".....the revised guidelines reflect greater sensitivity to such factors as sophistications of money laundering conduct." "....the staff (Sentencing Commission) found that, historically, prosecutors have been stretching these guidelines significantly,..."

"Offenses that technically qualify as money laundering are frequently simply incidental to or component parts of the underlying crime. This has given rise to extensive disproportionate sentencing.....The sentencing report indicated that 68 percent of the defendants convicted of structuring either didn't know or did not believe the funds were illegal. .....Yet, these people could still get the same type of sentence as a major money launderer, somebody involved in a huge smurfing operation. So do the guidelines work? I don't think they work, unless what we are trying to do is fill the jails up....."' The Justice Department has said to me informally that we are trying to decriminalize money laundering or that we are trying to greatly lessen the offense of money laundering....." ".....To continue under the current guidelines is to ignore the realities of money laundering totally, while continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants."

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

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

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

"I think that this proposed amendment on the guidelines for money laundering goes one way towards

eliminating what we consider to be unfair leverage and sometimes abusively exercised leverage with money laundering."

Misconduct and excesses by federal prosecutors pertaining to money laundering offenses as reported by the press and the courts: Prosecutorial misconduct pertaining to the charging and plea practices of Federal prosecutors with respect to the offense of money laundering has reached epidemic proportions in our country. From January 10-15, 1993, the Washington Post published a series of six stories about the growing number of cases involving prosecutorial misconduct at the federal level. The articles, under the general heading "The Appearance of Justice", dealt with prosecutorial misconduct involving, among other things, "stings" and money laundering cases. In one of the articles a decision by Federal Judge James Ideman was reported, who dismissed a major racketeering and money laundering case on grounds of prosecutorial misconduct. Judge Ideman charged that the U.S. Attorney in that case withheld exculpatory (Brady material) evidence completely exonerating all the defendants, while showing the government's main witness to be a perjurer. The appellate court characterized the prosecutor's conduct as "intolerable" and recommended that the Attorney General review the case and decide whether the prosecutor should be subjected to departmental discipline. Judge Ideman complained in strong terms that after three years he was still waiting for the Department of Justice to address his charges against the prosecutor. In fact, he suggested a whitewash.

In other articles the Washington Post cited many other cases and examples of prosecutorial abuse, numerous instances of failure to disclose favorable evidence, government intrusion into the relationship between defense attorneys and clients, intimidation of witnesses and overzealous tactics designed to force guilty pleas before trial. The Post pointed out, that the Justice Department has been slow to investigate its own lawyers and has refused to release the results of investigations when completed.

On a December 20, 1993 editorial entitled "A Reno Reform" (page A24), it was mentioned that the "Washington Post" had received a letter from Attorney General Janet Reno responding to the articles on prosecutorial misconduct. Attorney General Reno promised actions that could lead to important and much needed reforms within the Department of Justice. According to the "Post" more than a year later the proposed reforms by Attorney General Reno had not been implemented.

On April 30, 1994, the "Washington Post" reported on the 6th Circuit's appointment of a federal judge in Tennessee to investigate charges of federal prosecutorial misconduct in that state because the internal Department of Justice review could not be trusted. Also, the Washington Post cited the Supreme Court finding that federal prosecutors committed fraud in the Demianjak case as yet another example that prosecutorial misconduct of its attorneys is not being dealt honestly or effectively by the Department of Justice.

(e) Disparities in Sentencing for Money Laundering Offenses.

There are many disparities and inconsistencies in the application of sentencing guidelines for money laundering offenses which are well documented by caselaw. For defendants who agree to "plea-bargain", federal prosecutors and the courts are very lenient and deviate substantially from the guidelines. For defendants who refuse to "plea bargain" not only the mandatory minimums are imposed but additional enhancement is provided for "obstruction of justice". It is not uncommon to have disparities of ten points or more for the same type of money laundering offense. This is particularly true for offenses prosecuted via the "sting" money laundering statute. Sentencing disparities can be illustrated with the following examples within the 9th Circuit, both involving money laundering "sting" offenses.

Dr. Pararas-Carayannis's "conviction" for a "sting" money laundering offense involving the proceeds (a few hundred dollars in credit card slips deposited in his merchant account) of an unlawful activity (an escort service, represented only as such by government undercover agents) in Hawaii, resulted on two counts of alleged violation of 1956(a)(3). Under the mandatory sentencing guidelines, Pararas-Carayannis received 20 points and an enhancement of two additional points for "obstruction of justice". Under the guidelines, he was sentenced to 41 months of imprisonment and 24 additional months of supervised release, in spite of the fact that just prior to sentencing, he had suffered a third, acute and almost fatal, anterolateral myocardial infarction (heart attack) that required two angioplasties and had resulted in his total disability. Motions for a downward departure from the sentencing guidelines for aggravated circumstances as provided by the U.S. Sentencing Commission, were denied by the court.

Ironically, and in spite of the "mandatory sentencing guidelines", a similar 1956(a)(3) conviction (with explicit representation that the source of proceeds were drug money) in the U.S. District Court in Montana, resulted recently in only a ten-month "split sentence" for Defendant Nelson in the pre-release center in Great Falls, Montana, with five months in the custody component and five months in the pre-release component of the center. Under the same Mandatory Sentencing Guidelines and for a similar 1956(a)(3) "sting offense" (with the only representation being that the proceeds were those of an escort service), and in spite of his advanced age and dismal health, Dr. Pararas-Carayannis was sentenced to more than quadruple of Nelson's sentence.

