prison for longer periods of time."[1] The fallacy in this statement is familiar to criminal justice professionals : people don't always go to jail in America for behavior; they go to jail for getting caught. Because of limited resources, law enforcement is a focused and selective activity. Focus law enforcement and prosecutorial resources on one segment of the market and that market's denizens will go to jail. This type of focus usually results in the neglect of some other market segment. In this case, the neglected market is the up-scale cocaine market - Hollywood, Wall Street, etc. Of course, those at the very top of the rung - money launderers, including some in the banking industry - get the least amount of focus.The socio-economic/racial politics of the international drug trade [microcosm] are similar to those of the free market [macrocosm].

Rather than belatedly placing blame, we should learn some lessons from this period in our sentencing history: we should be wary of strategies and policies that result in a significant racial imbalance and should not automatically accept the premise that certain groups in society are more "criminal" than others. If all our information shows a disparate impact from any policy, we should study the matter thoroughly and come to some rational conclusion

However, we should not walk away from a sentencing policy which has had such a devastating racial impact. The results are obvious. The retroactive application of the new sentencing guidelines concerning crack cocaine would certainly serve the purpose of the amendment: to redress current imbalances and remove the stigma of unfairness and racism that currently exists. The retroactive application of the new laws can be applied without great difficulty. It is right to seek to correct past injustices. We urge the Sentencing Commission to recommend that these guidelines be applied retroactively or, in the alternative, be applied in a conditionally retroactive fashion.

The Drug Policy Foundation
Arnold S. Trebach, President
David C. Condliffe, Executive Director

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[1]May 1, 1995 letter from the Sentencing Commission to Senator Orrin Hatch, transmitting the Commission's proposed legislation to revise the penalty statutes for offenses involving crack cocaine. Part III, page 6 of "Statement of the Commission Majority..." paragraph #5.

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J. Robert Cooper, Esquire

May 26, 1995

Mr. Richard P. Conaboy, Chairman
Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle, N.E.,
Washington, D.C. 20002

Re: **Proposed Amendment 18§2S.1-Money Laundering**

Dear Chairman Conaboy:

In the May 10, 1995, Federal Register (Volume 60, No. 90, Part IV) the Commission proposed to the Congress that they change present Sections 2S1.1 and 2S1.2, relating to laundering of money instruments.

In explaining the reasons for the proposed amendment, the Commission noted that, "when the Commission originally promulgated Sections 2S1.1 and 2S1.2 to govern sentencing for the Money Laundering and Monetary Transaction Offenses, found at 18 USC 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Since then, courts have construed the elements of these offenses broadly. As a result, the Commission has found that Sections 2S1.1 and 2S1.2, do not adequately distinguish the varying degrees of offense conduct that are sentenced under these guidelines."

Beginning November 1, 1987, when these guidelines were first implemented, the run of the mill gambler, that is to say, the "bookie" who did little more than place bets on sporting events, was penalized under Sections 2S1.1 and 2S1.2 and treated as "money launders" rather than being treated as an offender, whose offense level could otherwise be determined for an underlying offense by reference to other Sections of the Sentencing Guidelines.

In particular, gambling is defined under Section 2E3.1, and offenses for those violations can be determined with no difficulty.

Since November 1, 1987, numbers of defendants have been treated as "money launders" under Section 2S1.1 and 2S1.2, and not under Section 2E3.1. The resultant guideline level, in many cases greatly exceeds the appropriate guideline level under the gambling section.

Retroactivity

Under the present proposals, submitted to the Congress, no recommendation has been made as to the retroactive application of proposed amendment 2S1.1. As part of the amendments an invitation for public comment was made concerning retroactivity.

This letter is to respectfully request that the Commission recommend to the Congress that Section 2S1.1 be made to apply retroactively and apply to all defendants, now in custody, serving sentences where they were treated as "money launders and not gamblers." It would be unconscienceable to think that a defendant, now serving a sentence, would be treated differently for his violation than one who is convicted subsequent to November 1, 1995 for similar misconduct. This is particularly true in view of the fact that the Commission readily acknowledges and admits that the District Courts have construed 2S1.1 and 2S1.2 as they now exist, "broadly".

Thank you for your attention in this matter.

Very truly yours,

J. Robert Cooper

JRC/mg

FOUNDATION ON DRUG POLICY AND HUMAN RIGHTS

Amsterdam • New York • Washington, D. C. • Bremen

June 5, 1995

The U.S. Sentencing Commission
One Columbus Circle
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Sentencing Commissioners:

The Foundation on Drug Policy and Human Rights commends the Sentencing Commission for its recent amendments concerning drug offenses. In particular, ending the disparity between crack and cocaine, providing a more consistent weight for marijuana plants and reducing sentences for non-violent drug offenders by putting in place a safety valve.

The purpose of this letter is to urge the Commission to make these changes retroactive. It is evident that these amendments were passed because the previous sentencing guidelines were inappropriate and unjust. Allowing the sentence of an offender to continue to be based on unjust sentencing guidelines merely because he or she was sentenced prior to these amendments would be arbitrary — a sentence based on the date of sentencing, not on what is fair and just.

According to the International Covenant on Civil and Political Rights, passed by the United Nations on December 16, 1966 and ratified by the United States in 1992, criminal offenders should not be arbitrarily sentenced. To allow some offenders to remain incarcerated with extremely lengthy, mandatory prison terms, while at the same time other offenders who are convicted of the same offense receive shorter prison terms would violate international human rights law.

Judges across the United States have been critical of the harshness of mandatory sentencing statutes, particularly as the apply to low-level drug offenders, crack offenders and marijuana growers. Your amendments do a great deal to move sentencing toward a system of justice that reflects the traditional notions of justice in the United States and the recognition of basic human rights under international law. Failure to make these provisions retroactive would undercut the good work you have already done.

Sincerely,

E. Drucker

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June 9, 1995

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

Re: Sentencing Commission Guideline Amendments Nos. 5, 8 & 7

Dear Sentencing Commissioners:

As a former federal prosecutor, I observed first hand the inequities of the Sentencing Guidelines for drug offenders. Specifically, that African-Americans bore the brunt of the disparity between crack cocaine and powder cocaine. That the exaggeration of marijuana plant weight under the Guidelines produced sentences out of proportion to the extent of the operation, and lastly, that the Guidelines were particularly harsh on the non-violent, first-time offenders who had no one to role over on.

Now, as a law professor, I remain appalled that violent criminals win early release while drug defendants, who committed far less heinous acts and present much less danger to the public, languish in prison wasting our tax dollars. Therefore, I ask you in the name of justice and common sense to make Amendments Nos. 5, 7 and 8 retroactive at your July 13, 1995 meeting in Boston.

With regard to Amendments 5 and 8, retroactive application will further the Commission's goal of fair and equitable sentencing. These amendments have been carefully researched and studied and there is no logical reason not to make them retroactive. Any charge that the Commission is soft on crime rings hollow, given that these prisoners are all serving mandatory minimums sentences unaffected by any Guideline changes.

Regarding the safety-valve amendment, it is absolutely the greatest waste of taxpayer dollars to keep these low level offenders locked up one day longer than their mandatory sentences. It is time to undo some of the injustices caused by overzealous politicians eager to prove their toughness on crime

to an uninformed and fearful public. Please do the right thing and make these amendments retroactive.

Sincerely yours,

David M. Zlotnick
Assistant Professor of Law

University of Hawaii at Manoa

Social Science Research Institute
2424 Maile Way • Porteus Hall 704 • Honolulu, Hawaii 96822
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31 May 1995

Public Comment - Retroactivity
U.S. Sentencing Commission
South Lobby, Suite 2-500
One Columbus Circle, NE
Washington, D.D. 20002-8002

Dear Sirs:

I have recently become aware of the Commission's amendments to the federal sentencing guidelines with respect to certain drug offenses. I wish to offer my comments on three of those amendments, and urge the Commission to make them retroactive.

Amendment #5 - I strongly support the amendment that would equalize the penalties for cocaine, whether in the form of powder or "crack". The current penalties are discriminatory, in that the majority of offenses for "crack" cocaine are committed by African-American citizens. Cocaine is cocaine, regardless of the form in which it is ingested.

Amendment #7 - I support the additional two-point reduction in offense level for certain non-violent, first-time offenders who qualify for the "safety-valve" exemption included in last year's Crime Bill. The incarceration of persons in this category is not likely to produce any desirable results, and is done at tremendous expense to taxpayers.

Amendment #8 - I support changing the plant-weight ratio for marijuana to make it constant, irrespective of the number of plants involved.

I hope you will take my recommendations to make these amendments retroactive into consideration.

Sincerely,

Donald M. Topping
Director

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June 6, 1995

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

Re: **Public Comment on Retroactivity of Marijuana Amendments**

To Whom It May Concern:

I understand the Commission is considering whether to apply to prisoners now serving sentences the plant weight ratio and "safety valve" amendments that the Sentencing Commission recently passed. I urge you to do so, for reasons of both principle and fairness.

Applying these provisions retroactively would be principled in light of the fact that the Commission has obviously determined that the purposes of the law and the needs of society and controlled substances violators would be accomplished by service of the kinds of sentences incorporated in the amendments. I can think of no principled basis for saying that those needs would be rationally served by requiring people who are currently in prison to serve longer terms than the Commission has determined are appropriate sentences for their transgressions.