(f) Conclusions and Recommendations

The present high sentencing levels of the money laundering statutes often violate the Eighth Amendment, because they impose excessive

bail, excessive fines, and cruel and unusual punishment totally out of proportion to the underlying offenses. Congress needs to revise the language of the money laundering laws to safeguard against misapplications of the statutes. There have been serious charging and plea-bargain abuses by federal prosecutors in money laundering prosecutions. Due process requirements of the money laundering statutes are often ignored by federal prosecutors. Congress should require the Department of Justice to provide proper charging and plea bargaining guidelines to its attorneys. Additional guidelines should be provided by the Department of Justice on how targets should be selected for deceptive government "sting" investigations using 18 U.S. Code, Section 1956 (a)(3); on how government confidential informants should be qualified, screened and monitored; on what is the effect of the Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers seeking convictions by any means; and on how outrageous government invasion of privacy can be avoided.

Prosecution of money laundering offenses, particularly through 18 U.S. Code, Sections 1956 and 1957 have produced sentences that are anomalous and which have undermined the uniformity that Congress sought to achieve when it adopted sentencing guidelines. Present base offense sentencing levels for money laundering offenses are often disproportionately higher to those of the underlying conduct which often may be a minor offense. Often the offense level of the underlying conduct resulting in a "money laundering conviction" cannot even be determined. <u>The U.S. Sentencing Commission's proposed amendments to the sentencing guidelines will introduce fairness in sentencing and should be implemented</u>.

Respectfully Submitted,

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE

g) APPENDIX: The "Sting Money Laundering Conviction" of Dr. George Pararas-Carayannis in Hawaii - Gross Violation of His Due Process Right to a Fair Jury Trial under the Fifth Constitutional Amendment.

Dr. George Pararas-Carayannis, a prominent scientist with 25 years of Government Service was prosecuted for laundering a few hundred dollars of a hypothetical government "escort service" under 1956(a)(3). His conviction involved a serious constitutional violation which deprived him of a fair jury trial as required by the due process provision of the Fifth Amendment. Specifically, the U.S. District Court in Hawaii violated his Fifth Amendment right to a fair jury trial by preventing the jury from hearing testimony and weighing challenged videotaped evidence (as required by Rule 1008 (Article X) of the Federal Rules of Evidence) which would have clearly resulted in his acquittal.

After the closing of the case, outside the presence of the jury and while the jury was deliberating, the court took the testimony of government witnesses who admitted to the fact that the videotapes which had been previously challenged as tampered but had been introduced into evidence anyway, had been indeed removed improperly from the courtroom by the government attorney, during trial. These videotapes had been taken to a hotel room in Waikiki (Hilton Hawaiian Village, room 1362), registered to a government audiovisual expert brought in from the Washington D.C. area. Based on this damaging testimony the court ruled that this videotaped evidence could not be shown to the jury during their deliberations. However, the court failed to summon the jury and apprise them of these new facts and developments relating to the court's evidence, to give additional instructions, or to call for a mistrial. The jury was permitted to continue its deliberations unaware of the improprieties that had taken place.

On the third day of jury deliberations, the court reversed its ruling, reopened the case, and again in the absence of the jury, took additional testimony of government witnesses on the improper removal of the videotaped evidence. At that time these government witnesses testified that electronic equipment capable of tampering videotapes had been brought, also, into the government expert's room but that the

expert had since returned to Washington D.C. and could not testify as to what he was doing with the videotapes.

In spite of its own previous ruling and the testimony on the government attorney's misconduct and outrageous violations of the rules of evidence and procedure, the court held a cursory, in-camera viewing of the challenged videotapes and decided on both admissibility and weight of this videotaped evidence, even though the latter is clearly a jury function supported by Rule 1008 (Fed R.E.) and by caselaw. The jury was not allowed to learn of the improprieties with the handling of the evidence, about the electronic equipment in the expert's room, or the government's intent in taking the videotapes there without the court's knowledge or permission.

Furthermore, obvious discrepancies and alterations which were identified and pointed out during this cursory, in-camera review, were indicative that these videotapes were altered copies and not the alleged originals which had been shown to the jury during trial. Disregarding the testimony pointing out specifically to numerous discrepancies, erasures and alterations, the court ruled that there were no changes and, even if there were, they were not prejudicial to the case. This, simply, was not the case. The tapes had been tampered. The changes were prejudicial.

In spite of vigorous protests by the defense, the court re-authenticated these copies as originals, ruled on their admissibility and weight, then allowed the jury to view them without disclosing the damaging testimony that would have affected significantly the jury's confidence in their validity. In addition, the court allowed the jury to use as an "aid" in understanding the inaudible portions of the videotapes, the government attorney's edited transcripts which had also been improperly removed from the court during trial because, allegedly, the U.S. District Court in Hawaii did not have an "evidence storage facility". Jurors, unable to understand the still inaudible portions of the disputed videotapes, relied on the government attorney's edited transcripts and were seen taking written notes from these records.

In effect, the Court's actions in reversing its ruling and in reopening the trial without the jury's presence, then deciding on issues related to both admissibility and weight of challenged, tainted evidence, deprived Dr. Pararas-Carayannis of his due process right to a fair trial by jury that he was entitled to under the Fifth Amendment. This was clear, serious error and abuse of discretion which prejudiced and determined the outcome of the jury's verdict. If the jury had been apprised by the court of the government attorney's egregious misconduct with the handling of the court's evidence, during trial, and if they had heard the testimony of government witnesses that electronic equipment capable of tampering had been brought to the hotel room of the government audiovisual expert where the videotapes had been taken, Dr. Pararas-Carayannis would have been acquitted of all charges against him. Instead, after 11 days of deliberations, the jury had acquitted him on five counts and were "hung" on two counts. The court urged to continue deliberations and allowed them to view the last and most tampered of the videotapes. Immediately after viewing this tampered tape and the creative government transcript, the jury returned a guilty verdict on these two counts.

These two counts charged Dr. Pararas-Carayannis with a violation of 18 U.S. Code 1956(a)(3), the money laundering sting statute, a statute which is often abused and which has been widely characterized as an "instrument of oppression" because of its low threshold of proof in guaranteeing convictions by government prosecutors. In this particular case, these two counts charged Dr. Pararas-Carayannis with the "thought crime" of knowingly and intentionally "disguising and concealing monetary instruments", the proceeds (a few hundred dollars) of an unlawful activity. The unrepresented unlawful activity was a Travel Act violation, presumably a hypothetical government escort service which was involved in prostitution, even though the court transcripts and the testimony of government witnesses show clearly that such representation was never made. Dr. Pararas-Carayannis was never charged with a Travel Act violation or a State offense even peripherally connected with prostitution. A Travel Act conviction requires a substantive State felony offense. In his case, these alleged violations were used only

for "definitional" purposes in fabricating and sustaining via a circuitous statutory track, the money laundering charges. Finally, in the absence of a representation of an unlawful activity by the undercover agent, the court had allowed into evidence hearsay testimony that "all escort services are fronts from prostitution", thus creating the impression for the jury that the representation requirement of an unlawful activity had been made by the government undercover agent simply by telling Dr. Pararas-Carayannis that she needed his help in processing through his merchant American Express and Diners account a few charge card slips of her escort service, something that banks do routinely on a daily basis.

Ironically, most escort services in Hawaii and elsewhere, advertise readily, to this day, their acceptance of credit cards. Banks routinely issue them merchant accounts. The telephone company and the Yellow Pages collect funds and provide services that promote these business and their acceptance of credit cards. Both State and Federal Government collect proceeds of such businesses in the form of taxes. Neither a bank nor a single escort service in Hawaii was ever prosecuted for money laundering or closed down for alleged prostitution by the State or the Federal Government. If indeed the requirement for proving money laundering is the supposition that "all escort services are fronts for prostitution", then banks, telephone companies, Yellow Pages and State and Federal Agencies must be guilty of laundering millions in "monetary instruments".

Dr. Pararas-Carayannis's conviction and sentencing, obtained with such charging extrapolation of the money laundering statute, and through outrageous prosecutorial misconduct, are indeed hypocritical, ludicrous and represent a clear abuse of the money laundering laws and of the Criminal Justice System. Finally, more than $3 million of taxpayer's money has been wasted thus far to "criminalize" and destroy Dr. George Pararas-Carayannis, an internationally-recognized, government scientist who has contributed significantly to his field of work and to society.

034-96

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE
P.O. Box 240147
Honolulu, Hawaii, 96824

February, 27, 1996

MEMBERS OF 104TH CONGRESS

SUBJECT: Public Law 104-38 disapproving amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences and sentences for money laundering and transactions in property derived from unlawful activity; Charging and plea practices of Federal prosecutors with respect to the offense of money laundering; Consistency and appropriateness in the use of the money laundering statute.

Dear Senator/Representative:

It is regrettable that Congress, without holding proper hearings or properly studying the issues, substituted its judgement for that of the U.S. Sentencing Commission's in preventing long-needed sentencing guideline changes from taking effect on November 1, 1995, by passing Public Law 104-38. The amended guidelines would have assured that offense levels comport with the seriousness of a defendant's offense conduct and would have prevented unwarranted sentencing disparities as a result of abusive charging and plea-bargain practices by federal prosecutors. Also, it is unfortunate that P.L. 104-38 grouped together drug related sentencing with sentencing which often involves minor underlying unlawful activity, unrelated to drugs but improperly and excessively charged as "money laundering" by federal prosecutors.

The Commission's proposed sentencing amendments for money laundering offenses were the result of a three-year effort directly resulting from a continuous ongoing guideline review, in-house studies, public hearings, testimonies of experts, and a thorough and diligent revision process. Congress, as one of the fundamental goals of the Sentencing Reform Act, specifically directed the Commission to undertake this review of the sentencing guidelines so that offense levels comport with the seriousness of a defendant's offense conduct and thus unwarranted sentencing disparities for similar offense conduct are avoided.

Passage of P.L. 104-38 and disregard of the Commission's recommendations for these well justified amendments negates previous Congressional directives and is contrary to the spirit of the law - the Sentencing Reform Act. Furthermore, through its passage of P.L. 104-38, Congress continues the disparities of sentencing and contradicts its own goal of balancing the federal budget by allocating close to $4 billion for the building of additional prisons which, to a large extent, will house "marginal offenders" serving longer and undeserved sentences for offenses which do not

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comport with the seriousness of the offense conduct. Such contradictory Congressional policy is counterproductive to the U.S. economy and is not in the best interest of our country.

For your information, consideration, and possible support, we are attaching our Commentary on the U.S. Sentencing Commission's Proposed Guidelines on amendments for Laundering Monetary Instruments addressing the need for offense levels to comport with the seriousness of the defendant's offense conduct. The issues addressed in our commentary are obviously of concern to Congress since P.L. 104-38 included a directive for a report on "the charging and plea practices of Federal prosecutors with respect to the offense of money laundering", a report which must include "an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute".

Charging and "plea-bargain" practices, of federal prosecutors for alleged "money laundering offenses" have been excessive and abusive. They have reached epidemic proportions in our country. In some instances these practices have approached the level of human right violations, in spite of their disguised facade of "due process".

International law (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Resolution 3452 (XXX)) provide that:

> *"no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment".*

Torture is defined as:

> *"any means or any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".*

Dr.George Pararas-Carayannis's prosecution, "conviction" and "sentencing" in Hawaii, following a money laundering "sting" is an example of prosecutorial excess, and a human rights' violation. It is more fully documented in the attached Commentary to the U.S. Sentencing Commission and its Appendix. A circus arrest of Dr. Pararas-Carayannis and his character assassination by the media were carefully prearranged by government attorneys through a series

of press releases, followed with shelf-aggrandizing press conferences of theatrical proportions praising the work of the "organized crime task force" which had involved at least half a dozen government agencies. Through distortions, Dr. Pararas-Carayannis was tried and found guilty by the media long before his trial. His subsequent prosecution was clearly excessive and abusive charging and misapplication by federal prosecutors of the money laundering statute. No one bothered to establish what the underlying offense to the charge of money laundering was or whether he was guilty of an underlying offense.