On the issue of fairness, it has been my observation over 25 years of practice that persons sentenced by the law are more willing to accept sentences that they think are fairly applied than those that appear discriminatory, without any obvious rhyme or reason. The road to rehabilitation and a law-abiding reentry to society is more quickly and surely travelled by one who carries no festering resentments caused by feelings of unfair treatment.

I have not mentioned prison overcrowding, which certainly cannot be a sole consideration, but in light of the Commission's recent decision that the new guidelines provide appropriate sentences, I assume that means that the space now being used by those who would be released by retroactive application of the new guidelines could be better used for persons the Commission and the Congress think need to be kept locked up longer.

Thank you for your consideration.

Very truly yours,

Charles W. Daniels

CWD:jkb

To respond to writer:
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Alexandria, VA 22304
703.751.1321•703.823.8850(fax)

June 5, 1995

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

Dear Sentencing Commissioners:

The purpose of this letter is to urge the Sentencing Commission to make recent amendments concerning drug offenders retroactive. In particular the amendments concerning the disparity in sentencing between crack and cocaine, the weight of marijuana plants and the safety-valve for non-violent drug offenders.

The Harm Reduction Coalition is made up of health care providers, social service providers and people who work in community-based organizations throughout the United States. Agencies participating in HRC work with people who use drugs and their families on a daily basis. The goal of harm reduction is to reduce the harm caused by drug use to both the individual who uses drugs, their families and to their communities. Traditional methods of drug control have failed to prevent increases in the spread of disease, violence, crime and dysfunction. As a result harm reduction emphasizes new strategies based on public health and social service models to reduce drug-related harm which are proving successful in reducing harms related to drug use.

Lengthy mandatory sentences undercut efforts to reduce drug-related harm. Indeed, they maximize harm by preventing people from developing family relationships, completing their education, developing careers and managing other aspects of their lives. When sentencing is racially disproportionate, as crack-cocaine sentencing currently is, it enhances feelings of racism and injustice in the United States. Similarly, when sentencing is arbitrary, as the current marijuana plant weight is, it adds to a sense of inequity and capriciousness. Finally, when non-violent drug offenders are required to serve lengthy prison terms, while violent offenders serve shorter sentences, it makes the justice system seem subjective and unfair. These are some examples of how the current sentencing statutes maximize drug-related harm.

The amendments you have made are steps in the right direction toward a drug policy

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based on more effective strategies. However, the failure to make these amendments retroactive will further increase the sense of arbitrariness in communities most affected by drug laws. People committing the same offenses will have radically different sentences merely because of the date of their sentence. The date of sentencing should not be the controlling factor in an individual's sentence. There should be more sense and consistency in the administration of the criminal law.

We laud the Commission for the steps it has taken and urge the Commission to correct previous inequities by making these amendments retroactive.

Sincerely,

Kevin B. Zeese, Esquire
Interim Executive Director

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450

Alderson Legal Assistance Program
Roger D. Groot, Supervisor
(703) 463-8560

June 5, 1995

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

Attn: Public Information

Dear Sir/Madam:

I supervise the Alderson Legal Assistance. The Program, a law school clinic, provides legal assistance to the inmates at the all-female Federal Prison Camp, Alderson, West Virginia. I have held my position since before the Sentencing Guidelines became effective; I have probably examined 3000 presentence investigation reports. Of those, several hundred involved crack cocaine offenses.

The most striking fact about federal crack cocaine cases is that the defendant is invariably a black person. I can recall only two white inmates at Alderson who were serving crack cocaine sentences. I am quite aware of the various cases treating this disparate impact problem. I am also quite aware that removing the crack cocaine/powder cocaine disparity from the Sentencing Guidelines will leave the mandatory minimum statutes in place.

Nonetheless, the Sentencing Guidelines have, since 1987, contributed to a racially disparate impact in sentencing cocaine offenders. Thus, I urge that the proposed amendments to Sentencing Guideline § 2D1.1 (¶ 5 of the proposed amendments published at 60 Fed. Reg. 25074) be made retroactive by adding that paragraph to the list in § 1B1.10.

Retroactive application will be relatively easy. The presentence investigation reports of each person sentenced for a crack cocaine offense will include the weight of drugs attributed to that person. No new factfinding will be necessary. The guideline sentence can simply be recalculated using the stated weight. If that weight, applying the appropriate attribution rule, triggers a statutory mandatory minimum, the statutory sentence will still control. If it does not, the recalculated guidelines range will control.

The resentencing process will be similar to that used when the Sentencing Commission amended the LSD weights. In my experience, the implementation of that amendment went very smoothly. This one will actually be easier because in some of the LSD cases the original sentence had been based on weight rather than doses. Thus, resentencing required a factual reexamination to determine doses so that a new weight could be calculated. That two-step process will not be required in crack cocaine cases.

For all of the reasons, I strongly urge the Sentencing Commission to make final the proposed amendments to Sentencing Guideline § 2D1.1 and to make the amendments retroactive.

Very truly yours,

Roger D. Groot

Roger D. Groot
Alumni Professor of Law
and Supervisor

RDG/cjk

Seekers of Justice Equality & Truth, Inc.

June 07, 1995

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

Attn: Public Information

On behalf of currently incarcerated inmates and their families, Seekers of Justice Equality & Truth, Inc. recommends retroactivity of amendment five, which equalizes offense levels for offenses involving similar amounts of base cocaine and powder cocaine; and amendment seven, which eliminates severe mandatory minimums for simple possession of base cocaine.

We thank the Commission for eliminating the 100-to-1 quantity ratio, particularly the four Commissioners who voted in favor of a 1-to-1 at levels currently provided for powder cocaine. On the basis of fairness and equality we feel that this is the only just ratio to select.

In addition, we feel that the use of aggravating factors such as the use of firearms and bodily injury to others in the commission of a crime are very important determining factors and should be used not only in base cocaine cases but all criminal cases. However, we are concerned with the use of informants and the likes as opposed to the use of concrete evidence and feel that when taking away one's rights and committing them to prison guilt should be proven beyond a reasonable doubt in courts throughout this country; *thus, guilty beyond a reasonable doubt should and needs to be reinstituted to again become the law of the land in our criminal justice system.* Although we realize that the Commission has no authority over courts, because of the many letters and phone calls we received from family members and inmates we felt the need to express our opinion in this regard.

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farther, we are concerned with the hundreds of first time drug offenders currently serving sentences from twenty (20) years to life and beyond within the federal bureau of prisons. Most of these individuals were convicted on drug conspiracy charges; have no prior convictions; and were given managerial roles based solely on informants testimonies. Individuals such as these deserve to be given a chance to be rehabilitated and should be place in alternative programs instead of being confined to prison for the rest of their lives, more respect is given to murders and rapists.

We ask, if at all possible, that the Commission would address this issue. Our organization along with Families Against Discriminatory Crack Laws, could provide the Commission with names of such defendants if needed. *Prison terms beyond five years for non-violent first time offenders in our opinion is indeed cruel and unusual punishment.* If five years in prison is not sufficient time to serve for a non-violent drugs offense then what would the Commission recommend.

Respectfully submitted,

Juanita Hodges
Director

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June 16, 1995

VIA FACSIMILE AND EXPRESS COURIER

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

RE: Retroactive Application of the Proposed
Money Laundering Guidelines Amendment

Dear Ladies and Gentlemen:

As a former federal prosecutor and current defense counsel, I write to urge the Sentencing Commission to specify for retroactive application Proposed Amendment Number 18 to the sentencing guidelines relating to revision and consolidation of the guidelines that govern sentencing for money laundering (U.S.S.G. 2S1.1 and 2S1.2). Because the elements of the money laundering statutes (18 U.S.C. §§ 1956 and 1957) have been interpreted by the courts much more broadly than the Commission expected when it promulgated U.S.S.G. §§ 2S1.1 and 2S1.2, these guidelines have been given much wider application and resulted in much more severe punishments than the Commission intended, an injustice that retroactive application of the Proposed Amendment Number 18 would help to correct.

In this regard, I wish to bring to the Commission's attention a recent case -- in which I was involved as counsel for one of the defendants -- that serves as a stark illustration of the need to provide for retroactivity in order to correct sentencing results that the Commission never intended. United States v. Kingston, et al., No. CR 93-409(A) WJR (Central District of California) was focused almost entirely on allegations that the defendants cheated Independence Bank of Encino, California by fraudulently siphoning funds from joint real estate ventures in which they and the bank were involved. Yet, while most of the counts sounded in fraud,

the Government also chose to charge the defendants with violating 18 U.S.C. § 1957 on the basis of their having transferred into bank accounts that the defendants openly controlled (and one of which was at Independence Bank itself) the proceeds of the underlying fraud that had previously been deposited in other accounts. Although the Government made no claim that these subsequent transfers were for the purpose of concealment, such is not an element of § 1957 as it has come to be interpreted and, consequently, this fraud case was effectively turned into a money laundering case for sentencing purposes, resulting in a substantial and unjustified increase in punishment.