Subsequent "plea-bargaining" practices by Federal prosecutors to coerce Dr. Pararas-Carayannis into a guilty plea before trial were clearly human rights' violations, by any definition. When he refused to "plea bargain", government attorneys, through subversion of the criminal justice system, but always under "color of law", intentionally inflicted upon him unprecedented psychological torture with unwarranted, continuous, retaliatory prosecutions in Hawaii and in California, charging frivolous, unsupported allegations - charges which could not be supported by facts or evidence and which were subsequently dismissed. The single purpose of this psychological/legal bulldozing was to break Dr. Pararas-Carayannis emotionally and to coerce him to accept a guilty plea for any count of "his choice" in the fabricated money laundering "sting" scheme involving proceeds (a few hundred dollars) of an alleged unlawful activity - the latter being a non-existent, "escort" service. The undercover government agent in the "sting" had been a young, attractive lady, who had been instructed to make promises of a romantic relationship with Dr. Pararas-Carayannis in exchange for helping her process through his merchant account a few credit card slips of her <u>"escort service"</u>. No representation of any unlawful activity was ever made and Dr. Pararas-Carayannis was not charged with committing or being a participant in any underlying unlawful activity, real or hypothetical. Allegedly, the underlying unlawful activity was a hypothetical "Travel Act violation" used only "definitionally" to support, via a dubious statutory tracking, the money laundering charge.

The high sentencing level of money laundering and the other frivolous collateral indictments were intended to torture psychologically Dr. Pararas-Carayannis and to render him financially destitute in order to coerce him to "plea bargain". When these efforts failed, and during trial, government attorneys resorted to even more serious misconduct to prevent the jury from acquitting Dr. Pararas-Carayannis and to extract improperly a guilty verdict by depriving him of his due process, Fifth amendment right to a fair, jury trial (See Appendix of Commentary to Sentencing Commission). The court record documents that, outside the presence of the jury and while the jury was deliberating, testimony was taken from government witnesses admitting that federal prosecutors had taken, <u>during trial</u> and without the court's permission or knowledge, the court's evidence (videotapes that had been challenged as having been previously tampered). to a hotel room where an audiovisual

government expert had set up an electronic laboratory. The jury was not allowed to hear anything pertaining to these improprieties or to weigh the reliability of the tainted "evidence". The court reversed its previous ruling, and allowed the jury to view copies of the challenged videotapes even though significant alterations had been made. Unaware of the improprieties of the evidence, the jury acquitted Dr. Pararas-Carayannis on five counts but returned a guilty verdict on two counts and on the basis of hearsay evidence that "all escort services are fronts for prostitution". The two counts were for "disguising and concealing" monetary instruments of an unrepresented unlawful activity, when he deposited two checks from the credit card company into his business account.

As a result of this unprecedented psychological torture and inhumane stress he had been subjected, six weeks later Dr. Pararas-Carayannis suffered a nearly fatal heart attack which has resulted in his total disability and a progressing heart failure. In spite of his dire health condition and advanced age, he was subsequently sentenced to a total of 65 months for these two counts (41 months in prison and 24 months of supervisory release). This is in addition to four years of supervised release he has already served while waiting to be "processed", making his total punishment almost 10 years. Ironically, a similar 1956(a)(3) "sting" conviction in Montana, but with clear and explicit representation from an undercover government agent that the proceeds of the underlying unlawful activity were from drugs, resulted in only a ten month sentence for defendant Nelson, with half of it in a pre-release center.

In Dr. Pararas-Carayannis case, government attorneys have wasted thus far more than $3 million of taxpayers' money for an unwarranted prosecution of fabricated "money laundering" amounting to a few hundred dollars. It is absurd that government prosecutors would involve themselves in such charging excesses, in such abusive plea bargaining practices, and in such waste of taxpayers' money when there is real crime and limited resources to fight it.

Abusive charging and plea practices of Federal prosecutors, as illustrated by the above example, must be stopped. Laws such as P.L 104-38 disapproving amendments to the Federal Sentencing Guidelines are contradictory to the Sentencing Reform Act and prolong the disparities and injustices of both charging and sentencing. Congress needs to revise the language of the money laundering laws to safeguard against misapplications of the money laundering statutes and plea-bargain abuses by federal prosecutors. Congress should require the Department of Justice to provide proper charging and plea bargaining guidelines to its attorneys. Additional guidelines should be provided by the Department of Justice on how targets should be selected for deceptive government "sting" investigations using 18 U.S. Code, Section 1956 (a)(3); on how government confidential informants should be qualified, screened and monitored; on what is the effect of the statute on Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers

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seeking convictions by any means; and on how outrageous government invasion of privacy can be avoided.

Prosecution of money laundering offenses, particularly through 18 U.S. Code, Sections 1956 and 1957 have produced sentences that are anomalous and which have undermined the uniformity Congress sought to achieve when it adopted sentencing guidelines. Our Criminal Justice System is often being subverted by those who have the responsibility to uphold it.

In conclusion, we encourage you to introduce or support legislation which will prevent further abuses of the money laundering laws. These laws need thorough review and revision to be adjudged constitutionally accurate in their intent and language so as to adhere strictly and hold true to the rules and principles of the Constitution of the United States of America and its Bill of Rights and subsequent Amendments.

We encourage you to revise, amend or repeal Public Law 104-38 because it contradicts the intent and spirit of the Sentencing Reform Act. We ask that you support proposed amendments promulgated by the U.S. Sentencing Commission which will eliminate abuses and disparities of the sentencing guidelines.

Sincerely,

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE (AACLJ)

Attachment: Commentary on the U.S. Sentencing Commission's Proposed Guidelines and Sentencing Amendments pertaining to Laundering Monetary Instruments.

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035-96

COMMENTS OF

THE AMERICAN CIVIL LIBERTIES UNION

TO THE

UNITED STATES SENTENCING COMMISSION

REGARDING

IMPLEMENTATION OF CONGRESSIONAL DIRECTIVE
ON COCAINE SENTENCING

submitted by

MARK KAPPELHOFF
LEGISLATIVE COUNSEL

MARCH 29, 1996

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INTRODUCTION

The American Civil Liberties Union (ACLU) appreciates this opportunity to comment on the congressional directive[1] regarding recommendations for changes in the federal sentencing of cocaine offenses. In particular, we intend to comment on whether the U.S. Sentencing Guidelines should be amended from the current 100-to-one quantity ratio between cocaine base [hereinafter "crack"] and powder cocaine, but still maintain a disparity. Last year, in an effort supported by the ACLU, this Commission proposed recommendations to Congress that would equalize the penalties between powder and crack cocaine possession and distribution. Notwithstanding this Commission's extensive study and consideration of the issue, Congress and the President disapproved the Commission's proposed amendments that would have eliminated the 100-to-one disparity in base penalties for crack and powder cocaine trafficking offenses and mandatory minimum sentences for simple possession of crack cocaine.

The ACLU, once again, reasserts its belief that the Commission's amendments proposed last year were correct and should not have been disapproved by Congress. We remain further resolved that the 100-to-one disparity in cocaine sentencing is unwarranted and racially discriminatory in effect. Accordingly, finding no justification for a contrary proposal, we strongly urge this Commission to stand by its previous findings and propose these same amendments to Congress this amendment cycle.

The ACLU is a nonpartisan organization of over 275,000 members nationwide dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at

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[1] See Pub. L. 104-38, 109 Stat. 334 (Oct. 30, 1995).

the core of our mission, we have a particular interest in ensuring that equal protection of the law and freedom from disproportionate punishment are upheld wherever threatened. The ACLU has previously submitted testimony before this Commission on the issue of the disparity in sentencing between crack and powder cocaine on October 25, 1993, March 18, 1994 and March 7, 1995. We wish to incorporate by reference those comments.

Our comments will be specifically directed in support of the Commission resubmitting to Congress the same amendments proposed last year that eliminate the 100-to-one quantity ratio between powder and crack cocaine and establish a one-to-one quantity ratio. We also will comment in opposition to any proposals to enhance penalties for violence and other harms associated with crack and powder cocaine.

II. UNITED STATES SENTENCING COMMISSION'S FINDINGS CONFIRM DISPARITY IN COCAINE SENTENCING IS UNWARRANTED

A. Commission's Findings:

Last year, the United States Sentencing Commission completed a very thorough study and review of the disparity in the sentencing of crack cocaine defendants and powder cocaine defendants.[2] The Commission issued its findings in a Special Report to Congress entitled "Cocaine and Federal Sentencing Policy." In the Report, the Commissioner's unanimously agreed that the present 100-to-one quantity ratio "is far too great and should be reconsidered."[3]

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[2]U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal Sentencing Policy, (February 1995), (hereinafter, "Report."

[3]Id.

As a result of its findings in the Report, this Commission subsequently submitted to Congress recommendations for modifying the sentencing policy between differing forms of cocaine. When it submitted its recommendations, this Commission unanimously concluded that:

> the current 100-to-1 ratio [between crack and powder cocaine] found in the mandatory minimum penalty statutes, and replicated in the current sentencing guidelines, cannot be recommended and should be changed. Further, the Commission unanimously believes that the current five-year mandatory minimum for simple possession of crack cocaine should be reconsidered.[4]

In addition to unanimously advocating the equalization of penalties between crack and powder cocaine possession in the U.S. Sentencing Guidelines, a majority of the Commissioners also voted to equalize the sentences of cocaine distribution.

B. Evidence Supports Commission's Findings:

This Commission relied on sound evidence to support its recommendations for equalizing cocaine sentencing. In addition to confirming that racial disparity exists in cocaine sentencing, this Commission discounted the reasons often cited for the distinction in sentencing between powder and crack cocaine: pharmacologically distinctive; violence; and accessibility due to low cost.

1. <u>Disparate Racial Impact</u>

With respect to the issue of racial disparity in cocaine sentencing, this Commission unequivocally stated that:

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[4]Id. In addition to unanimously advocating the equalization between crack and powder cocaine possession in the U.S. Sentencing Commission Guidelines and in their recommendations to Congress, a majority of Commissioners also voted to equalize the sentences of cocaine distribution.

> [f]ederal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine . . . [and that] the high percentage of Blacks convicted of crack cocaine offense is a matter of great concern to the Sentencing Commission.[5]

Among other troubling statistics, this Commission disclosed that in 1993, 88.3% of those sentenced federally for crack cocaine offenses were African American, while only 4.1% of the defendants were Caucasian, despite a finding that a majority of the nation's reported crack users are White.[6] Consistent with this evidence, this Commission went on to conclude that:

> When one form of a drug can be rather easily converted to another for of the same drug and when that second form is punished at a quantity ration 100 times greater than the original form, it would appear reasonable to require such a existence of sufficient policy bases to support such a sentencing scheme . . . [especially] when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population. . ."[7]

2. Lack of Pharmacological Distinction

In addition to exposing the racial disparity found in cocaine sentencing, this Commission discounted the reasons often proffered in support of the gross distinction in sentencing between powder and crack cocaine. First of all, this Commission dismissed the notion that crack and powder cocaine are pharmacologically different substances. In powder or crack form, cocaine is cocaine. Indeed, this Commission noted that cocaine in any form produces the same physiological and psychological effects. It further found that both powder cocaine and crack cocaine carry a risk of addiction. Cocaine powder is easily transformed into crack. Thus, as the Commission majority ultimately concluded, "[i]n light of the fact that crack cocaine can easily be produced from powder

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[5] Id.