The Sentencing Commission could not have intended this result because it was not until after the guidelines were passed that § 1957 was interpreted by the courts to be applicable to subsequent deposits of the proceeds of underlying crimes. Rather, in drafting its original guidelines relating to § 1957, the Commission appears to have relied on the legislative history of § 1957 that suggests that the statutory aim was to criminalize the conduct of third persons (such as bankers, brokers and real estate agents) who, by knowingly handling illicit proceeds, permit themselves to be used by drug dealers and organized criminals to conceal the illegal source of those proceeds. See S. Rep. No. 433, 99th Cong., 2d Sess. (1986), at 1-4; H.R. Rep. No. 855, 99th Cong., 2d Sess. (1986), at 7-8. Since, however, the language of the statute did not so limit its application, it came to be read much more broadly. See, e.g., United States v. Johnson, 971 F.2d 562, 568-69 (10th Cir. 1992); United States v. Stavroulakis, 952 F.2d 686, 691 (2d Cir.), cert. denied, 504 U.S. 926 (1992).

The result in the Kingston case was to increase the applicable total offense level from 21 to 24, thus increasing the actual sentence well beyond what the "real offense" warranted. The proposed amendment, however, if in effect at the time, would have brought the guideline score back to 21. While I have no idea how many other like cases exist, even the existence of a few such cases of patent injustice warrant retroactive application of the Proposed Amendment Number 18.

Respectfully submitted,

Jed S. Rakoff

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June 7, 1995

Mr. Richard P. Conaboy, Chairman
Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle, N.E.
Washington, D.C. 20002

Re: Proposed Amendment to Present Sections 2S1.1 and 2S1.2

Dear Chairman Conaboy:

My attention has recently been directed to the May 10, 1995 Federal Register (Volume 60, No. 90, Part IV) in which the Sentencing Commission proposed to Congress that Congress change present §§ 2S1.1 and 2S1.2, relating to laundering of money instruments. I am writing you to express my strong support for the proposed amendments, and also to advocate and request that the Sentencing Commission recommend to Congress that § 2S1.1 be made to apply retroactively and applied to all defendants, now in custody, serving sentences where they were treated as "money launderers" and not gamblers.

Specifically, I note that the Commission, in explaining its reasons for the proposed amendments, stated that "when the Commission originally promulgated Sections 2S1.1 and 2S1.2 to govern sentencing for the Money Laundering and Money Transaction Offenses, found at 18 USC 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Since then, the Courts have construed the elements of these offenses broadly. As a result, the Commission has found that Sections 2S1.1 and 2S1.2 do not adequately distinguish the varying degrees of offense conduct that are sentenced under these guidelines."

Since November 1, 1987, when these guidelines were first implemented, the individual who illegally engaged in bookmaking, including bookmaking on sporting events, was typically penalized under §§ 2S1.1 and 2S1.2, and treated as a "money launderer" rather than being treated as a person convicted of a gambling offense. In particular, gambling is defined under § 2E3.1, and offenses for those violations can be determined with little difficulty.

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Nevertheless, since November 1, 1987, a significant number of defendants have been treated as "money launderers" under §§ 2S1.1 and 2S1.2, and not under § 2E3.1. The resulting guideline level, in many cases, greatly exceeds the appropriate guideline level under the gambling section. Thus, the proposed amendment 2S1.1 is particularly appropriate.

I also recommend that the Sentencing Commission propose to Congress that § 2S1.1 be made to apply retroactively, and apply to all defendants, now in custody, serving sentences where they were treated as money launderers, instead of persons convicted under a gambling offense. It would appear that it is highly inappropriate for a defendant, now serving a sentence, not to receive the benefit of this amendment along with other persons who are convicted subsequent to November 1, 1995 for similar misconduct. This is particularly true in view of the fact that the Commission readily acknowledges that the district courts have broadly construed §§ 2S1.1 and 2S1.2 as they now exist, in a manner that was never contemplated by the Sentencing Commission.

Thank you for your consideration of this recommendation.

Very truly yours,

WATSON & MARSHALL L.C.

George A. Barton

GAB:src

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June 14, 1995

Mr. Richard P. Conaboy, Chairman
Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle, N.E.
Washington D.C. 20002

Dear Chairman Conaboy:

This letter is in response to your request for public comment in the May 10, 1995 Federal Register (Volume 60, No. 90, Part IV) relating to laundering of money instruments.

Under the present proposal submitted to Congress, no recommendation has been made as to the retroactive application of amendments 2S1.1 and 2S1.2. I respectfully request that the Commission recommend to the Congress that Sections 2S1.1 and 2S1.2 be made to apply retroactively and apply to all defendants now in custody serving sentences, particularly in view of the fact that the Commission found that Sections 2S1.1 and 2S1.2 have been broadly construed by the District Courts, and further that they do not adequately distinguish degrees of different conduct under these guidelines.

I urge the Commission to consider my request that the proposed Amendment 18 2S1.1 and 2S1.2 - Money Laundering be made retroactive.

Very truly yours,

Emmanuel H. Dimitriou

Emmanuel H. Dimitriou, Esquire

EHD:jlh

WESTMORELAND, PATTERSON & MOSELEY

ATTORNEYS AT LAW

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REPLY TO MACON OFFICE

June 1, 1995

Mr. Richard P. Conaboy, Chairman
Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Retroactivity of Proposed Amendment 18 §2S1.1 and 2S1.2

Dear Chairman Conaboy:

This letter is in response to your request for public comment in the May 10, 1995 Federal Register (Volume 60, No. 90, Part IV) relating to laundering of money instruments.

In explaining the reasons for the proposed amendment, the Commission noted that, "when the Commission originally promulgated Sections 2S1.1 and 2S1.2 to govern sentencing for the Money Laundering and Money Transaction Offenses, found at 18 USC 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Since then, the Courts have construed the elements of these offenses broadly. As a result, the Commission has found that Sections 2S1.1 and 2S1.2 do not adequately distinguish the varying degrees of offense conduct that are sentenced under these guidelines.

Additionally, the Commission states that Amendment 18 is needed to better insure that offense levels comport with the relative seriousness of the money laundering and underlying offense conduct and reduce unwarranted disparity resulting from charging and plea bargaining practice.

Finally, I would like to point out that when the Commission consolidated money laundering 2S1.3 and 2S1.4, the Commission elected to make that amendment retroactive.

For the above reasons, I urge that the Commission please consider my request that the proposed Amendment 18.2S1.1 and 2S1.2 - Money Laundering be made retroactive.

I thank you for your time, concern and consideration in this matter.

Very truly yours,

ANTON F. MERTENS

AFM/ncn

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ARTIN A. WILSON
OHN R. DAVIS, JR.
(GA/FL)
DAVID M. DONNER
MOLLY L. McCOLLUM

June 2, 1995

Mr. Richard P. Conaboy, Chairman
Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle, N.E.
Washington D.C. 20002

Re: Retroactivity of Proposed Amendment
18 Section 2S1.1 and Section 2S1.2

Dear Chairman Conaboy:

The purpose of this letter is to respond to your request for public comment in the May 10, 1995 Federal Register relating to laundering of money instruments. I would like to urge the Commission to please consider my request and input that proposed Amendment 18 Section 2S1.1 and Section 2S1.2-Money Laundering be retroactive. The retroactivity will be fair to defendants who have already spent more time in jail than they would have ordinarily as a result of the present application of Section 2S1.1 and Section 2S1.2.

It would appear to be fair and consistent with the present system to make the proposed Amendments 18 Section 2S1.1 and Section 2S1.2 retroactive.

Hopefully my input will be helpful in your analysis of this legal question. Please upon receipt of this letter feel free to contact my office if I can be of assistance.

Very truly yours,

John R. Davis, Jr.

JRDjr/jas

MILNER, LOBEL, GORANSON,
SORRELS, UDASHEN & WELLS

ATTORNEYS AT LAW

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SHIRLEY BACCUS-LOBEL, P.C.

June 1, 1995

Richard Conaboy, Esq.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, D.C. 20002

RE: Proposed Modification of Guidelines regarding Money Laundering

Dear Mr. Conaboy:

I have practiced federal criminal law for 25 years. Fifteen were spent as a prosecutor with the Department of Justice in both Washington, D.C. and Dallas, Texas. In the Northern District of Texas U.S. Attorney's Office, I served as Criminal Chief and, later, First Assistant. Since 1985, I have been actively engaged in practice as a criminal defense lawyer, principally in the federal arena. I think you therefore will agree that my background is balanced.

I commend the Commission for proposing a modification to the money laundering guidelines, which have provided federal prosecutors with an unfair tactic. Given the potential for abuse inherent in the artificially high guidelines for money laundering, together with the ease of charging a money laundering offense, I urge the Commission to apply the change in the guideline retroactively in order to undo some of the injustices that resulted from the inflationary application of that guideline. Thank you.

Yours very truly,

Shirley Baccus-Lobel

SBL:ps

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PAMELA B. BANKERT
VALERIE L. PAWSON
MICHAEL D. TRACEY
MICHAEL D. CUTLER
JOHN A. TENNARO
JOHN J. WELTMAN
ROBERT A. ADELSON
THERESA POWERS
ELIZABETH E. MORROW
PATRICIA A. LANG
JOSHUA S. TRACEY

June 14, 1995

Public Comment: Retroactivity
U.S. Sentencing Commission
South Lobby, Suite 2-500
One Columbus Circle NE
Washington DC 20002-8002

RE: Amendment Nos. 7 and 8

Dear Sir/Madam:

I urge you to make the above-referenced amendments retroactive. I am an attorney in practice for 22 years, with significant experience in criminal defense, post-conviction matters and prisoner classification, placement and treatment. I am a former assistant legal counsel to the state Corrections Department.

Marijuana should be regulated as a public health issue, like alcohol and tobacco, not as a criminal issue. The cost of waging the drug war exceeds its imperceptible benefits. Public safety is far better served, and public funds much more wisely spent, by making scarce prison beds available for violent criminals and releasing marijuana prisoners.

Thanking you for your cooperation and assistance on this matter, I am

Very truly yours,

LAWSON & WEITZEN

Michael D. Cutler

MDC/pc
norml/ussentcm.ltr

KEVIN M. SCHAD

Attorney at Law

6310 E. Kemper Road, Suite 125A
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Cincinnati, Ohio 45242
(513) 247-5366
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June 14, 1995

United States Sentencing Commission
Retroactivity Public Comment
1 Columbus Circle NE
South Lobby, Suite 2-500
Washington, DC 20002

To whom it may concern:

I am writing to you, both as a concerned citizen and as a defense attorney, regarding the proposed amendments which your office has recently promulgated. Specifically, new amendments numbers 5, 7, and 8, I believe, should be made retroactive. The benefits to the current prison overpopulation, as well as to the inmates themselves and their families would be immeasurable. Therefore, please register my comment that these amendments should be made retroactive. I appreciate you taking the time to review my letter.

Sincerely,

Kevin M. Schad

KMS:sjb

ROBERT A. RAICH
ATTORNEY AT LAW

472 CAVOUR STREET
OAKLAND, CALIFORNIA 94618

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FAX: (510) 420-1847

June 16, 1995

Public Comment -- Retroactivity
U.S. Sentencing Commission
South Lobby, Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002

Dear Sentencing Commission:

I urge you to make the following amendments to the sentencing guidelines retroactive, so they will apply to current inmates.

Amendment 5 to equalize crack and powder cocaine. This will help end some injustice suffered by African Americans.

Amendment 7 to provide a reduction for defendants qualified under the "safety-valve." This would match the exemption in the mandatory minimum sentencing statutes.

Amendment 8 to use a standard weight for each marijuana plant. This will end injustice for people who grow 50, versus 49, plants.

Thank you for your consideration of making these amendments retroactive.

Very truly yours

Robert A. Raich

Admitted in California and Texas

PLEASE REPLY TO:

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1950 Addison Street, Suite 103 ☐
Berkeley, CA 94704
(510) 486-0981

Institute for Scientific Analysis

June 12, 1995

Public Coment--Retroactivity
U.S. Sentencing Commission
South Lobby, Sute 2-500
One Columbus Circle, NE
Washington, D.C.

Dear Sentencing Commission:

This letter is to request that the following amendments be made retroactive: Amendment #8--use standard weight of 100 grams for each marijuana plant; Amendment #7--provide additional two-point reduction for defendants who qualified for the safety-valve.

I hope you will be sentitive to the requests of those of us, like myself, who have been involved in drug research for many years. Please do what is humane and pragmatic.

Sincerely,

Marsha Rosenbaum, Ph.D.

Andrew C. Maternowski
Attorney at Law
3601 North Pennsylvania Street
Indianapolis, Indiana 46205-3435
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June 7, 1995

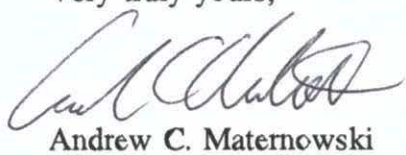
The United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Sentencing Commissioners:

I write you today to indicate my strong support for retroactive application of both the 100 grams per marijuana plant equivalency amendment and the equalization of the crack/power cocaine guideline.

Retroactivity is necessary to remedy the extremely harsh sentences imposed on street-level crack dealers and non-violent marijuana cultiators who are over-crowding our jails.

Very truly yours,



Andrew C. Maternowski

ACM:atc

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June 2, 1995

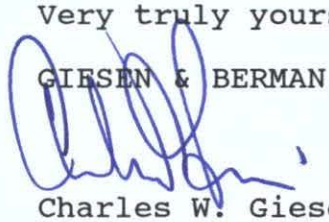
United States Sentencing Commission
Attn: Public Comment
One Columbus Circle NE, Suite 2-500
Washington D.C. 20002-8002

Gentlemen:

I am writing to strongly encourage you to adopt Proposed Amendment No. 7 and Proposed Amendment No. 8. These proposed amendments would alleviate many of the inequities and hardships, as well as the inflexibility contained in the current provisions. They would additionally give judges greater discretion to avoid inequitable results in individual situations.

Very truly yours,

GIESEN & BERMAN, S.C.

By 

Charles W. Giesen

CWG:djh

TY

University of Hawaii at Manoa

Social Science Research Institute
2424 Maile Way · Porteus Hall 704 · Honolulu, Hawaii 96822
Phone: (808) 956-8930 · Facsimile: (808) 956-2884

6 June 1995

Public Information - Retroactivity
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Sirs:

I am writing this letter in support of making Amendment #8, the 100 grams-per-plant amendment, retroactive.

Most people who are currently incarcerated in federal prisons for growing marijuana have received sentences that are far too long, and completely out of proportion to any "crime" they have committed.

This amendment should be applied retroactively to people already sentenced or incarcerated. Making it retroactive would prevent any inequity between the sentences of people already serving time and those who will be sentenced after the law changes.

Sincerely,

Donald M. Topping
Director

ROBERT MICHAEL XIFARAS
ATTORNEY AT LAW

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OF COUNSEL
Barry P. Wilson, Esq.

June 5, 1995

U.S. Sentencing Commission
One Columbus Circle N.E.
Suite 2-500
Washington, D.C. 20002-8002

Attn: Public comment

Dear U.S. Sentencing Commission:

As a concerned citizen and a lawyer I strongly support proposed Amendment #8 which seeks to retroactively apply any guideline changes to individual cases which will lessen an individual's time of incarceration and I strongly support proposed Amendment #7 which seeks to create a "safety valve" which will provide an exception to certain qualified defendants convicted of specific drug offenses. Our nation's resources should not be wasted on incarcerating people for non-violent drug offenses.

I strongly feel that drug abuse, like alcohol abuse, is a health issue not a criminal law issue. Thank you for your attention.

Very truly yours,

Robert M. Xifaras

RMX/ija

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June 6, 1995

Public Comment-Retroactivity
U.S. Sentencing Commission
South Lobby, Suite 2-500
One Columbus Circle, NE
Washington, D.C. 20002-8002

Please consider this letter as public comment on Amendment Number 8 and Amendment Number 7 to the amendments to the Federal Sentencing Guidelines which are being considered by your agency.

Please consider this letter as my absolute and strong support for making Amendment 7 to provide additional two point reduction for defendants who qualified for the safety valve and Amendment 8 to use the standard weight of 100 grams for each marijuana plant retroactive.

In the unlikely event you are making any notation of additional comments, then please consider my opinion that marijuana should be immediately decriminalized and we should quit wasting our tax dollars incarcerating people for marijuana offenses.

Thank you for your time and consideration of my opinions.

Very truly yours,

deVries & Associates, P.C.

By:

F. Coulter deVries
Attorney at Law

FCDEV/bjhw
cc: NORML

MOFFITT, ZWERLING & KEMLER, P.C.

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June 6, 1995

Public Comment-Retroactivity
U.S. Sentencing
South Lobby, Suite 2-500
One Columbus Circle, NE
Washington, D.C. 20002-8002

Dear Commissioners:

I urge you to make the following proposed amendments retroactive:

Amendment #7 Provide an additional two level reduction for defendants who qualify for the "safety valve" exception to the mandatory minimum statutes.

Amendment #8 Assigning the arbitrary weight of one hundred (100) grams for each plant of marijuana when fifty (50) or more plants are involved.

Both of these amendments are geared toward making the federal sentences of people who pose a lesser threat to society more in line with common sense and decency.

Sincerely,

John K. Zwerling

THOMAS M. LOEB
ATTORNEY AND COUNSELOR AT LAW

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FAX (810) 354-1489

Paralegal:
Darlene Bugajski

June 2, 1995

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002
Attn: Public Comment

Re: Proposed Amendment No.'s 7 and 8

Dear Sir or Madam:

I recently learned that there are two proposed Guideline Amendments that your commission is considering. Amendment No. 7, I am told, would allow an exception to mandatory minimum sentence for certain qualified defendants convicted of specific drug offenses. Amendment No. 8 would apply any guideline changes to individual cases which may lessen a prisoner's time of incarceration retroactively.

By way of this letter, I strongly urge the passage of both of these Amendments. While there may be different opinions concerning the advisability of mandatory minimum sentences in general, or of sentences for certain drug offenses in particular, it can hardly be disputed that our prison system is in a terrible state of disarray because of overcrowding. Additionally, many current mandatory minimum sentences are far too severe. I hope these provisions pass.

Thank you for allowing me to express my opinion.