[6] Id.

[7] Id.

cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use."[8]

3. Violence Not Uniquely Associated With Crack Cocaine

This Commission also rejected the assertion that there is more violence associated with the use of crack than with the use of powder cocaine. There is no evidence that such violence is attributed to the pharmacological effects of smoking crack. Or, as this Commission stated:

> We are aware that a host of maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority concluded that increased penalties are not an appropriate response to any of these problems. We are unable to establish these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are not unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol.[9]

4. Cost and Availability Do Not Justify Higher Penalties

Finally, this Commission concluded that higher penalties for crack cocaine are not justified because of it is generally inexpensive and readily available. In fact, higher penalties for crack cocaine guarantee that small time street level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. In rejecting this type of policy which disproportionately impacts on low income people, this Commission stated that:

> [T]he fact that crack is typically sold in small amounts which may make it more readily available among lower income groups [does not] justify increased punishment compared to a form of the drug that is more commonly sold in amounts available only to the affluent.

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[8]Letter From Richard A. Conaboy, Chairman, United States Sentencing Commission to The Honorable Orrin Hatch, Chairman, Senate Judiciary Committee, (May 1, 1991); See also Special Report to Congress.

[9]Id.

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The Commission does not believe that longer punishment can be justified solely because a particular form of a drug is more likely to be used by a disadvantaged population.[10]

III. CONGRESS AND PRESIDENT UNWISELY DISAPPROVE COMMISSION'S PROPOSED AMENDMENTS BASED ON "TOUGH ON CRIME" POLITICS

On May 1, 1995, acknowledging the overwhelming evidence against maintaining the inequitable sentencing guidelines for cocaine, this Commission submitted to Congress proposed amendments to the federal sentencing guidelines.[11] These amendments were drafted with the intention of eliminating the disparity between the penalties for crack and powder cocaine possession and distribution. Unless Congress acted to disapprove them, the amendments would have taken effect on November 1, 1995.

Unfortunately, Congress acted. Despite this Commission's comprehensive and exhaustive efforts analyzing the issue of the disparity in federal cocaine sentencing, Congress, in a highly political and divisive debate, disapproved the Commission's recommendations and sent the issue back for further study.[12] President Bill Clinton followed suit and signed the disapproving legislation into law on October 30, 1995. As a result, the disparity in cocaine sentencing continues unabated today.

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[10] Id at 4.

[11] See Letter to the Honorable Orrin Hatch, Chairman Judiciary Committee, from Richard Conaboy, Chairman, U.S. Sentencing Commission, May 1, 1995. See also Amendment No. 5, "Amendments to Sentencing Commission, 60 Fed. Reg. 25074 (May 10, 1995).

[12] See CONG. REC. H10,281 (daily ed. Oct. 18, 1995). It is interesting to note that, since its creation in 1984, this was the first time that Congress rejected a recommendation from the United States Sentencing Commission. See United States Sentencing Commission FY1994 Annual Report, Appendix C.

The ACLU, as well as other civil rights organizations, religious leaders and Members of Congress expressed outrage at the Congress' and the President's apparent indifference to the issue of racial disparity in federal cocaine sentencing. Congressman Mel Watt (D-NC) captured the essence of this frustration when he stated what many believed to be true:

> We are going to discuss this to death. Let the Sentencing Commission go back and study it for ten years so we do not have to deal with it in the Congress of the United States. That is what this is all about. Justice delayed is justice denied, and we are delaying and denying justice to the very people who need it in our society.[13]

Moreover, several civil rights organizations expressed their disappointment by submitting a joint letter to President Clinton that stated in part:

> Nothing undermines the racial fairness of the criminal justice system more than these crack laws; Mark Fuhrman and the beaters of Rodney King operate outside the system, but the racism of the crack laws is official, written, legislatively sanctioned part of the system. Rooting out the Mark Fuhrmans will take time, rooting out discriminatory crack sentencing is as easy as a stroke of a pen.[14]

Consistent with these comments, the ACLU believes that the Congress and the President were wrong to disapprove this Commission's proposed amendments. Further, we applaud this Commission's exhaustive efforts and demonstrated commitment to correcting the unjustified and irrational disparity in federal cocaine sentencing. This is a worthy goal today, just as it was last year. As such, we firmly believe that there is no persuasive reason for this Commission to abandon its previously proposed amendments.

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[13] CONG. REC. H10,259 (daily ed. Oct. 18, 1995).

[14] See Letter to The President, October 25, 1995.

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IV. COMMISSION SHOULD REJECT POLITICAL PRESSURE AND RESUBMIT SAME AMENDMENTS TO CONGRESS

It is all too clear that political expediency remains the primary obstacle preventing this Commission from enacting amendments that eliminate racial disparity in cocaine sentencing. Congress and the President have substituted their own distorted "tough on crime" politics for that of this Commission's independent decision-making process. Ironically, Congress originally created the Commission as an independent agency so it could remain insulated and free from the traditional political pressures associated with criminal justice matters. [15] In agreeing to create the United States Sentencing Commission, Congress essentially acknowledged that it, as a political branch of government, could not be trusted to fairly and neutrally address the politicized nature of federal sentencing policy. The Commission, on the other hand, as an independent agency in the judicial branch, could be trusted to objectively consider provocative criminal justice sentencing issues and render decisions unencumbered from political influences.

In fact, the politically independent design worked as intended when this Commission was asked to consider cocaine sentencing. This fact was made clear by the somewhat prophetic testimony of Commissioner Wayne A. Budd:

> [I]n 1994 . . . Congress specifically directed the Commission to tackle the cocaine issue. Led by Chairman Conaboy the Commission did what it was asked to do: face head-on this type of political hot potato and provide the dispassionate, non-partisan leadership on the basis of hard facts and hard data."[16]

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[15] See 18 U.S.C. 995.