Very truly yours,

Thomas M. Loeb
TML/mln

ALBERT R. DILLEY
Attorney at Law
180 Monroe Ave NW
Grand Rapids MI 49503-2626

June 1, 1995

TO: U.S. SENTENCING COMMISSION
SOUTH LOBBY, SUITE 2-500
One Columbus Circle NE
Washington D.C. 20002-8002

Re: Comment on Proposed Amendments to Guidelines - Drug Offenses

I have studied your proposed Amendments which would make changes in sentencing guidelines. Amendment #5 would reduce sentences for crack cocaine offenses to the same as powder cocaine. This would be good, as the previous guideline operated disproportionately toward African-Americans because of their greater use of crack. They became subject to long prison terms, thus overloading or filling up our prisons with users of one kind of illegal drug as compared with another.

Amendment #7 provides a two-point reduction in level for certain offenders who qualify for the "safety valve" exemption. This is also a good change, favoring non-violent, first time offenders.

Amendment #8, modifying the plant-weight ratio for marijuana, corrects a mistake or oversight, and this is another good change.

All of these Amendments address, and achieve, greater fairness in sentences for drug offenses. But, I understand no decision has been made on applying them retroactively to present inmates.

I strongly urge that you make them retroactive. This, again, would serve BASIC FAIRNESS in treatment of those serving present sentences, but it would also serve another important purpose: Prisons all across the country, both Federal and State, are becoming overcrowded, and there is much talk about building more and more prisons, at enormous expense to taxpayers. One way to relieve this congestion is simply to incarcerate fewer people, and for shorter periods of time. This particularly applies to the non-violent type of offenders involved in the above Amendments #7, #8, and #5. As many of present inmates become qualified for review under these changes and are released, space becomes available for the violent kind that all of us want confined in prison. We are talking here about so-called victimless crimes as compared with crimes in which there is a person harmed by the act of the offender. Quite a difference, as a practical matter.

Thank You for considering my views.

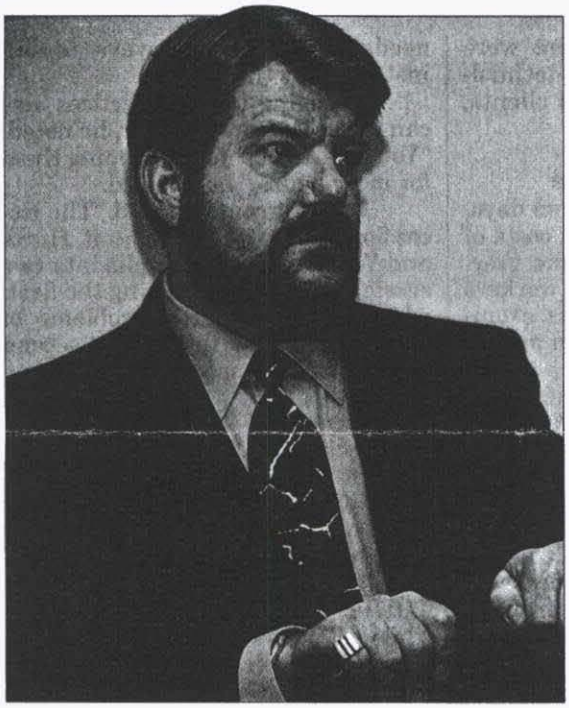
ARD/bm

Very truly yours,

Albert R. Dilley

Priorities Wrong?

Report: Drug war filling prisons



"The criminal justice system is on the fast track to collapse."

—Neal Sonnett

Summarizing the ABA's first-ever report on the state of criminal justice, Neal Sonnett sounded a dismal warning.

"The criminal justice system in this country is on the fast track to collapse," declared Sonnett, chair of the ABA's Criminal Justice Section.

The report, released at the ABA's Midyear Meeting in February, said the criminal justice system is directing more of its attention to drug offenses and less to violent crime, even though drug use is down and violent crime is up.

According to the report, drug arrests between 1986 and 1991 increased 25 percent. The number of persons imprisoned for drug offenses increased 327 percent, or 13 times the percentage increase in arrests.

The result, said the report, is that the proportion of persons imprisoned for drug offenses is increasing while the proportion imprisoned for violent crime is decreasing.

The introduction to the report calls "startling" the increases in drug cases and convictions, in arrests of minorities for drug offenses, and in corrections budgets.

For example, the report found that in recent years "corrections has been receiving a larger share of total criminal justice resources, and police have been receiving a lesser share."

The report, a distillation of facts, figures and studies from 1986 to 1991, was put together by prosecutors, defense lawyers, judges and academics. It is the first of what will be an annual report on the state of criminal justice, Sonnett said.

Among other findings were that, from 1986 to 1991:

▶ Violent crime increased by 11 percent.

▶ The gap between incidences of violent crime and arrests grew by a quarter of a million.

▶ The proportion of the prison population made up of drug offenders increased from 9 percent to 22 percent while the proportion made up of violent offenders decreased from 55 percent to 45 percent.

▶ Arrests increased 23 percent for minorities compared with 10 percent for nonminorities.

Using other years as a benchmark, the report found that:

▶ In 1990, half of the jail inmates and more than half the prisoners, probationers and parolees were minorities.

▶ While prison capacity grew by 60 percent between 1984 and 1990, the number of prisoners grew faster, increasing nearly 70 percent. The result has been a 45 percent increase in the number of prisons cited by courts for overcrowding.

▶ Between 1985 and 1990, expenditures for justice activities increased 63 percent to $74.2 billion.

—Henry J. Reske

APRIL 1993

ABAJ/CHRIS FITZGERALD

Outlook for commercial real estate is improving in most areas. Good business is increasing demand for offices, retail and other space. For several years, there wasn't much building, so Class A space is tight.

Vacancy rates will keep falling, though not as fast as last year. Among the strongest office markets are Sacramento, Portland, Las Vegas, Salt Lake City, Des Moines, Columbus, Knoxville, Charlotte and Raleigh.

And rents will edge higher, anywhere from 1% to 5%, on average. Also fewer concessions to tenants. It's no longer a renter's market.

Local gov'ts will be given more discretion on public housing... whether to repair down-at-the-heels projects or simply get rid of them. Housing & Urban Development Dep't wants to loosen up rigid regulations, but it may get more than it bargained for. Congress must OK the changes. Many members think HUD's ideas are a good start but don't go far enough.

Federal Reserve will remain on the sidelines for a few months. There may be a rate hike in May if the economy keeps growing 3% or more and signs of inflation emerge. Otherwise, the Fed will keep hands off. It lacks the precision to slow things sharply while avoiding a recession.

On crime: Local gov'ts won't wait for solutions from Washington. Despite all the hubbub over federal crime legislation, 85% of the costs of the criminal justice system are paid for by state & local gov'ts.

Here's what they're doing: Setting mandatory time for offenders. Requiring more of the sentences to be served, "truth-in-sentencing" laws. Building and expanding prisons. Establishing strict curfews for teens. Testing boot camps for juvenile delinquents. And eliminating parole.

Drug offenses will compete for prison space with violent crimes. If they have to choose, judges will keep violent criminals behind bars rather than clog cells with those convicted of nonviolent drug felonies.

Watch for intensified fighting in Bosnia and Croatia this spring. Not just Bosnian Serbs against Muslims, but Croatians against Serbians.

State Dep't will attempt another peace offensive in coming weeks, try to work something out before spring weather brings renewed conflicts.

But Congress will probably end the arms embargo within weeks. It's getting harder for opponents to deny help to the Bosnian Muslims.

NATO peacekeepers will withdraw whenever the fighting picks up. No way they'll stay in the area and risk getting caught in the middle.

Russia's problems are worsening, aggravated by the Chechnya mess. The economy shows no signs of getting on its feet. Inflation is rampant.

Even the Int'l Monetary Fund questions further loans to Moscow.

U.S. investments there are on hold...just treading water for now. American businesses that have established a foothold won't give it up, but they're not expanding either. For most firms, it's wait-&-see time.

Moscow is hurt by Mexico's economic woes and currency collapse. Investors are now wary of emerging markets everywhere, ESPECIALLY Russia.

Yours very truly,

Austin Kiplinger

Feb. 10, 1995

THE KIPLINGER WASHINGTON EDITORS

The Kiplinger Washington Letter (ISSN 0023-1770) is published weekly for $73-one year, $132-two years, $189-three years by The Kiplinger Washington Editors, 1729 H St., NW, Wash., DC 20006-3938. Second-class postage paid at Wash., DC. POSTMASTER: Send address changes to The Kiplinger Washington Letter, 1729 H St., NW, Wash., DC 20006-3938.

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OR YOU CAN FAX US AT 202-778-8976

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

May 26, 1995

The Honorable Brenda P. Murray
Chair, Women in Prison Task Force
National Association of Women Judges
1612 K Street, NW, Suite 1400
Washington, DC 20006

Dear Judge Murray:

Thank you for your recent letter and comments about single custodial parents and women offenders. I have taken the liberty of sharing your letter with the other Commissioners.

As a starting point in this ongoing process, the Commission is hiring a summer intern who has expertise on gender bias issues. I will make sure your letter is passed along and future contact is made once the researcher is in place.

We appreciate the views of the National Association of Women Judges and your willingness to share them with us.

Sincerely,

Richard P. Conaboy

Richard P. Conaboy
Chairman

National Association of Women Judges

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20003-8003

May 5, 1995

Dear Judge Conaboy,

Following up on the views we presented in March, the National Association of Women Judges respectfully urges the Commission to focus on the implications of sentencing single custodial parents and women offenders in setting its priorities.