[16] Testimony of Wayne A. Budd, United States Sentencing Commission, before the Subcommittee on Crime of the House of Representatives, Committee on the Judiciary (June 29, 1995) at 1-2.

To be sure, the ACLU commends this Commission for being true to its stated purpose of fairly and objectively analyzing the disparity in sentencing between crack and powder cocaine. We also appreciate and share in this Commission's disappointment that the Congress and the President rebuffed these efforts. However, we urge the Commission not to compromise its principles and independence by acquiescing to irrational political pressures. Simply stated: this Commission was absolutely correct in proposing amendments to the federal sentencing guidelines to equalize cocaine sentencing. No contrary evidence has emerged in the past several months to support a different result.

Indeed, we are cognizant that Congress is likely to reject the same amendments if they are offered again. This fact alone should not dissuade this Commission. Compromise in the name of political expediency cannot be condoned and should not be pursued. Rather, fundamental fairness and justice demands that this Commission continue to propose amendments that eliminate entirely the disparate impact of cocaine sentencing laws.

V. DISPARITY IN SENTENCING GUIDELINES FURTHER CONTRIBUTES TO RACIAL DISPARITY THROUGHOUT THE CRIMINAL JUSTICE SYSTEM

The disparate racial impact of the federal cocaine sentencing guidelines is further aggravated by race-based law enforcement and prosecutorial strategies. Racial bias begins with street level enforcement strategies, where African Americans are disproportionately targeted, stopped, arrested, prosecuted and then exposed to long mandatory minimum sentences under the federal sentencing

system.[17] These discriminatory law enforcement strategies, such as selective prosecution and arrest initiatives, result in subjecting a disproportionate number of minorities to the racially disparate federal cocaine sentencing laws. Consequently, this combination further magnifies the already disproportionate impact of the unfair federal sentencing guidelines, resulting in a dramatic increase in the incarceration rates for African Americans and other minorities.

A. Selective Prosecution Strategies Contribute to Racial Disparity

Prosecutorial race-based decision-making results in exposing a disproportionate number of minorities to the disparate federal sentencing guidelines. A recent illustration of this procedure is found in Los Angeles where the U.S. Attorney's office openly admitted to targeting its resources towards minority communities.[18] According to a Los Angeles Times article, not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since Congress enacted its mandatory sentences for crack in 1986. This occurred, despite the fact that whites account for a majority of crack users. During this same period, however, hundreds of white crack traffickers were prosecuted in state courts, where their sentences for the same offense were as much as eight years less than in federal courts.

This Commission found much the same results in other areas in the nation. A 1992 Commission survey shows that only minorities were prosecuted for crack cocaine offenses in more

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[17] See Marc Mauer and Tracey Huling, Young Black Americans and the Criminal Justice System, Five Years Later, (1995). See also David Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659 (1994).

[18] Dan Weikel, "War on Crack Targets Minorities Over Whites," Los Angeles Times, May 21, 1995.

than half the federal court districts handling crack cases.[19] No whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York and two in Pennsylvania.

A case currently pending before the United States Supreme Court may prove instructive on the selective prosecution issue. On February 26, 1996, the United States Supreme Court heard oral arguments in United States v. Armstrong[20], a case in which indictments were dismissed against five Black defendants who alleged that the U.S. Attorney's Office selectively prosecuted them based on their race. Although the case involves a narrow discovery issue of whether federal prosecutors must disclose their charging criteria in crack cocaine cases, the Court's ruling could have far-reaching implications for defendant's prosecuted pursuant to the crack statutes.

The raw statistics cited in the Armstrong case that involve prosecutions in Los Angeles are troubling indeed. For example, the federal public defender's office in Los Angeles discovered that of the 24 crack cocaine cases closed out in 1991, all of the defendant's were African American. Whereas, from 1990 to 1992, 222 white defendants charged with crack cocaine offenses were prosecuted in state court; thus, effectively avoiding the harsh sentences required under the federal sentencing guidelines.

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[19] Id.

[20] United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1995), rev'd on rehearing en banc 48 F.3d (9th Cir. 1995), cert. granted No. 95-157 (Oct. 30, 1995).

B. Arrest Policies Contribute to Racial Disparity

Race-based arrest policies of law enforcement agencies have also disproportionately impacted on African Americans and other minorities. Drug arrests alone have increased dramatically in the 1980s, rising from 471,00 in 1980 to 1,247,000 by 1989.[21] Just as these nationwide arrest rates increased dramatically, the proportion of African Americans arrested grew disproportionately, from 24% of all drug arrests in 1980 to 39% in 1993.[22]

Claims are unfounded that African Americans are arrested in larger numbers because they tend to have higher rates of drug use and sales. African Americans, in fact, account for a disparate amount of those arrested for drug offenses. The best evidence supporting this conclusion comes from the National Institute on Drug Abuse in its annual household survey on drug possession. The most recent survey reveals that African Americans comprise 13% of monthly drug users, while accounting for 39% of the those arrested for drug offenses.[23]

C. Racial Disparity Found in Incarceration Rates

Racial disparity throughout the criminal justice system, including selective law enforcement and prosecutorial strategies coupled with the federal sentencing guidelines, has ultimately resulted in a disproportionate explosion in the prison population. The United States recently surpassed the

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[21]"Drugs and Crime Facts, 1990," Bureau of Justice Statistics, 1991.

[22]Federal Bureau of Investigations, Uniform Crime Reports, various years, cited to in Young Black Men and the Criminal Justice System, Five Years Later.