In our written statement we identified five area of concern -Family Ties, Pregnancy, First Time Offenders and Non-violent Offenses, Substantial Assistance Departures, and Domestic Violence. Because the number of women offenders is much smaller than the number of men, knowledgeable people are concerned at the lack of research in these areas.

Two examples which come immediately to mind for the Commission's consideration are:

(1) Is the evidence persuasive that sentencing which allows continuation of a parent-child relationship, where there has been an effective parenting relationship, lowers recidivism and/or benefits the child or children? Would it be possible to do some empirical studies using community based sentencing?

(2) Has there been further research on the point made by Ellen Barry, Director of Legal Service for Prisoners With Children, (copy enclosed) that judges who incarcerate women in the paternalistic belief that doing so protects them from their addictions are acting on a false premise?

The Association would be happy to provide any assistance that you think appropriate.

Sincerely,

Brenda P. Murray

Brenda P. Murray
Chair, Women In Prison Task Force

Enclosure

BY ELLEN M. BARRY

American Bar Association
Criminal Justice Vol 5, # 4

Pregnant, Addicted and Sentenced

Debunking the myths of medical treatment in prison

Doris M. was sentenced to serve six months in the county jail in Oakland, California, when she was seven months pregnant. Ordinarily, she would have received a lighter sentence for a minor probation violation, but the sentencing judge apparently wanted to ensure that she remained in county jail for the duration of her pregnancy. Doris was addicted to heroin and, prior to her sentencing, had sought methadone treatment at a local community-based program. Instead of receiving the treatment she needed, she was forced to withdraw from heroin "cold turkey" when she entered the county jail. She suffered severe withdrawal, with vomiting, headaches, abdominal pain, diarrhea, and other traumatic symptoms. She was not examined by an obstetrician for almost six weeks and received no follow-up appointment or medical treatment. When she was approximately eight-and-one-half months pregnant, she had severe uterine pain and felt no fetal movement. Three days later, her stillborn daughter was removed by cesarean section (*Jones v. Dyer*, No. H-114544-0, Alameda County Superior Court, California).

Jesse V. was almost six months pregnant when she was sentenced to serve a six-month sentence at the Kern County Jail on a charge of misdemeanor assault. She was addicted to heroin and asked to be placed on a methadone maintenance program. For one week she was given a very low dose of methadone, insufficient to prevent withdrawal. She was then taken off all treatment and forced to go through withdrawal "cold turkey." She suffered shakes, chills, nausea, and vomiting, and was unable to keep down food. The medical staff did nothing except give her Tylenol. During her withdrawal, she was required to sleep on the floor of the jail on an inch-thick mattress. She experienced back pain so severe that she had great difficulty standing up or walking. In spite of the fact that she was experiencing a critically high-risk pregnancy, she was seen on only one occasion by an obstetrician, and then only with the assistance of outside legal counsel (*Yeager v. Smith*, No. CV-F-87-493-REC, Fed. Dist. Ct., California).

Many thoughtful advocates—judges, lawyers, social workers, physicians—have voiced great concern about the need for effective and compassionate treatment of pregnant, drug-dependent women. However, over the last few years there has been an unmistakable and unfortunate trend toward incarcerating pregnant women who appear to be drug- or alcohol-dependent at the time of sentencing.

Where did this trend begin? In part, it arose from the tremendous frustration of sentencing judges who could see no other options. Other reasons were a misunderstanding of the nature and treatment of substance abuse, a lack of resources in the general community for treatment, and a growing sentiment to seek punishment for individuals involved with drugs (and to a lesser extent with alcohol).

Lawsuits challenging the woefully inadequate medical treatment for pregnant women were filed against both of the county jails in the cases cited above. In both, comprehensive settlements were reached which addressed all aspects of pregnancy care in these county jail systems, as well as the issue of appropriate treatment for pregnant, drug- or alcohol-dependent women.

However, the most alarming aspect is that these two women were forced to detoxify without adequate medical care or supervision. In Alameda County, California, the case of Doris M. inspired legal, medical, and social service advocates to begin a treatment program for pregnant, drug-dependent women. In Kern County, however, while the settlement agreement requires that pregnant, drug- and alcohol-dependent women receive adequate care, there are few resources in the general community

for drug and alcohol treatment, especially for pregnant substance abusers.

While civil rights actions on behalf of pregnant prisoners are an important element in the effort to ensure adequate medical care, such litigation is only one way to address the problem. We must look at the front end of the system—at the sentencing process—in order to develop effective policies.

Those who support the premise that incarceration guarantees better maternity care make a number of assumptions that are misguided at best, and dangerously inaccurate at worst. Let us look at five myths that are commonly regarded as true:

1. The threat of incarceration will deter substance-dependent women from using drugs or alcohol during their pregnancies.
2. Pregnant, substance-dependent women will be adequately detoxified and will receive ongoing treatment for substance abuse while incarcerated.
3. Pregnant, substance-dependent women will receive adequate maternity care while incarcerated.
4. Pregnant, substance-dependent women have no access to drugs or alcohol while incarcerated.
5. Even if incarceration is not ideal, it is the only effective solution for handling the problems of pregnant, substance-dependent women.

Myth 1: Deterrence by threat of incarceration

Let us begin with the premise that we want to maximize the likelihood that pregnant, substance-dependent women will have better maternity care (e.g., reduce the risk of infant mortality and morbidity, increase birth weights, reduce the likelihood of neurological damage). Research and practical experience have shown that the threat of incarceration has no significant deterrent effect on the behavior of pregnant, substance-dependent women. Some addicted women may temporarily stop taking drugs immediately before birth in order to avoid a positive toxicology result. This may result in even more widespread and insidious damage to future generations of children because it prevents medical specialists from identifying substance-exposed infants early enough to counteract any damage. But the threat of incarceration may lead to an even more drastic outcome—that sentenced women may be less likely to seek medical attention early in their pregnancies. Thus, instead of promoting proper medical care, the threat of incarceration may, in fact, have the opposite effect.

Myth 2: Detoxification

Detoxification of pregnant, substance-dependent women can be accomplished safely and successfully. Although procedures differ, doctors agree that these women should not be allowed to withdraw "cold turkey" without treatment or supervision. However, in more than 12 years of experience with Legal Services for Prisoners with Children, I have often found inadequate facilities and inappropriate treatment available in prisons and jails.

In fact, effective drug and alcohol detoxification treatment rarely exists in a correctional setting. Even in cases where excellent medical care systems are established (such as in Alameda County, California, following the miscarriage of Doris M.), these programs are still subject to the whims and bureaucratic structure of correctional services. During the course of the litigation in *Jones v. Dyer*, the county chose to contract with a private, for-profit correctional health care agency, Prison Health Services (PHS). The county also contracted with a highly respected community-based program, Berkeley Addiction Treatment Services, for counseling and medical care. However, during the initial period of the contract, PHS did not have a license to dispense methadone. Methadone was administered haphazardly for several months through piecemeal contracts with private hospitals in the area until the license to dispense methadone was obtained. Currently, the treatment of drug-dependent women at the jail appears to be satisfactory because of the involvement of competent medical staff, health educators, and an effective treatment program, but Alameda County is an exception to the general rule of poor quality medical care.

The general public may have little sympathy for the alcoholic or drug addict who is forced to withdraw "cold turkey" without medication or appropriate care in a county jail setting. But the harsh reality is that under such conditions pregnant women may encounter severe abdominal pain, diarrhea, dizziness, shakes, and nausea, and face a substantial risk of miscarriage or damage to the fetus.

Good medical care can be provided—both inside and outside prison—for pregnant substance abusers. There are medical protocols that are widely recognized and that minimize the probability that a pregnant woman who is withdrawing from addictive substances will experience miscarriages or damage to the fetus. Outside of prison, these risks are reduced by procedures that are neither expensive nor time-consuming. Inside prison, these procedures have the added benefit of reducing the risk of expensive litigation for damages arising from the failure of correctional agencies to provide adequate treatment.

Some sentencing judges and other criminal justice personnel also assume, incorrectly, that pregnant

Ellen M. Barry *is director of Legal Services for Prisoners with Children, in San Francisco.*

women who are drug- or alcohol-dependent will be able to use recovery services in prison. While it is true that many jails and prisons have Alcoholics Anonymous, Narcotics Anonymous, and other treatment programs, most of them are nonprofit, community-based groups that are thought of as peripheral to the correctional setting; rather, they exist tangentially at the behest of the administration. As with other community-based programs, they can be terminated by the superintendent or sheriff. Also, in penal institutions these programs operate without the privacy and confidentiality essential to a successful recovery process.

The correctional setting is not an effective, conducive environment for recovery from drug or alcohol addiction, particularly for pregnant, substance-dependent women. In today's punitive climate, drug and alcohol rehabilitation for prisoners may not be considered a primary correctional policy (although health providers must certainly consider it a paramount goal). To assume that these women will receive adequate maternity care or substance abuse treatment while incarcerated is unrealistic and short-sighted.

Myth 3: Pregnant, substance-dependent women will receive adequate maternity care in prison or jail

This is a common fallacy shared by judges, health providers, social services workers, and the general public. If pregnant women will not stop taking drugs and get regular prenatal care, the rationale goes, lock them up and force them to get it. This might be realistic if there were any truth to the assumption that pregnant women in jails and prisons receive adequate medical care. But this is simply not true. While there are some exceptional cases—a few jails and prisons offer adequate care voluntarily, and some correctional systems have upgraded their care under court order—generally medical treatment for pregnant women, whether substance-dependent or not, is overwhelmingly deficient in most facilities.

In California, where there are over 6,000 women prisoners in the state correctional system and almost as many women in county jails throughout the state, there has been much litigation against confinement conditions for pregnant women during the last few years. In each instance, plaintiffs' attorneys uncovered numerous cases of seriously deficient medical treatment for pregnant women prisoners, many of whom were addicted to drugs or alcohol. These findings were bolstered by a statewide research study, one of the few comprehensive studies of pregnancy care in a correctional setting, that documented drastically inadequate medical care in two California state prisons and one large, urban county jail (see C. McCall, J. Casteel, and N. Shaw, *Pregnancy in Prison: A Needs Assessment of Perinatal Outcome in Three California Penal Institutions*, 1985, Cal. Dep't of Health Servs. Maternal & Child Health Branch, Contract No. 84-84085 A-1).

In *Harris v. McCarthy* (No. 85-6002-JGD), plaintiffs challenged the systematic failure of the California Department of Corrections to provide adequate prenatal and postnatal care to women in state prison.

The lead plaintiff, Annette Harris, experienced vaginal bleeding during her pregnancy for more than three weeks without examination or treatment, and was given a drug that is not recommended during pregnancy because of a risk that it might induce labor. She went into labor prematurely, and her newborn died after two hours.

Brenda J. received inadequate treatment for *placenta previa* (breakthrough bleeding) and not only had a miscarriage at eight-and-one-half months, but also had to undergo an emergency hysterectomy.

Marlena V. gained more than 120 pounds during her pregnancy because of toxemia and was not allowed appropriate treatment.

Linda B. had a documented history of inadequate dilation during her pregnancies, but the prison refused to transport her to the outside hospital for examination, even though she was almost three weeks overdue.

Linda H. was taken to the outside hospital in shackles, seated

AN ALTERNATIVE

Mandela House is a model program for pregnant, crack-dependent women in Oakland, California. Since it opened in December 1987 with six pregnant women, the program has served more than forty women and their infants. Independent studies have confirmed that the intensive treatment provided by program staff is a significant factor in higher birth weights for infants, better motor development and growth, and an impressive rate of ongoing recovery for "alumnae" of the program. The program offers continuous therapy in drug treatment and family counseling; child development and parenting skills training; nutritional and prenatal workshops; and constant supervision by a trained and caring staff. Executive director Minnie Thomas has been nationally recognized for her effectiveness, her leadership, and her vision in the area of treating pregnant, drug-dependent women and drug-exposed infants.

For more information about Mandela House or the recently opened companion program, Keller House, contact: Minnie Thomas, Executive Director, Solid Foundation, 3723 Hillview, Oakland, CA 94605; 415/482-3217.

upright in a van. The baby was born in severe distress, was in neonatal intensive care for thirty-one days, and continues to have permanent disability as a result.

Esperanza C. was not seen once by an obstetrician during the entire course of her pregnancy at the prison; the fetus died in utero at eight-and-one-half months' gestation.

The experiences of the named plaintiffs in *Harris v. McCarthy* were typical. Plaintiffs' attorneys documented a number of abuses in the provision of medical care to pregnant women, including the lack of adequate protocols and procedures for high-risk pregnancies and pregnancy-related emergencies; the failure to give routine medical examinations and treatment to pregnant women; the routine use of wrist shackles, leg restraints, and sometimes abdominal shackles on pregnant women; the lack of adequate recordkeeping, coordination, and follow-up; and the lack of any systematic treatment by an obstetrician or gynecologist. In April 1987 a comprehensive settlement agreement was approved by the United States District Court, Central District of California, which required a number of specific procedures, protocols, and improvements in the quality of pregnancy care for women prisoners.

With the *Harris* decision as a model, attorneys for pregnant prisoners have challenged conditions of confinement for women in county jail systems throughout the state. *Jones v. Dyer* was filed in Superior Court in Alameda County in February 1986 in response to the case of Doris M., above, and documented many other instances of inadequate care for pregnant women prisoners. *Yeager v. Smith* was filed in federal district court, Central District of California, in September 1987 against the Kern County Jail in Bakersfield, California, on behalf of Jesse V. and other class plaintiffs. The lead plaintiff, Louwanna Yeager, gave birth on a thin mat on the floor of the jail after informing jail staff almost three hours before that she was in active labor. She was told that she would have to wait since no medical staff were on duty. The baby was born in severe stress, experienced oxygen loss at birth, and died several months later.

Plaintiffs in both *Jones* and *Yeager* have recently entered into strong settlement agreements that require comprehensive medical and pregnancy care services for pregnant women in these jails, including specific language addressing the treatment of pregnant, substance-dependent women. However, in spite of the strong settlement agreements, aggressive court monitors, and the vigilance of plaintiffs' counsel, pregnant women prisoners still find it difficult to obtain consistently adequate care. One significant reason for this is the tremendous overcrowding in these systems. In the *Harris* litigation, the largest California prison for women, the California Institution for Women, is close to 300% over its designed capacity, with more than 2,600 women in a prison intended for 930. Many of these women are low-risk parole violators, and the majority have substance-abuse problems. County jails are often similarly overcrowded.

Conditions of confinement in jail settings are arguably even more severe than in state prisons. Pregnant women are frequently exposed to contagious diseases, unsanitary and unsafe conditions, severe overcrowding, and extremely stressful environments. Pregnant women at the Kern County Jail in Bakersfield, California, were routinely forced to sleep on the floor for weeks at a time because of excessive overcrowding. These conditions are typical. Before policymakers argue for incarceration to ensure that pregnant women receive adequate prenatal care, we should take a hard look at what kind of care these women will actually receive in a correctional setting.

> Illegal substances are more readily available in correctional facilities than on the streets

Myth 4: Incarceration prevents access to drugs and alcohol

Another common misconception is that women will have no access to illegal drugs or alcohol while in prison or jail. It is extremely naive for policymakers to maintain that prisoners with substance-abuse problems are cut off from the sources of their addiction by incarceration. In some instances, illegal substances are even more readily available in correctional facilities than on the streets.

Although it is generally assumed that drugs and alcohol are supplied to prisoners by visitors, a recent study at the Cook County Jail in Chicago, Illinois, indicates otherwise. In a study of approximately 20,000 searches of visitors in 1988, only a handful of instances of drug trafficking by visitors was discovered. Illegal substances are readily available in jails and prisons, and correctional staff apparently play a major role in their transportation and distribution.

Myth 5: Incarceration is the only solution

Most policymakers concerned about the treatment of pregnant substance-dependent women admit that incarceration is by no means an ideal solution. However, many still believe that it is the or

viable one. Even if correctional systems uniformly required adequate detoxification procedures and medical care, even if conditions of confinement were at constitutionally acceptable levels, incarceration would not be an effective solution to the problem. The correctional environment is not highly conducive to recovery from substance abuse, nor does it ensure that the temptation to use addictive substances will be reduced, since drugs and alcohol are readily available.

Effective, cost-efficient alternatives to incarceration that are models for the treatment of pregnant, drug- and alcohol-dependent women do exist—and they offer a ray of hope.

Conclusion

Treatment, rather than punishment, must be the primary focus of the response to this critical social problem. There must be additional expansion of model programs such as Mandela House in Oakland, California, Pomeroy House in San Francisco, California, and Houston House in Boston, Massachusetts (see sidebar). In addition, there must be a greater emphasis on educating young people and the general public about the effects of drug and alcohol consumption on fetal development. Finally, rather than taking a punitive approach to pregnant, substance-dependent women by incarcerating them in jails and prisons that do not provide adequate methods of detoxification, prenatal medical care, or treatment for recovery from substance abuse, we must continue to seek solutions that focus on treatment and recovery. Only then will we begin to see a comprehensive and effective solution emerge. CJ

Drug Tests

(*Continued from page 8*)

offers no conclusion as to whether such evidence would be admissible or sufficient in other contexts, such as where a lesser standard of proof is involved or where other evidence of guilt exists. It holds only that, where the government in this case could show the guilt of a criminal defendant only through the testimony of an expert, the expert's testimony, together with reasonable inferences from it, was not sufficient to show guilt.

The retention issue is of even greater concern in marijuana cases where research shows an average of 30 days and up to 77 days of retention. (Ellis et al., *Excretion Patterns of Cannabinoid Metabolites after Last Use in a Group of Chronic Users*, 38 Clin. Pharmacol. & Therapeut. 572-78 (1985).)

In many criminal justice situations, the government only uses a screening test—without any confirmation. While courts initially were split over the need for confirmation testing, the trend has clearly been toward the sufficiency of unconfirmed test results in post-conviction proceedings, due to the low standard of proof required at such hearings. (*Superintendent v. Hill*, 105 S. Ct. 2768 (1985).)