[23]Id. See also National Institute on Drug Abuse, National Household Survey on Drug Abuse: Main Findings (1991), (May 1994).

one million mark in its prison population. Although over half of the prison population is Black, African Americans comprise only 12% of the nation's population.[24] This leads to one of the most striking statistics: one out of every three young Black men are either imprisoned, on probation, or parole at any given time.[25]

Our nation's harsh drug laws and enforcement policies have largely contributed to this dramatic rise in prison population. The number of adults imprisoned for drug offenses more than tripled from 1986 to 1991. Over 60 percent of federal prisoners are drug offenders and that figure is expected to rise throughout the decade.[26]

African Americans pay the greatest price for these enforcement policies. A Department of Justice commissioned study on federal sentencing policies disclosed that between 1986 and 1990, both the rate and average length of imprisonment for federal offenders increased for Blacks in comparison to Whites. It further concluded that the highest proportion of Blacks charged with crack offenses was "[t]he single most important difference accounting for the overall longer sentences imposed on Blacks, relative to their racial groups."[27] The study's analysis concluded the following:

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[24]See U.S. Department of Justice Statistics Bulletin, "Prisoners in 1994 (Department of Justice, Washington, D.C. 1995).

[25]See Young Black Americans and the Criminal Justice System: Five Years Later.

[26]See David B. Kopel, "Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety," (CATO Institute, May 17, 1994)(relying on U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 1993, NCJ-141874 (Washington: U.S. Department of Justice, May 9, 1993).

[27]See U.S. Department of Justice Programs, Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? (Nov. 1993. See also U.S. Sentencing Commission Special Report to Congress, p. 162.

> If legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.[28]

VI. PROPOSED ENHANCEMENTS TO DRUG GUIDELINES ARE UNNECESSARY

The ACLU believe that it is unnecessary to promulgate additional guideline enhancements for cocaine penalties. The existing guideline enhancements sufficiently account for any additional harm that may be associated with crack (or any other drug). The federal sentencing guidelines already take into account additional harms such as involvement of firearms or other dangerous weapons, serious bodily injury or death, use or employment of juveniles, leadership role in the offense, prior criminal history, among other aggravating factors. These offenses are either treated as separate offenses or statutory enhancements to offenses. Therefore, there is no reason to render the statutes irrelevant by creating enhancements.

We are particularly troubled by the addition of systemic crime (crime related to the drug's marketing, distribution, and control) and social harms (harms associated with increased addictiveness, parental neglect, child and domestic abuse) as factors to be considered for guideline enhancement. No objective data exists to support a conclusion that certain offenses or societal harms are uniquely associate with crack cocaine. In fact, this Commission concluded that "pulling

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[28] Id.

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apart the systemic crime associated with crack cocaine versus powder cocaine is difficult if not impossible."[29]

VII. RAISING PENALTIES FOR POWDER COCAINE WILL FURTHER CONTRIBUTE TO RACIAL DISPARITY

The ACLU believes that the Sentencing Commission should reject any proposal to increase the penalties for powder cocaine as an alternative to reducing the sentences for crack cocaine offenses. Chairman Conaboy already addressed this issue in his testimony by simply stating that "[t]he current sentencing guidelines [already] provide for severe and tough sentences for all drug offenses."

Moreover, employing this methodology will simply flood the courts and prisons with more nonviolent, unarmed first time drug offenders. It is estimated that sentencing powder cocaine defendants the same as crack defendants are currently sentenced will result in 41,000 person-years to federal prison population, at a cost of $800 billion within ten years.[30]

CONCLUSION

The ACLU maintains that the 100-to-one disparity in federal sentencing between powder and crack cocaine is irrational, unwarranted and discriminatory in fact. We maintain that the overwhelming weight of the evidence shows that the federal sentencing structure for crack cocaine

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[29] United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 95 (Feb. 1995).

[30] See Bureau of Prisons, "State of the Bureau 1991" (Summer 1992).

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has a disparate impact on African Americans and is not supportable on pharmacological, scientific or social grounds. Moreover, racially discriminatory prosecutorial and law enforcement strategies have further exacerbated the disparate impact of the cocaine sentencing scheme on African Americans.

Last year, this Commission, after thorough consideration, properly concluded that there was no justification for treating the two forms of the same drug differently. As such, it proposed amendments to the federal sentencing guidelines that would eliminate the 100-to-one disparity in base penalties for crack and powder cocaine trafficking offenses and the mandatory minimum sentences for simple cocaine possession. However, in a blatant, politically expedient act, Congress and President Clinton disapproved these amendments. While we appreciate the complication this situation presents, we urge the Commission not to be influenced or dissuaded by transparent "tough on crime" politics. We strongly urge the Commission to resubmit these same proposed amendments to Congress.

Our comments today reconfirm our commitment to the belief that justice and fairness demands that the only appropriate ratio between powder cocaine and crack cocaine is one-to-one. In light of the lack of evidence to support any other sentencing scheme, we believe that proposing a ratio other than one-to-one is simply an endorsement of racial discrimination in cocaine sentencing.

We thank the Commission for this opportunity to comment.

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March 7, 1996

Richard P. Conaboy, Chairman
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Dear Chairman Conaboy and Commissioners:

The North Carolina Academy of Trial Lawyers has carefully studied the proposed amendments to the guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the Federal Register for the 1996 amendment cycle.

The Academy has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The North Carolina Academy of Trial Lawyers fully endorses the positions taken on each of the proposed amendments by the Practitioners Advisory Group. The Academy especially urges the adoption of those amendments and modifications endorsed by the Practitioners Advisory Group in regards to money laundering and controlled substances.

With regard to crack cocaine, the Academy believes a five to one ratio is the best substitute for our preferred one to one ratio which was rejected by Congress last year. We endorse five to one because it is consistent with other ratios established in the drug table and would establish the same penalty for crack as currently exists for heroin, PCP and methamphetamine and their equivalents.

The North Carolina Academy of Trial Lawyers thanks the Sentencing Commission for this opportunity to express its views on the proposed amendments and remains available for future consultation on these and any other matters.

Sincerely yours,

Richard B. Glazier

Richard B. Glazier
Criminal Law Section
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cc: Lyle Yurko
David Freedman
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