The majority of courts have upheld the use of the EMIT test in post-conviction situations. (*Harmon v. Auger*, 768 F.2d 270 (8th Cir. 1985); *Jensen v. Lick*, 589 F. Supp. 35 (D.N.D. 1984); *Vasquez v. Coughlin*, 499 N.Y.S.2d 461 (App. Div. 1986); *Leahy v. Kelly*, ___N.Y. Ct. of App. ___ (Dec. 23, 1987); *Peranzo v. Coughlin* (S.D.N.Y., Oct. 27, 1987).) There have been a minority of courts finding screening tests to be insufficient evidence. (*Kane v. Fair*, No. 136229 (Mass., filed Aug. 5, 1983); *Johnson v. Walton*, No. 561-84 R (Rutland County, Vt. Sup. Ct. Feb. 14, 1985); *Higgs v. Wilson*, 616 F. Supp. 226 (W.D. Ky. 1985), vacated, *Higgs v. Bland*, No. 85-5701, 85-5887 (6th Cir., May 19, 1986); *Wykoff v. Resig*, 613 F. Supp. 1504 (N.D. Ind. 1985).)

Thus, even though the scientific community, the Food and Drug Administration and the National Institute of Drug Abuse have all come to require conclusive testing by gas chromatography and mass spectrometry (GC/MS), because of the low standard of proof at certain stages of criminal proceedings, critical decisions on individuals' freedoms are being made based solely on the questionable techniques of immunoassay urine testing.

The strongest requirement for confirmation testing came in the settlement of a New Jersey class action suit filed by prisoners in the state prison system. Under the settlement, GC/MS confirmation is required for marijuana. Thin-layer chromatography (TLC) is required for amphetamines, cocaine, opiates, and barbiturates; gas chromatography is required for alcohol. New Jersey attorney Jack Arsenault was able to obtain this settlement, in part because a review of test results conducted by other methods showed wide variance. (*Denike v. Fauver*, Civ. Act. No. 83-2737 (J.S.D.C.N.J. 1983).)

The future of drug testing

Drug testing continues to expand into American society, pushed by the floundering drug war and by corporations who profit from such testing. The acceptance of urine testing by the courts sets the stage for more intrusive forms of testing—DNA and hair testing, for example. Individual hairs provide a history of drug use for the length of the hair. Thus, the 1960s symbol of independence, long hair, may become a tool for repression in the 1990s.

The 1990s may indeed be the 1960s upside down. CJ

UNITED STATES SENTENCING COMMISSION
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WASHINGTON, DC 20002-8002

(202) 273-4500

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(202) 273-4529

May 8, 1995

MEMORANDUM

TO: Chairman Conaboy
Commissioners
Senior Staff

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Comment from the National Association of Women Judges

As a follow-up to their testimony at the March public hearing, Judge Murray writes to reiterate their concerns. I wanted to be sure to get this around before your discussions today on priorities.

Attachment

CORRESPONDENCE STATUS SHEET

THIS SHEET MUST ACCOMPANY THE ATTACHED CORRESPONDENCE. PLEASE SEE INSTRUCTIONS BELOW

DOCUMENT DATE: May 5, 1995 CONTROL NO.: _____

AUTHOR/AGENCY: Judge Brenda P. Mukkay

SUBJECT MATTER: _____

DATE FORWARDED: May 9, 1995 DUE DATE: 5/15/95

PREPARER/OFFICE: Mike

REMARKS: _____

thanks - shared w/other commrs.
will look to resources to begin investigation

↓

COMPLETED MAY 8
BY PHYLLIS NEWTON.

SIGNATURE

✓	PREPARE RESPONSE	✓	CHAIRMAN
__	NO RESPONSE/FILE	__	STAFF DIRECTOR
__	FOR YOUR INFORMATION	__	GENERAL COUNSEL
__	OTHER: _____	__	OTHER: _____

CC:

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

STATUS

IF MAILED DATE: May 26, 1995

REMARKS/NOTES: Incoming Correspondence - Conaboy
Chron File - Conaboy

CUA

THE CATHOLIC UNIVERSITY OF AMERICA

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June 20, 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:

The Commission has indicated that it will consider, at its July 13, 1995 meeting in Boston Massachusetts, the issue of retroactivity in regards to Amendments to the Sentencing guidelines which will become effective November 1, 1995 (unless modified or rejected by Congress).

On behalf of the Practitioners' Advisory Group, I am writing this letter to address the issue of retroactivity as it pertains to Amendment 5 dealing with crack cocaine -- that portion of Amendment 5 which equalizes the offense levels for offenses involving similar amounts of crack cocaine and powder cocaine at the level currently provided for powder cocaine.

The criteria which has been customarily considered by the Commission in assessing Amendments for retroactive designation are discussed in the background commentary to §1B1.10. Among the factors that have been considered by the Commission have been the purpose of the Amendment, the magnitude of the change in the guideline range made by the Amendment and the difficulty of applying the Amendment retroactively.

Based on this criteria, the Practitioners' Advisory Group respectively submits that the portion of Amendment 5 dealing with the equalization for sentencing purposes of powder and crack cocaine easily qualifies for retroactive application. Of course, the purpose of the Amendment is to equalize offense levels for crack cocaine and powder cocaine at the level currently provided for powder cocaine. The driving force behind this Amendment, in addition to other factors, was the fact that the effect of the one hundred to one ratio has resulted in astronomically high sentences for defendants convicted of trafficking in crack cocaine--the effect of which has been to punish more severely Afro-Americans for cocaine offenses. The Commission recognized that there does not exist a proven scientific basis for a one-hundred to one differential and the Commission voted to equalize both crack and powder cocaine.

While the change in the guideline range that will be brought about by this Amendment will be substantial, this Amendment deals with a fundamental matter of fairness in sentencing for cocaine offenses. Moreover, as the Commission is aware, the Amendment changing the offense levels for LSD which passed in 1993 was made retroactive and there does not exist any reason for the Amendment equalizing crack cocaine with powder cocaine not to be made retroactive also.

In terms of the difficulty of applying the Amendment retroactively, I can speak from first hand knowledge that §1B1.10 has not proved to be difficult in application for the Federal Courts. I had a successful Motion made pursuit to 18 U.S.C. §3582(c)(2) granted in November, 1992 in the United States District Court for the District of Maryland and the matter was handled without even the necessity of a formal court hearing. It was handled by a Motion and consent Order of Court. In a lot of these cases, the Assistant United States Attorney assigned to the case will not even be opposed to the sentence reductions for prisoners in those cases where the Commission has decided to make a substantive Amendment retroactive. In short, motions for a sentence reduction under 18 U.S.C. §3582(c)(2) need not be time consuming or burdensome to District court judges.

The Practitioners' Advisory Group respectfully urges the Commission to vote at its July 13, 1995 meeting in Boston Massachusetts to give retroactive application to that portion of Amendment 5 which equalizes the base offense levels for crimes involving similar amounts of crack cocaine and powder cocaine at the level currently provided for powder cocaine.

I have been advised that the Department of Justice is seeking a legislative proposal to have Congress disapprove this Amendment. In light of this action by the Department of Justice it may be prudent for the Commission to withhold voting on the possible retroactive application of Amendment #5--crack cocaine--until after November 1, 1995, in order to see what, if any, action is taken by Congress on this matter.

With warmest personal regards, I am

Sincerely,

Fred Warren Bennett
Associate Professor of Law

cc: All Commissioners

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June 23, 1995

MEMORANDUM

TO: Judge Conaboy
Commissioners
Phyllis Newton
Paul Martin
John Steer
Tim McGrath

FROM: Brenda E. Allen

Forwarded for your information is a letter from Fred Warren Bennett., dated June 20, 1995, regarding retroactivity as it pertains to Amendment 5 dealing with crack cocaine.

Attachment

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
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June 27, 1995

Professor Fred Warren Bennett
The Catholic University of America
Columbus School of Law
Office of the Faculty
Washington, DC 20064-8030

Dear Professor Bennett:

Thank you for your comments on the retroactivity of the Commission's amendment pertaining to cocaine penalties. I have taken the liberty of sharing your letter with the Commissioners and appropriate staff for their review.

The Commission appreciates your taking the time to respond to its solicitation of public comment; such input is helpful with its deliberations.

Sincerely,

Richard P. Conaboy
Chairman

File Crack Cocaine "Retroactivity"

CORRESPONDENCE STATUS SHEET

THIS SHEET MUST ACCOMPANY THE ATTACHED CORRESPONDENCE. PLEASE SEE INSTRUCTIONS BELOW

DOCUMENT DATE: JUNE 20, 1995 **CONTROL NO.:** _____

AUTHOR/AGENCY: FRED WARREN BENNETT

SUBJECT MATTER: RETROACTIVITY

DATE FORWARDED: JUNE 22, 1995 **DUE DATE:** June 29, 1995

PREPARER/OFFICE: MIKE COVINGTON

REMARKS: _____

		SIGNATURE	
✓	PREPARE RESPONSE	✓	CHAIRMAN
___	NO RESPONSE/FILE	___	STAFF DIRECTOR
___	FOR YOUR INFORMATION	___	GENERAL COUNSEL
___	OTHER: _____	___	OTHER: _____

CC:

All Commissioners	COMPLETED 6-23-95		
Phyllis	Brenda		
Paul			
John Steer			
Tim McGrath			

STATUS

IF MAILED DATE: JUNE 28, 1995

REMARKS/NOTES: INCOMING CORRESPONDENCE - CONABOY

CHRON FILE - CONABOY

CRACK - COCAINE